4 New legislation that restricts competition

Clause 5(1) of the Competition Principles Agreement (CPA) — the guiding principle — obliges governments to ensure that legislation does 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 be achieved only 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 all new legislation that restricts competition to be consistent with the guiding principle — clause 5(5)
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. This requirement extends to both primary legislation (Acts of Parliament) and subordinate legislation (generally, regulations made under enabling primary legislation).

The importance of CPA clause 5(5)

CPA clause 5(5) aims to provide the community with an assurance that unwarranted anticompetitive restrictions are not removed from existing legislation only to resurface in new legislation.

An effective gatekeeping mechanism is a necessary condition against the introduction of legislation that is not in the public interest. But it is not a sufficient condition. A robust gatekeeping *model* does not of itself guarantee *outcomes* consistent with governments' clause 5(5) obligations.

The effectiveness of gatekeeping arrangements is ultimately demonstrated by the quality of legislation that is promulgated.

In assessing compliance with clause 5(5), the National Competition Council does not seek to impose itself as an additional layer to assess the quality of new legislation and whether impacts on competition have been considered. Instead, the primary focus of the Council is to ensure jurisdictions have rigorous gatekeeping mechanisms in place and that they have been applied reasonably broadly. If the Council is unable to attest to this, it will, as part of its broader assessment of governments' compliance with the CPA, examine new legislation for anticompetitive impacts. This scrutiny may be more likely where the passage of particular legislation is incongruous with gatekeeping mechanisms in place.

Principles for effective gatekeeping

The Council considers the clause 5(5) obligations to mean that governments should have legislation gatekeeping arrangements that maximise the opportunity for regulatory quality. Effective gatekeeping requirements would meet the following principles:

- All legislation 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 explicitly consider competition impacts.

- There are mandatory guidelines for the conduct of regulation impact analysis by government bodies.

- An independent body with relevant expertise advises agencies on when and how to conduct regulatory impact assessment, and is empowered to examine regulatory impact assessments and advise on the adequacy and/or quality of the analysis.

Where possible, there should also be ongoing monitoring and annual reporting by the independent body on compliance with the regulation impact analysis requirements.

The Council informed all governments of these key principles before preparing its 2004 National Competition Policy (NCP) assessment of jurisdictional compliance with CPA obligations. One government has noted that clause 5(5) does not require jurisdictions to comply with the specific gatekeeping arrangements that the Council has established as its preferred model of compliance with clause 5(5). However, in determining its competition payment recommendations, the Council has obligations under the Agreement to Implement National Competition Policy and Related Reforms to assess whether the parties have 'given full effect to, and continue to observe

fully, the Competition Policy Intergovernmental Agreements'. Legislative gatekeeping arrangements are an important element of these arrangements.

The Council notes that gatekeeping processes are dynamic in nature and governments have in recent years sought to enhance their existing processes. The continual raising of the best practice benchmark helps to enshrine the gains realised from competition policy to date.

A key area where the Council considers there to be scope for enhancement is for governments to establish fully independent assessors of new regulation. The Council notes that there is currently a spectrum of assessors in terms of rigour. They vary from bodies with actual and perceived independence — such as the federal Office of Regulation Review (ORR) and the Victorian Competition and Efficiency Commission (VCEC) to units within the Departments of Premier and Cabinet. Within this range, governments also have assessors located within state treasuries or through interdepartmental committees.

As a general principle, the Council considers that fully independent assessors provide the highest quality safeguards against the introduction of new legislation that is inconsistent with CPA clause 5(5). Even where it is not feasible for governments to create such mechanisms in the short term, the Council considers that improvements can be made to existing mechanisms.

For smaller states and territories, it may not be feasible to establish standalone agencies such as Victoria's VCEC. An alternative may be to consider incorporating the gatekeeping role within the independent prices oversight agencies that operate in all jurisdictions (such as the Queensland Competition Authority and the Western Australian Economic Regulation Authority) where these agencies can be resourced to scrutinise proposed regulations for competition impacts. Alternatively, where regulatory review mechanisms remain within general government, controls may be necessary to ensure that review functions are not compromised by policy priorities.

Irrespective of the model chosen, the ultimate aim should be to facilitate the separation between policymaking and scrutiny to increase the actual and perceived independence of the gatekeeping function.

