4 New legislation that restricts competition

Governments' obligations

Clause 5(1) of the Competition Principles Agreement (CPA)—the guiding principle—obliges governments to ensure legislation (box 4.1) 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 cannot otherwise be achieved. Complying with CPA clause 5 obliges a government to ensure:

- its stock of legislation satisfies the guiding principle—CPA clause 5(3) (discussed in chapters 9–19)
- all new legislation that restricts competition is consistent with the guiding principle—CPA clause 5(5)
- legislation that restricts competition in the public interest is reviewed at least once every 10 years to ensure it continues to meet the guiding principle—CPA clause 5(6).

Together, CPA clauses 5(3), 5(5) and 5(6) aim to ensure that no legislation—existing, new or continuing—unnecessarily restricts competition. It is important to recognise, however, that regulations that impede efficiency but which do not involve competition restrictions may never have been addressed under the NCP. Similarly, the National Competition Council has sometimes questioned the extent of compliance and administration ('red tape') and efficiency costs imposed to support competition restrictions found to be in the public interest. Where an excessive compliance burden has a non-discriminatory impact, the legislation may still meet the requirements of CPA clause 5.

An assessment of the public benefit of restricting competition to achieve governments' objectives should occur through rigorous examination before legislative proposals are developed. Most Organisation of Economic Cooperation and Development (OECD) nations have systems to improve regulatory quality. Generally, in Australia, where new legislation involves competition restrictions with nontrivial effects, a regulation impact assessment is triggered. The key tool is the regulation impact statement (RIS)—also referred to as a regulation impact assessment, a competition impact analysis or a public benefit test. A RIS is a document prepared by an agency

responsible for a regulatory proposal. It formalises the analysis of the impact of a regulation, including an assessment of the risks, costs and benefits, and a consideration of regulatory and nonregulatory alternatives.

Box 4.1: Primary, subordinate and quasi regulation

Forms of regulation include primary legislation (Acts of Parliament) and also subordinate or delegated legislation in the form of:

- 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 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. The Radiocommunications (Spectrum Licence Limits—2 GHz Band) Direction No. 2 of 2000, for example, imposed restrictions on some potential bidders for radiofrequency spectrum.

A further category is quasi regulation, which includes rules, instruments and standards that do not form part of explicit regulation. Examples of quasi regulation are industry codes of practice, guidance notes (such as a statement issued by the Australian Securities and Investments Commission concerning offers of securities made over the Internet), industry–government agreements and accreditation schemes.

In its 2003-04 report *Regulation and its review*, the Productivity Commission, drawing on the work of the Australian Government Office of Regulation Review, observed that:

> *The RIS process is recognised internationally as playing a pivotal role in improving the quality of regulation. RIS processes also reinforce other processes of government designed to improve the quality, transparency and administration of regulations. In 2003-04, RIS processes were strengthened in several jurisdictions. Nevertheless, some regulators continue to experience difficulties in complying with such best practice processes.* (PC 2004a, p. 1)

The integrity of the regulation impact assessment process is central to the capability of governments to meet their CPA clause 5(5) obligation. The process of ensuring governments develop effective and efficient regulation is referred to as 'gatekeeping'. The 'gatekeeper' is the entity with responsibility for ensuring the requisite processes are followed to prevent poor quality regulation.

Preserving the gains from reform

In 1996 around 1800 pieces of legislation were identified and scheduled for review under the National Competition Policy (NCP) legislation review

program. By June 2005, around 85 per cent of this legislation had been reviewed and, where appropriate, reformed (see chapters 9–19).

The review program required a substantial commitment by governments and has been pivotal in removing barriers to competition across activities as diverse as the professions and occupations; agriculture, forestry and fishing; retail trade; transport; planning and construction; and communications. The outcome has been a material reduction in unwarranted regulatory restrictions. Major reforms have been introduced in tandem with a systematic transformation of a multitude of smaller productivity-detracting regulations. While major reforms often deliver more apparent community benefits, the cumulative effect of all reforms has greatly contributed to Australia's enviable economic performance over the past decade, with the myriad of smaller reforms akin to stripping the excess kilos from an athlete.

Preserving these hard-won gains necessitates having mechanisms to lock in the benefits from removing competition restrictions shown not to be in the public interest. The impending conclusion of the legislation review program should not be an opportunity to revert to discredited regulatory approaches.

It is against this backdrop that CPA clause 5(5) provides the community with an assurance that:

- unwarranted anticompetitive restrictions will not resurface in new legislation ('backsliding' on completed reforms)

- new legislation is tested to ensure restrictions on competition are in the public interest and that objectives cannot be otherwise achieved.