The Council's assessment of the quality of jurisdictional gatekeeping mechanisms against the best practice requirements and an identification of areas for improvement is outlined below.

Governments' gatekeeping arrangements

The Council recognises that governments have generally made progress in recent years in developing gatekeeping mechanisms. However, the Council

does not consider that some governments have yet achieved best practice compliance with clause 5(5).

All governments provide guidelines on how to consider the impacts of proposed legislation, including those impacts related to competition policy. However, independent review mechanisms for testing the quality of regulation impact statement (RIS) analysis can be absent, which may reduce incentives for regulation-making bodies to critically analyse proposed regulatory impacts. Further, processes for primary legislation can be less rigorous than those for subordinate legislation in many jurisdictions.

Improvements in regulatory best practice processes assist in ensuring regulations are created where they deliver net benefits to the community, and in the least restrictive manner. For example, more rigorous application of best practice gatekeeping processes may yield better outcomes in areas such as the restrictions on legal advertising regulations (see box 4.1).

Box 4.1: Legal advertising regulations across jurisdictions

Recently introduced restrictions on legal advertising for personal injury are intended to address the problem of the dramatically escalating costs of public liability insurance reducing public access to insurance. However, it is not clear that advertising restrictions are the most effective means of reducing public liability indemnity costs. Advertising restrictions can create significant restrictions on competition because they can make it harder for newly qualified practitioners and practitioners entering new markets to inform potential clients of their services.

There may be other regulatory alternatives that can more effectively address public liability costs, without imposing restrictions on competition to the same degree. These alternatives may include building on the reforms to which jurisdictions agreed in 2002 to address public liability insurance costs; for example, changing the application of tort law, using structured settlements and implementing risk management strategies.

The following sections summarise new legislation imposing advertising restrictions.

New South Wales

The State's advertising restrictions on lawyers are imposed by the Legal Profession Regulation 2002. These were first inserted by the Legal Profession Amendment (Advertising) Regulation 2002, and were strengthened in 2003 by the Legal Profession Amendment (Personal Injury Advertising) Regulation 2003. While the latter regulation was subject to consultation with the profession, it was not subject to RIS requirements. Further, the *Legal Profession Legislation Amendment (Advertising) Act 2003* will allow regulations to be made that prohibit third-party advertising in a way that undermines the ban on lawyers advertising in relation to personal injury or work injury.

Queensland

Queensland's *Personal Injuries Proceedings Act 2002* does not prohibit lawyers from advertising personal injury services, but it does restrict the advertising medium and the nature of the message. Any advertising must include only factual information, including the lawyer's name and contact details, and the conditions under which they are prepared to provide personal injury services. However, advertising 'no win, no fee' personal injury services is not permitted.

Further, advertising can be published only by certain allowable methods such as printed publications. Advertising in hospitals or on the radio or television is not permitted.

Western Australia

The Western Australian Government introduced the *Civil Liability Act 2002,* which limits personal injury advertising by restricting the publishing of any statement that may encourage a person to make a claim for compensation, including a claim relating to personal injury. Like Queensland, the state also restricts the nature of the advertising medium.

Northern Territory

The Northern Territory Government introduced the *Legal Practitioners Amendment (Costs and Advertising) Act 2003,* which confines the advertising of personal injury matters to limited factual matters and selected media. The legal practitioner is also prohibited from publishing a statement that will encourage a person to make a claim for damages for personal injuries.

The following section examines 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 4.1 summarises and compares governments' approaches to gatekeeping.

The Australian Government

The Australian Government publication *A Guide to Regulation (*ORR 1998) requires a RIS to be prepared for all new and amended regulation, with limited exceptions, that has the potential to restrict competition or impose costs or confer benefits on business. The RIS must clearly identify the problem(s) and relevant policy objectives, and assess the costs and benefits of alternative means of fulfilling the objectives.

RISs are included in the explanatory material for both primary and subordinate legislation, enhancing the transparency of the decision-making process. The requirements for subordinate legislation have been enhanced by the passage of the *Legislative Instruments Act 2003,* which is expected to come into operation on 1 January 2005. The main features of the legislation are that:

- all legislative instruments (including regulations, disallowable instruments, ordinances and proclamations) must be registered under the scheme unless exempted
- rule-making agencies must ensure appropriate consultation has occurred before making a legislative instrument
- all registered instruments will be sunsetted after 10 years, subject to exceptions.

The ORR oversees the Australian Government's regulatory review process. It advises federal 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 departments and agencies with guidance and training on the RIS requirements. It also reports on compliance with the RIS requirements in the annual publication *Regulation and its review* (published by the Productivity Commission).

Assessment

The Council notes that the Australian Government's gatekeeping arrangements comply with NCP obligations for effective gatekeeping. In particular, the ORR makes a significant contribution to improving regulatory quality and transparency by monitoring the compliance of departments with the government's regulatory requirements.

The Council considers that the only significant aspect of the federal regulatory review practice regime that could be improved is the provision of statutory backing to RIS requirements for subordinate legislation. While the administrative requirements of the current government require RIS analysis of such legislation, the Legislative Instruments Act does not explicitly require a RIS to be prepared for subordinate legislation. This is in contrast to the equivalent subordinate legislation Acts in some state and territory jurisdictions, and may increase the potential for subordinate legislation to be prepared without adherence to RIS requirements.

New South Wales

New South Wales uses both legislative and administrative provisions to implement its legislative gatekeeping arrangements. The provisions require all legislative proposals to include impact analysis.

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 approach — as outlined in *From red tape to results — government regulation: a guide to best practice* (Government of New South Wales 1995) — has been applied in assessing the regulatory impact of the proposal. In particular, the guide 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.

The Cabinet Office, in its role as coordinator of the government's NCP program and advisor to agencies on regulatory best practice, scrutinises all legislative proposals and assists agencies to integrate RIS analysis into the policy and legislation-making process. This role applies to both primary and subordinate legislation.

Under the *Subordinate Legislation Act 1989*, New South Wales government agencies must also prepare RISs for proposed principal statutory rules[1] before the rules can be made. The *Manual for preparation of legislation* (Government of New South Wales 2000) and the guidelines in schedule 1 of the Act provide guidance on meeting the Act's requirements. Ministers must also certify compliance with the requirements of the Act.

Ministers are required to table a copy of the RIS in the same sitting week in which Parliament is notified of the new regulation, or as soon as possible thereafter. Following tabling, proposed subordinate legislation is subject to the scrutiny of the Legislation Review Committee (LRC) — a joint statutory committee — which monitors whether:

- the regulation may have an adverse impact on the business community
- the objectives of the regulation could have been achieved by alternative and more effective means.

Direct amendments to statutory rules are exempt from the requirement to prepare a RIS though they can impose significant restrictions on competition. The Legal Profession Amendment (Personal Injury Advertising) Regulation 2003, for example, effectively prohibits barristers and solicitors from advertising personal injury legal services (a severe restriction to competition). While consultation was undertaken, this direct amendment to the principal statutory rule was implemented without an accompanying RIS or substantial new evidence to demonstrate a net public benefit.

Assessment

The New South Wales Government has implemented several key measures that contribute to improving the quality of new legislation consistent with the requirements of clause 5(5). These measures include the tabling of RISs for subordinate legislation and the requirement that Ministers certify that a new regulatory proposal complies with the provisions of the Subordinate Legislation Act. However, New South Wales can enhance processes in accordance with clause 5(5) in several areas.

First, there is no clear independent mechanism for advising the government on the likely impact of proposed regulations prior to introduction into Parliament. While the Cabinet Office advises agencies on regulatory best practice, the Council has reservations about the transparency of the Office's review mechanisms and its apparent lack of separation from the policy development process. This is in contrast to the federal ORR which is located within the Productivity Commission — an independent statutory authority.

[1] 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.

Consideration should therefore be given to relocating the regulatory review function outside of the Cabinet Office.

Second, the regulatory best practice requirements for primary legislation do not appear to be as rigorous as those for subordinate legislation, despite primary legislation creating the basis for subordinate legislation. An option for addressing this shortcoming may include mandating the preparation of RISs for primary legislation with material impacts. Further, the power of the LRC could be expanded to examine the broader impacts of proposed primary legislation, including the adverse impacts on the business community as is the case for subordinate legislation.

Finally, the Council previously raised concerns about direct amendments of subordinate legislation being excluded from the requirements of regulatory impact analysis. The state has responded, noting that the Subordinate Legislation Act requires the Minister to ensure agencies comply with the Guidelines for the preparation of statutory rules (located in schedule 1 of the Act). While the Council acknowledges that the guidelines require RIS-type analysis, it considers that the requirements are not as rigorous as those for proposed new subordinate legislation, including the requirement to table a RIS in Parliament.