Preventing 'backsliding'

In April 2004, the Australian Government directed the Productivity Commission to review the NCP and report on future areas 'offering opportunities for significant gains to the Australian economy from removing impediments to efficiency and enhancing competition'. In undertaking this task, the commission identified the importance of locking in the gains achieved to date:

> *Just as Australia cannot afford to forgo opportunities for further competition related and other reform, so too must it avoid backsliding on the many beneficial reforms undertaken over the last two decades, or those that are still in the process of being implemented. For example, any unwinding of competition policy would increase costs, undermine incentives for future productivity improvement and reduce the flexibility and adaptability of the economy to changing circumstances. The ensuing reduction in Australia's competitiveness relative to countries that are continuing to improve, would in turn detract from our future standard of living.*

> *Moreover, backsliding would send an unfortunate signal about the commitment of governments to resisting pressure from sectional interest groups. Hence, mechanisms that can help to lock in the gains of previous competition related and other reforms should be a central component of the procedural framework attaching to any future reform agenda.* (PC 2005a, p. 172)

The Council concurs that pressure from lobby groups to reverse agreed reforms to promote their interests over the public interest is a cause of backsliding. Even with the discipline of the NCP and the associated competition payments, governments have been subjected to intense pressure to block or moderate reform proposals derived from rigorous and independent analysis (box 4.2).

Box 4.2: The influence of the Pharmacy Guild of Australia on pharmacy reforms

In 1999, the Council of Australian Governments (COAG) commissioned a national review of pharmacy regulations and a subsequent working group to consider the review's recommendations. The COAG endorsed outcome of this process included recommendations that governments lift restrictions on the number of pharmacies that a pharmacist can own and remove provisions that discriminate against friendly societies operating pharmacies. The Australian Government affirmed its commitment to the COAG outcomes in its Third Community Pharmacy Agreement with the Pharmacy Guild of Australia. The agreement noted that '*the parties are committed to achieving … continued development of an effective, efficient and well-distributed community pharmacy service in Australia which takes account of the recommendations of the Competition Policy Review of Pharmacy and the objectives of National Competition Policy'* (Department of Health and Ageing 2000, p. 8). However, no jurisdiction has implemented the COAG pharmacy reforms.

In 2004, New South Wales introduced a Bill to reform regulation consistent with the national review outcomes. In response, the Pharmacy Guild mounted a strident campaign to block reform. The Australian Government subsequently advised New South Wales along with other jurisdictions that intended to make compliant reforms, that the COAG outcomes could be diluted. This resulted in the retention of competition restrictions with no parallel in other professions and for which no public interest justification was established.

A further consequence was the imposition of new restrictions in the ACT and the Northern Territory. For example, previously, the Northern Territory did not cap the number of pharmacies that a pharmacist could own, or prohibit ownership by persons other than pharmacists. In 2004, however, the Territory indicated that it would introduce ownership restrictions for pharmacies, such that friendly societies would be permitted only where deemed by the Minister to meet the needs of the community. The Council requested the territory to demonstrate the public benefit from such action. Accordingly, the territory conducted an independent review of its proposal. Following advice from the Prime Minister that no penalty would attach to the introduction of the new restrictions, the territory advised that its review would not be made public. The new restrictions commenced in February 2005.

In its 2004 NCP assessment, the Council stated that failure to implement the modest reforms of the COAG review meant it was time for another rigorous review of pharmacy. The Productivity Commission endorsed this view (PC 2005a, p. 265).

New legislation

A recent report by the Business Council of Australia estimated that the stock of legislation across Australia is growing at around 10 per cent each year

(BCA 2005). The Business Council found that Australian Parliaments added 33 000 pages of new laws and regulations in 2003.

In a recent speech, the Productivity Commission's Chairman observed that 'Australia has at least five or six hundred regulatory bodies'. For Commonwealth legislation, he noted that:

> *With respect to statutory rules and disallowable instruments …the most recent information available indicates that over 7000 such regulations were made in the five years to 2001-02. Beyond this is much regulatory activity that doesn't get seen by Parliament at all. As a rule of thumb, all of this could be multiplied eight times to account for state and territory regulations.* (Banks 2005, pp. 6–7)

The volume of new legislation indicates the potential for new restrictions on competition (and for excessive red tape) to be introduced. It is vital, therefore, that new legislative proposals are tested appropriately. Regulation that promotes the interests of the wider community lays the foundation for an internationally competitive economy. Legislation that primarily serves the interests of certain groups, industries and occupations—whether intentionally or because it is ill-conceived or not rigorously assessed—can impose a net cost on the community as a whole.

These potential costs of anticompetitive restrictions underscore the need for vigorous scrutiny of new legislation. As the Productivity Commission stated:

> *Independent and transparent review and assessment processes are critical to secure good outcomes, especially on contentious issues; prevent backsliding; and promote public understanding of the justification for reform.* (PC 2005a, p. xxv)

The experience with the legislation review program demonstrates the imperative for strong gatekeeping mechanisms to act as a countervailing force against the reticence of governments to implement contentious reforms where this could alienate an important constituency. The New South Wales Government, for example, acknowledged this year that it did not release independent review reports of its poultry industry regulation because to do so would have made clear that the legislation is not in the public interest. The government preferred to perpetuate restrictions on competition in full knowledge that the legislation is not in the public interest (box 4.3).

In addition to the power of vested interests and voter coalitions, overly expeditious policy making too can create pressure to pursue regulation with unanticipated costs. The Council noted in its 2003 NCP assessment the haste with which state governments regulated, without considered review, legal professional advertising to address a perceived insurance crisis. At the Commonwealth level, compliance with gatekeeping requirements has been weakest for proposals that are politically sensitive and/or urgent. According to Banks (2005), urgency encourages ministers and departments to circumvent RIS processes for precisely the type of regulation that requires detailed consideration.

A further factor that can lead to regulation that is not in the public interest is its potential off-budget capability. Regulation can provide a 'cheap' means to achieve policy objectives. The Council has had to engage with governments about regulatory proposals designed to engineer cross-subsidies between certain groups rather than meet community service obligations through transparent budget funded programs. Similarly, the Productivity Commission found that regulations in relation to native vegetation forced farmers to bear the costs of providing public benefits (PC 2004b).

Box 4.3: Withholding reforms shown to be in the public interest

The Poultry Meat Industry Act in New South Wales' restricts competition between processors and growers by setting base rates for growing fees and by prohibiting agreements not approved by an industry committee. At the time of the 2003 NCP assessment, the government failed to show that these restrictions were in the public interest and had not conducted an open NCP review process. The Council recommended, and the Australian Government imposed, a permanent deduction of 5 per cent of 2003–04 competition payments.

In March 2004, the New South Wales Minister for Agriculture sought the Council's view on the implications for the 2005 NCP assessment if the government submitted the legislation for review. It was agreed, if the government initiated an independent NCP review of the poultry legislation, that the Council would recommend a suspension of competition payments for 2004-05, rather than another permanent deduction. And, on the government's implementation of NCP compliant reforms, the Council would recommend lifting the suspension.

As agreed, the government commissioned an independent review of the Act, and the Council recommended a specific suspension of 5 per cent of the state's 2004-05 competition payments. Based on the recommendations of the NCP review, on 7 June 2005 the government announced reforms to remove the restrictions on competition and to improve the operation of the Act. In introducing the amendments, which had broad support among growers and processors, the minister outlined the history of the government's strategy to block reforms. The minister stated:

In 1999 a joint industry government review was conducted, and in 2001 Hassall's conducted an independent review. Both reviews failed to support the current Act …

… both the 1999 and 2001 reviews found a net public detriment with this Act. If that had been revealed publicly at that stage, the Commonwealth would have moved on us two to three years earlier.

… The government did not release the results of the reviews because it was protecting the growers from the actions of the National Competition Council.

… we were given the chance to conduct a third review …

…the 2004 review, which has just been completed, confirmed the earlier findings.

… We kept the Act in place since 1999 because we were interested in protecting the interests of growers. The New South Wales Government has protected those growers for six years longer than the initial review. (Macdonald 2005).

The Council's approach

Under CPA clause 5(5), each jurisdiction must demonstrate that new legislative proposals restricting competition are consistent with clause 5(1).

The Council has always interpreted this to mean that governments should have robust regulatory gatekeeping arrangements in place. It considers that 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 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.

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

- There should be monitoring and annual reporting by the independent body on compliance with the regulation impact analysis requirements.

Where the Council is not assured about the effectiveness of a jurisdiction's gatekeeping process, it has examined, on occasion, some new legislation that restricts competition. This 'sampling', based on an assumption that the quality of regulation is a function of the efficacy of the gatekeeping process, provides a check on the integrity of the latter.