Victoria

As part of the Victorian economic statement, *Victoria: leading the way* (announced on 20 April 2004), the State Government announced the establishment of the Victorian Competition and Efficiency Commission (VCEC). This body was established through an Order-in-Council under the *State Owned Enterprises Act 1992* that was gazetted on 1 July 2004 and replaces the Victorian Office of Regulation Reform.

Section 3 of the Order states that the functions of VCEC include:

- for the purposes of section 19(2) of the *Subordinate Legislation Act 1994*, providing independent advice as to the adequacy of RISs and of the costs and benefits of proposed statutory rules and of any other practicable means of achieving the same objectives contained within RISs

- providing independent advice as to the adequacy of any business impact statements (a primary legislation equivalent to RISs prepared for subordinate legislation).

The criteria for undertaking these assessments will be based on the current RIS guidelines until the revised guidelines can be put in place later in the year. These guidelines include the *Regulatory impact statement handbook* (VORR 1995) and *Guidelines for the application of the competition test to new legislative proposals* (Premier of Victoria 1995).

At present, the Victorian Cabinet handbook specifies that all Cabinet submissions must state whether the legislative proposal will restrict competition. If proposed legislation restricts competition, the Cabinet handbook requires the submission to describe the nature of the proposed restriction, along with the details of any NCP review undertaken. Where NCP reviews propose restrictions on competition, the submission must provide an adequate public interest justification for the restrictions. These requirements will be in addition to VCEC-endorsed business impact statements for significant legislative proposals.

The *Subordinate Legislation Act 1994* requires the preparation of a RIS for new or amended subordinate legislation proposals. This process requires an assessment of a proposal's competition implications, consistent with NCP principles. RIS guidelines give detailed instructions on how to conduct an NCP assessment of restrictions on competition, including the identification of costs, benefits and alternatives through a consultative process.

Once a RIS has been prepared it must be publicly circulated, with the Minister informing the community of the proposed statutory rules and RIS by placing a notice in the Gazette and a daily newspaper that is generally circulated in Victoria. The Subordinate Legislation Act also requires an independent assessment of the RIS to certify the adequacy of its analysis. VCEC will now undertake this role.

The Scrutiny of Acts and Regulations Committee of Parliament examines compliance with the Act. If the Committee considers that a RIS is deficient, it writes to the appropriate Minister seeking a response and rectification of the issues. The committee's ultimate sanction is to move a motion of disallowance for the regulations.

To date, Victoria has not undertaken any regular and comprehensive reporting on RIS compliance. However, this will change following the establishment of VCEC which will annually report to the Minister on the extent of departmental compliance with regulatory best practice requirements.

Assessment

The Council considers that Victoria's processes for developing legislation are consistent with clause 5(5) of the CPA.

RISs are required for subordinate legislation, and they must be independently scrutinised before tabling in Parliament. VCEC is likely to strengthen these processes. The Council also notes that VCEC-endorsed business impact statements will now be prepared for Cabinet proposals requiring significant changes to primary legislation. This supplements the previous mechanism of considering proposed legislation impacts as part of the Cabinet briefing process, and enhances regulatory best practice measures in place.

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 are determined in accordance with the *Public benefit test guidelines* (Government of Queensland 1999) issued by Queensland Treasury. 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 with other means of achieving the government's objectives. They provide explicit guidance on how agencies should assess legislation for compliance with CPA clause 5 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 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 on the proposed statutory instrument. It includes guidelines on matters that the RIS must address. The guidelines explain that such a statement must include an assessment of the costs and benefits of the proposed legislation and, if practical and appropriate, compare them with the benefits and costs of any reasonable alternative to the legislation. As a minimum requirement, the RIS must assess the proposed subordinate legislation against the existing arrangements, and include qualitative assessment of the costs and benefits. The Business Regulation Reform Unit (BRRU) administers the section of the Act relating to the conduct of a RIS and provides more detailed guidelines and advice in this area.

Any RIS must be made available to members of the public, and must accompany the explanatory note for significant subordinate legislation. The Queensland Treasury also monitors and reports on compliance with the gatekeeping arrangements.