The New South Wales Government stated in its 2005 NCP annual report that:

> … *the NCC* [the Council] *has formed its own view of what constitutes a set of 'best practice' principles for gatekeeping. Notwithstanding this, the Competition Principles Agreement does not prescribe any particular model, nor does it provide for the NCC to determine such a model.*
>
> … *the NCC has indicated that it may undertake its own checks of compliance by examining whether particular pieces of new legislation meet the clause 5(1) guiding principle. Clause 5(10) of the CPA requires jurisdictions to report on progress towards achieving the legislation review and reform agenda at clause 5(3), and does not require jurisdictions to report against the gatekeeping obligations at clause 5(5).* (Government of New South Wales 2005a, pp. 30–1)

It is the case that the CPA clause 5(10)—the reporting requirement for the review and reform of extant legislation—does not include a formal direction to report on compliance with clause 5(5). It is also the case that the CPA does not charge the Council with specifying best practice gatekeeping models. However, in determining competition payment recommendations, the Council is obliged under the Agreement to Implement the 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', which includes compliance with clause 5(5).

In assessing compliance with clause 5(5), the Council does not seek to interpose itself as a further layer to scrutinise every piece of new legislation. CPA clause 5(5) was never intended to cast the Council as another layer of gatekeeping. Rather, the Council's primary focus is to ensure jurisdictions have their own rigorous gatekeeping mechanisms in place and that they apply those mechanisms systematically.

In the context of being an assessor, the Council is in a unique position to monitor the different gatekeeper models. But, rather than seeking to use competition payments as a lever to impose a tops down model on governments, the Council has sought to inform governments on the best practice features of widely divergent approaches adopted across Australia.

Assessment of gatekeeping

In its 2003 and 2004 NCP assessments, the Council requested from governments details on the key elements, operations and institutional underpinnings of their gatekeeping mechanisms (NCC 2004, chapter 4). In particular, it sought to be satisfied that each government had, at a minimum, a formal process for the regulatory impact assessment of new and amended primary legislation and for subordinate legislation.[1]

Tables 4.1 and 4.2 (at the end of this chapter) give two perspectives on government's gatekeeping mechanisms. Table 4.1 encapsulates the Productivity Commission's comparison of jurisdictions' regulation impact assessment requirements and processes. Table 4.2 provides a snapshot of the Council's assessment of gatekeeping mechanisms. The commission's work details each government's RIS 'machinery', whereas the Council's focus extends to gauging the potential effectiveness of that 'machinery' in ensuring new legislation does not introduce unwarranted restrictions on competition.

Both analyses indicate that all governments have arrangements to examine regulatory proposals with nontrivial effects on competition and that each, to varying degrees, embodies the necessary attributes for effective gatekeeping. Although both approaches identify areas in which governments could improve their processes, the Council nevertheless determined in its 2004 NCP assessment that all jurisdictions had gatekeeping mechanisms that could, *in principle*, operate to ensure compliance with the CPA clause 5(5) obligation.

[1] The Council of Australian Governments (COAG) RIS requirements apply to national standard setting and regulatory action by ministerial Councils and standard setting bodies. The Office of Regulation Review's report on these COAG processes is discussed in chapter 5 and reproduced in full at appendix A.

That said, the Council expressed reservations about whether all gatekeeping processes were delivering appropriate outcomes *in practice*.

Having a gatekeeping model with the requisite processes and mechanisms does not, of itself, ensure *outcomes* consistent with the public interest. Rather, good regulation is a function of the overarching commitment shown by the government and of the practices, conventions and relationships between that government, its gatekeeper and the agencies devising regulation. A gatekeeper that is not sufficiently independent of the executive arm of government, for example, is less likely to provide relatively unconstrained independent advice on the adequacy of regulation impact analyses.

In this 2005 NCP assessment, the Council has not revisited the detail of each government's gatekeeping mechanism. Instead, given that this assessment is the final under the current suite of NCP agreements, the Council has sought to encourage governments to move beyond a static notion of adequate or NCP compliant gatekeeping, to a more dynamic approach that strives to adopt improved practices. In Australia, there is no fixed template for an optimal gatekeeping process: different governments have adopted different formats and this diversity of experience provides significant potential for governments to adopt better practices based on the experience of others.

The following sections discuss different approaches to two critical aspects of effective gatekeeping: (1) the independence and form of the gatekeeper; and (2) the transparency of its processes.

Independence and form of the gatekeeper

The most important determinant of effective gatekeeping is the independence (location) of the gatekeeper and its institutional underpinning. The Council's 2003 NCP assessment considered that the gatekeeping arrangements of the Australian Government represented best practice, which was primarily a function of the gatekeeper's independence. Recently, Victoria established the Victorian Competition and Efficiency Commission (VCEC) as an independent statutory gatekeeper (box 4.4)[2]. The VCEC also has responsibility for competitive neutrality policy matters and undertakes government initiated regulatory inquiries.[3]

Victoria's proactive role in this area demonstrates a strong commitment by the government to strive for high quality regulation. The re-specification of the benchmark for regulatory assessment will enshrine the gains from competition policy to date and encourage informed and high quality new legislation. The ability of the VCEC to withhold certificates of adequacy for

[2] Strictly speaking, the VCEC was established by an Order in Council that provides for a limited statutory form. However, VCEC has independent commissioners, and the protocol between the VCEC chair and the Department of Treasury and Finance specifies the former's independence.

[3] South Australia also co-locates its competitive neutrality and gatekeeping functions.

RISs provides a discipline that proposals for new laws will be properly assessed. This is a more potent requirement than relying on diffuse guidelines, circulars and memoranda. The introduction of a comprehensive competition impact analysis regime in the Northern Territory in 2003 further exemplifies the prospect for advances in regulation review.

Box 4.4: Gatekeeping and the Victorian Competition and Efficiency Commission

In Victoria, a formal assessment to determine whether the CPA clause 5(1) guiding principle has been satisfied must be undertaken for all new and amended primary legislative proposals and for subordinate legislation for which a regulatory impact statement (RIS) is required.

For primary legislative proposals that potentially have significant effects for business and/or competition, the CPA clause 5(1) test is incorporated within a business impact assessment (BIA). Primary legislative proposals that are not considered to have potentially significant effects are exempt from the BIA process, but the CPA clause 5(1) assessment must still be undertaken. For subordinate legislation, a RIS is required for new or amended regulatory proposals, except proposals that will not impose an appreciable burden on any sector, that have been assessed already for a national uniform legislation scheme or that are of a fundamentally declaratory or machinery nature.

Ministers are required to seek an independent assessment of the adequacy of RISs from the Victorian Competition and Efficiency Commission (VCEC). For primary legislation, the VCEC is also required to advise on the adequacy of BIAs. For subordinate legislation, RISs are prepared in accordance with guidelines issued by the Department of Premier and Cabinet.

Guidance material is available to all government agencies in the form of a single publication known as the *Victorian guide to regulation*. The guide:

- describes forms of regulation and regulatory alternatives, and the circumstances under which governments should consider intervening in the market
- outlines processes to ensure appropriate scrutiny of regulatory proposals, and when a BIA or RIS should be prepared
- provides a step-by-step outline on the information and issues that need to be addressed in BIA and RIS documents.

The VCEC's secretariat is drawn from the Department of Treasury and Finance. Importantly, a protocol between the secretary of the department and the chair of the VCEC ensures the independence of the secretariat's advice. The VCEC assesses each BIA and RIS, and provides a certificate of adequacy only when the analysis is of the required standard. For primary legislation, the VCEC certificate must be provided to Cabinet or the Cabinet committee that is considering the legislation. For subordinate legislation, the RIS must not be released for comment until the responsible minister has received independent advice from the VCEC regarding the adequacy of the RIS.

The VCEC reports annually to the Treasurer on the nature and extent of compliance with policies in relation to RISs and BIAs. This report is public. The VCEC also provides ongoing advice and training to government agencies on the preparation of RISs and BIAs. Parties are encouraged to consult with the VCEC in the early stages of the RIS/BIA process.

A further layer of scrutiny exists after regulations have been introduced. The all-parliamentary Scrutiny of Acts and Regulations Committee must be supplied with copies of the RIS, the regulations, all public comments received during the consultation period, and the relevant department/agency's response to the main issues raised in the public comments. The committee reviews the regulations and their conformity with the processes for regulation making specified in the *Subordinate Legislation Act 1994*.

Victoria and the Australian Government are the only two jurisdictions with independent statutory gatekeepers. Other jurisdictions locate their gatekeepers within their Treasury or Department of Premier and Cabinet/Chief Minister. During the recent Productivity Commission review of the NCP, governments expressed different views about the form and location of their gatekeepers. For example, the Queensland Government stated that:

> … *jurisdictions should be free to determine their own arrangements for monitoring new and amended legislation, including whether some form of 'independent' agency is warranted.* (PC 2005a, p. 256)

Conversely, the Western Australian Department of Treasury and Finance, acknowledged that:

> *Perhaps jurisdictions that do not have a sufficiently robust gate-keeping mechanism in place should work towards establishing independent bodies with relevant expertise to advise agencies on when and how to conduct regulatory impact assessments.* (PC 2005a, p. 257)

Some smaller jurisdictions, such as the Northern Territory contend that the resource cost of a stand alone gatekeeper would not be justifiable.