Assessment

Queensland has a range of initiatives that contribute to new legislation being consistent with clause 5(5) of the CPA. These initiatives include the requirement to undertake public benefit analysis of all new (including amending) legislation that restricts competition. The state also has detailed guidelines to conduct public benefit analysis, in addition to the support mechanisms provided by the BRRU.

However, Queensland could enhance its processes in accordance with clause 5(5) in several areas.

First, there is no independent mechanism for advising government on the likely impact of proposed regulations. While the Queensland Treasury monitors compliance with regulatory best practice outcomes, it may be perceived as not being sufficiently separated from the policy development process. Second, the regulatory best practice requirements for primary legislation do not appear to be as rigorous as those for subordinate legislation, whereby RISs must be produced and made available on request.

Western Australia

Western Australia's *Public interest guidelines for legislation review* (Government of Western Australia 2001a) sets the mandatory requirements for all reviews. These guidelines require a RIS-type analysis (consistent with NCP requirements) to assess the costs and benefits of reform. The Expenditure Review Committee and Cabinet are required to formally endorse or reject the recommendations of such reviews of proposed legislation.

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. Further, 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. If 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.

Assessment

Western Australia's legislation review processes are reasonably robust because a legislation review is required for all new primary and subordinate legislation that restricts competition. Key areas in which the state can improve compliance with best practice under clause 5(5) include:

- the introduction of an independent gatekeeping mechanism
- the introduction of a subordinate legislation Act (as in other jurisdictions) to formalise the scrutiny of proposed subordinate legislation and to increase transparency.

South Australia

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. The impacts to be assessed are regulatory, small business,

the environment, families and society and regions. In July 2003, the South Australian Government issued Premier and Cabinet Circular No 19, *Preparing Cabinet submissions* (Department of the Premier and Cabinet 2003), incorporating this initiative. These guidelines were revised in July 2004.

Under these requirements, 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 non-regulatory means.

South Australia's *Reviewing restrictions on competition in proposed new legislation* (Department of the Premier and Cabinet 2001) states that best practice is to release publicly (subject to Ministerial approval) the evidence of a review of proposed new legislation. 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.

A separate regional impact assessment report must be attached to the Cabinet submission if there is a significant regional impact. It must also be lodged in Parliament and published.

The Department of the Premier and Cabinet's NCP Implementation Unit provides advice and training to agencies on NCP compliance. It also advises Cabinet on the adequacy of the RIS statements in Cabinet submissions.

An assessment of the adequacy of the impact assessments is published in the annual report of the Department of the Premier and Cabinet.

Assessment

The Council considers that South Australia's gatekeeping arrangements comply with NCP obligations. While the location of the NCP Implementation Unit within a central agency may create some perceptions of a lack of separation between policymaking and regulatory scrutiny, the Council considers that the Unit operates effectively within these constraints. In particular, the Unit regularly liaises with the Council about appropriate thresholds for compliance for proposed new legislation.

However, a key area where the state can enhance compliance with best practice principles is by enshrining the requirement to prepare RIS analysis for subordinate legislation in the state's *Subordinate Legislation Act 1978.*

Tasmania

Tasmania's mandatory new legislation gatekeeping requirements are detailed in the *Legislation review program — procedures and guidelines manual*

(Government of Tasmania 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 when the proposed primary legislation includes a minor restriction on competition. The Regulation Review Unit (RRU), 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 public consultation. 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 RRU'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 RRU's endorsement of the assessment is required before an agency submits its proposal to Cabinet.

The *Subordinate Legislation Act 1992* 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 RRU considers this requirement to include subordinate legislation that restricts competition. The Act also requires agencies to conduct public consultation.

Assessment

The Council considers that Tasmania's gatekeeping arrangements achieve best practice compliance with clause 5(5). Indeed, the requirement for the RRU to endorse proposals before Cabinet consideration appears to exceed similar processes operating at the federal level.

The only aspect of the state's gatekeeping processes where the state may consider enhancing its processes is to address any actual or perceived lack of independence of the RRU which is located within Treasury. Tasmania could address this issue by locating the unit within an independent statutory body, as has occurred at the federal level.

The ACT

The ACT Government's legislative gatekeeping mechanisms require that a RIS be prepared for proposals that restrict competition. The requirement applies 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.