Given that the independent statutory form of gatekeeper is the 'gold standard', the contention that the resource cost is not justified should be further debated. The benefits to a state or territory that flow from good regulatory practice and integrated policy making (and from avoiding bad regulation) are substantial. For small jurisdictions, a second-best option could be to locate the gatekeeper function as a discrete unit within an existing independent entity such as the audit office or the prices oversight body.

Without an independent statutory gatekeeper, or one located within an independent entity, it would be preferable to house the function within agencies that are:

- removed, to the greatest extent possible, from the politics of policy development
- culturally attuned to a broad (economy- or statewide) perspective of the net public benefit.

In practical terms, these criteria suggest locating the gatekeeper within treasury departments.

Two key requirements for a non-statutory gatekeeper models are:

- *an effective 'Chinese wall'*—political considerations must be kept separate from the robust assessment of the costs and benefits of regulation, and RISs prepared within the same portfolio agency must be assessed without undue influence
- *'potency' and appropriate resources*—the gatekeeper needs to have sufficient resources to undertake its functions effectively, and it should be

headed by a senior official with direct reporting to the head of the agency in which it is housed and ultimately to a senior Minister (such as a Treasurer).

Finally, effective gatekeeping needs legislative underpinning. In many jurisdictions, subordinate legislation Acts dictate processes for the making of (subordinate) regulations. Processes for assessing new legislation, however, are typically less formalised and thus, less effective.

The location of the gatekeeper has a strong bearing on its independence and its capacity to properly undertake regulatory impact analysis. That said, if the gatekeeper is permitted to operate as a fully independent entity, supported by a strong institutional framework and afforded some 'muscle', it could conceivably operate effectively even within a policy department. The Council found, for example, that South Australia's gatekeeping arrangements, administered through the Department of Premier and Cabinet, appear to operate effectively in vetting proposed new legislation for competition impacts.[4] On the other hand, the Council has expressed reservations about New South Wales' gatekeeping arrangements (NCC 2004, p. 4.7)—see also table 4.1 (below) drawn from the work of the productivity Commission.

Transparency of gatekeeping processes

Effective gatekeeping requires transparent processes at a number of stages in policy development—for example, some governments adopt approaches such as consultation (or draft) RISs in addition to RISs for the decision maker. Generally, to the extent that RISs are undertaken for subordinate legislation, they are publicly accessible. But, this is not always the case for new legislation proposals. Victoria's business impact assessments for new legislation remain confidential. The ACT also retains Cabinet confidentiality for its RISs. In contrast, the overwhelming majority of Australian Government RISs for primary legislation are published *ex post*.

Where regulatory assessments are not made public, affected stakeholders may have no way of determining the basis on which decisions were made. In these instances, exposure drafts for new legislation can be a useful adjunct to encourage early alerts to potentially unanticipated consequences.

The view that Cabinet confidentiality must be preserved is not without merit. However, for contentious new legislation, it should be possible to make expurgated RISs available. While it is not the role of a gatekeeper to impede the policy initiatives of elected governments, it is in the public interest to have transparent RISs that make public the reasons that governments

[4] On occasion, the South Australian Government has sought the Council's advice on whether proposed new legislation would comply with CPA clause 5(5).

pursue one course of action over others. Such transparency can highlight the trade offs made and make governments more accountable for their decisions.

The Council considers that a central repository of RISs would be a valuable resource for interested parties and public policy practitioners. If this practice were widespread, it would allow policy makers (and others) to compare and contrast regulatory approaches, and their rationales, around the country. Moreover, a public repository of RISs would facilitate *ex post* evaluation and expose whether estimated costs and benefits were as anticipated. Such scrutiny would provide a further incentive for robust analysis.

Improvements needed across the board

The gatekeeper arrangements operated by the Australian and Victorian governments encapsulate effective processes; but scope for improvement remains even in these jurisdictions. Quasi regulation is not subject to impact assessment in Victoria (not an NCP requirement), for example and the business impact assessments for new legislation are not made public. In relation to the Australian Government's gatekeeping processes, the Productivity Commission has identified areas for improvement, including:

- greater transparency in the making and administration of regulations
- better integration of RIS processes into agency regulatory policy development processes
- the provision of better quality information on compliance costs and administrative burdens associated with options considered in RISs
- greater attention to effective implementation of regulations and ensuring greater accountability of regulatory decision makers (PC 2005a, p. 259).

The commission's proposals are equally applicable to state and territory gatekeeping arrangements.

The Council considers that the following areas also offer scope for systemic improvement:

- *Coverage*: Regulatory proposals for both primary and subordinate legislation need to be rigorously assessed. In New South Wales, it appears that the RIS process can be avoided for direct amendments to subordinate legislation. More generally, quasi regulation is generally not covered except by Tasmania and the Australian Government. (The Australian Government also requires assessments of regulatory proposals arising from international treaties.)
- *Sunset clauses*: New legislation should contain a sunset clause to ensure it is reassessed. Sunset clauses are consistent with the CPA clause 5(6)

obligation and would also facilitate re-examination of RISs, including how well they were prepared.

- *Sanctions*: At the Australian Government level, there is little sanction for a failure to comply with gatekeeping processes, other than the opprobrium arising from exposure via reporting by the Office of Regulation Review. Under the VCEC model, if a RIS is not assessed as adequate this must create some concerns for Cabinet. A more stringent option would be to preclude regulatory proposals from proceeding without an adequately certified RIS.

The above considerations are broad brush systemic matters. It is not the Council's role to comment on the detail of how regulatory impact assessments should be conducted at the agency level. That said, RISs should include a defensible quantification of costs and benefits, rather than unsubstantiated qualitative statements such as 'the costs are negligible'.

A way forward

In its recent review of the NCP, the Productivity Commission reaffirmed the need for high quality gatekeeping of new legislation and recommended that:

> *All Australian governments should ensure that they have in place effective and independent arrangements for monitoring new and amended legislation.*
>
> *Governments should also consider widening the range of regulations encompassed by gate keeping arrangements and strengthen national monitoring of the procedures in place in each jurisdiction and the outcomes delivered* (PC 2005a, recommendation 9.2, p. 259).

The Council agrees that national monitoring of gatekeeping arrangements will help to buttress improved processes. In any initial phase of systemic improvement, national monitoring would be important for success. Ultimately, however, individual governments need to commit to upgrade gatekeeping mechanisms.

The Council urges governments to ensure good policymaking is promoted through effective scrutiny of their agencies' performance in developing regulations. Such scrutiny should be undertaken by gatekeepers that are sufficiently independent to genuinely assess the quality of proposed new regulations and whether the new laws will be in the public interest. Having processes, procedures, guidelines and mechanisms in place will not ensure regulatory quality if the gatekeeper perceives its role as uncritically shepherding through regulatory proposals because they reflect the desire of the government of the day. While politics may drive policy formulation, the gatekeeper should be effective in ensuring the result is high quality

regulation that meets the objectives of governments without unnecessarily restricting competition or otherwise generating avoidable efficiency costs.

Fundamental systemic reform to ensure the promulgation of high quality regulation will require high level endorsement by Australian governments. There have been positive developments in this regard at the collective COAG level. The Office of Regulation Review reported that several changes have been made to 'enhance the application of the principles of good regulatory practice by COAG, ministerial councils, intergovernmental standard-setting bodies and bodies established by government to deal with national regulatory issues and problems' (see appendix A). These changes indicate an element of necessary dynamism. Unfortunately, however, the COAG RIS processes are not mirrored by some individual governments' gatekeeping arrangements.

A second tier of systemic improvement could derive from the Regulation Review Unit Forum, comprised of Australian Government and state and territory (and New Zealand) gatekeepers. The forum meets annually and is, in part, a vehicle for exchanging information on better practices. If an environment can be cultivated whereby jurisdictions operate transparent gatekeeping arrangements, then exposure to different processes and associated feedback and learning will be promoted.

Like most modern economies, Australia is subject to a rapid regulatory accretion, and governments face a variety of pressures to enact new laws. Where new laws are in the public interest, community welfare is enhanced. But the costs as well as the anticipated benefits of regulation must be assessed rationally. This is the role of gatekeeping systems, and while there have been improvements, many governments have systems that fall short of best practice, particularly given that the 'best practice frontier' is becoming more challenging. That best practice gatekeeping is a dynamic process is evidenced by new developments in other nations, such as the United Kingdom, which also are grappling with how to improve legislation and thus, national living standards.