For subordinate legislation, there is a statutory requirement to prepare a RIS if the subordinate law is likely to impose appreciable costs on the community or part of the community. These RISs must meet the same requirements applied to RISs for primary legislation.

The ACT has completed a review of its RIS process and, on 4 February 2004, released its *Best practice guide for preparing regulatory impact statements* (Government of the ACT 2003a) for departments. A key aspect of the guide is the requirement for agencies to consult with stakeholders and to include a consultation statement in the RIS. It also makes explicit reference to the clause 5(5) guiding principle.

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 and are not released to the wider public.

The Microeconomic Reform Section of the Department of Treasury has responsibility for assisting departments and agencies to prepare RISs. It also assesses all submissions relating to legislative proposals, and advises Cabinet on its compliance with best practice regulatory requirements. Proposals do not receive Treasury endorsement if their associated RIS fails scrutiny of either its analysis or its content. Departments are also required to address Treasury concerns before their final submissions go to Cabinet for a decision.

Assessment

The Council considers that the ACT's gatekeeping arrangements provide for a range of mechanisms to improve the quality of new legislation and regulation. In particular, the requirement that the Treasury be satisfied of the rigour of RIS analysis may significantly improve the quality of proposed primary legislation and mitigate restrictions on competition.

Several areas in which the ACT can enhance its compliance with best practice processes include:

- enhancing the independence of the RIS assessment body, to avoid perceptions that the RIS assessor is not influenced by government policymaking considerations
- considering whether to make public an expurgated version of the final RIS for primary legislation to improve transparency of decision-making.

The Northern Territory

Following the introduction of new gatekeeping processes in June 2003, the Northern Territory now 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 competition impact analysis (CIA). The government has also published *Competition impact analysis principles and guidelines 2003* (Department of the Chief Minister 2003), which explains government agencies' obligations when preparing legislation that may restrict competition. The guidelines help agencies determine whether a CIA must be prepared. They also set out the principles and characteristics of good regulation, and encourage government agencies to make their CIAs available to the public.

The Northern Territory does not have a single statutory independent body responsible for the 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 interdepartmental committee comprising representatives from the department and 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 the CIA process has been adequately completed. The government agency must submit the statement and CIA along with the draft legislation/regulation when seeking Cabinet or Executive Council approval. From 2004 there is also bi-annual reporting to the Chief Minister, the Treasurer and Chief Executives on agencies' compliance with the CIA process.

Assessment

The Council considers that the Northern Territory's gatekeeping arrangements are generally rigorous and robust compared with other jurisdictions, particularly in its requirements for proposed primary legislation.

Key areas in which the Northern Territory can enhance its gatekeeping processes consistent with best practice include:

- introducing a subordinate legislation Act (as in other jurisdictions) to formalise the scrutiny of proposed subordinate legislation and to increase transparency

- increasing the actual or perceived independence of the mechanism for regulatory scrutiny — for example, by replacing the interdepartmental committee with an independent organisation such as the ORR at the federal level.

Table 4.1: 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
Australian Government	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 administratively to subordinate legislation.	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 trains and guides 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 regulatory systems to 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 broader scrutiny of subordinate legislation subject to disallowance according to the criteria set out in the Legislation Review Act 1987.

(continued)

Table 4.1 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
Victoria	Cabinet submissions on legislative proposals must include an NCP impact assessment. The preparation of business impact statements for primary legislation will supplement this process.	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. The guidelines are to be updated to reflect the operation of VCEC.	Victorian guidelines specify the CPA clause 5 requirements.	VCEC — an independent body — provides advice on when and how to conduct RISs and business impact statements. It will report annually to the Treasurer, including on compliance with regulatory requirements.
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.	Legislation review requirements extend to regulations, rules, proclamations, notices, new legislation, amended legislation and local government by-laws	Western 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.

(continued)

Table 4.1 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
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's guidelines for primary and subordinate legislation are embodied within Preparing Cabinet submissions and Reviewing restrictions on competition in proposed new 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.
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 and the Subordinate Legislation Act 1992: Users Guide.	The manual requires agencies to apply the NCP tests.	The RRU 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 that 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.

(continued)

Table 4.1 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
Northern Territory	All draft Bills must be accompanied by a competition impact analysis.	All draft regulations must be accompanied by a competition impact analysis.	The Department of the Chief Minister has published 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 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.