Based on its experience with the NCP program, the Council considers that a strong commitment by governments to gatekeeping is the indispensable ingredient. As the Chairman of the Productivity Commission concluded, 'what is needed is deeper recognition within government of the value of good process itself, which the RIS "paperwork" simply records. That will require more fundamental change, which can really only be inculcated from the top down' (Banks 2005, p. 16). Box 4.5 provides the Council's checklist for robust gatekeeping arrangements, based on various models operating within Australia

Box 4.5: Elements of best practice gatekeeping

Institutional environment settings (COAG and individual governments)

- A high level commitment by governments to the importance of good process to achieve high quality regulation
- Consideration given to assessing the quality of the stock of legislation, in addition to ensuring the flow of high quality new legislation
- (At least initial) external monitoring, comparison and assessment of the performance of gatekeeping systems as governments move to improve these arrangements
- Cross-jurisdictional information exchange through the Regulation Review Forum as a vehicle to continually promote best practice gatekeeping systems

Whole-of-government process issues

- Legislative underpinning for the application of regulatory impact assessments for primary, subordinate and quasi regulation
- Structured integration of RIS processes into agencies' regulatory policy development roles
- Mandatory guidelines for the conduct of RISs, with appropriate cost–benefit assessment frameworks that focus on the quantification of costs and benefits for consumers, business, government and the community, and that appropriately explore alternatives to meet the stated objectives
- Greater awareness of the risks of using regulation to achieve off-budget solutions and/or to placate vested interests, rather than adopting a community-wide perspective

The gatekeeper

- Optimal model: an independent statutory gatekeeper established under a separate Act or through protocols to ensure independence
- Second best: an independent entity removed from a direct role in policy formulation with an appropriate 'Chinese wall', adequate resources and a high level line of reporting
- Responsibility for 'failsafe' systems to ensure all regulatory proposals are scrutinised to determine whether a RIS should be undertaken, and that RISs are conducted in a timely manner to avoid *ex post* justifications
- Capability to provide/withhold certificates of adequacy for RISs before consideration by Cabinet (or to not accept poor quality RISs)
- Training capabilities and high level imprimatur to work with agencies in developing RISs
- Public monitoring and exposure of agencies' compliance with RIS requirements and the quality of RISs prepared

Transparency

- Where appropriate, the conduct of RISs at the consultation stage and for the decision maker
- RISs made publicly available when legislation is introduced, including expurgated RISs where genuine confidentiality considerations arise
- A publicly accessible repository for RISs
- Incorporation of sunset clauses to facilitate *ex post* evaluation of the projected costs and benefits from the RIS

Table 4.1: Productivity Commission's reporting of RIS requirements and processes

Jurisdiction	*Bills*	*Subordinate instruments*	*Quasi regulation*	*RIS for consultation*	*RIS for decision maker*	*RIS guidelines*	*Cost–benefit assessment*	*Report on RIS compliance*	*Regulatory plans*	*Sunset clauses*
COAG									na	
Aust. Govt										
NSW										
Victoria										
Queensland										
WA										
SA										
Tasmania										
ACT										
NT										

Process/requirements in place | Qualified process/requirements in place | No process/requirements in place

Note: Table 4.1 focuses on governments' processes and requirements for the preparation of RISs to ensure regulatory quality. It is broader in scope than table 4.2, which focuses only on whether governments have processes in place that provide an assurance that the clause 5(1) guiding principle is applied to all new legislation (Acts, enactments, Ordinances and regulations).

Source: PC 2004a, tables F.1 and F.2.

Table 4.2: National Competition Council's assessment of gatekeeping arrangements for new legislation

Jurisdiction	*Formal assessment—Bills*	*Formal assessment—subordinate legislation*	*Published guidelines for assessing new regulation*	*RIS guidelines that specifically embody competition impacts*	*Independent assessment of gatekeeper requirements*	*Independent reporting of gatekeeper requirements*
Australian Government						
Victoria						
Queensland						
Northern Territory						
South Australia						
Tasmania						
ACT						
New South Wales						
Western Australia						

Effective process | Process in place: scope to improve | No formal process

Note: The key focus of table 4.2 is on whether governments have processes in place that provide an assurance that the clause 5(1) guiding principle is applied to all new legislation (Acts, enactments, Ordinances and regulations). The clause 5(1) focus is a narrower subset than that of able 4.1, which reports the machinery of RIS requirements and RIS processes by jurisdiction. Table 4.1 also accounts for regional, community, business (and small business) and family and society impact assessments.

Source: NCC 2004, pp. 4.5–4.20; governments' 2005 NCP annual reports.