Australian Government

Productivity Commission

Annual Review of Regulatory Burdens on Business:

Social and Economic Infrastructure Services

Productivity Commission Research Report

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The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

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Foreword

Reducing undue regulatory burdens on businesses enhances not only their performance, but also that of the Australian economy. For this reason, and following the Regulation Taskforce's more wide-ranging review in 2005-06, the Commission has been asked to conduct annual reviews of the burdens on business arising from the stock of Australian Government regulation in key sectors of the economy, over a five year cycle. This study of the social and economic infrastructure services sector is the third in that series.

As in its earlier reviews, the Commission has focused on identifying those regulatory burdens placed on businesses in the social and economic infrastructure services which it judges to be unnecessary within current policy settings. It makes recommendations to reduce these burdens, as well as for the better design of future regulatory frameworks affecting these sectors.

The study was overseen by Commissioners Angela MacRae, and until July 2009 Siobhan McKenna, with a staff research team in the Commission's Canberra office led by Les Andrews.

The Commission has been greatly assisted by many discussions with, and submissions from a wide range of participants, to whom it extends its thanks.

Gary Banks
Chairman
August 2009

Terms of reference

ANNUAL REVIEW OF REGULATORY BURDENS ON BUSINESS

Productivity Commission Act 1998

The Productivity Commission is asked to conduct ongoing annual reviews of the burdens on business arising from the stock of Government regulation. Following consultation with business, government agencies and community groups, the Commission is to report on those areas in which the regulatory burden on business should be removed or significantly reduced as a matter of priority and options for doing so. The Commission is to report by the end of October 2007, and the end of August each following year.

The Commission is to review all Australian Government regulation cyclically every five years. The cycle will commence with a review of regulatory burdens on businesses in Australia's primary sector. In subsequent years, the Commission is to report sequentially on the manufacturing sector and distributive trades, social and economic infrastructure services, and business and consumer services. The fifth year is to be reserved for a review of economy-wide generic regulation, and regulation that has not been picked up earlier in the cycle. The Commission's programme and priorities may be altered in response to unanticipated public policy priorities as directed by the Treasurer.

Background

As part of the Australian Government's initiative to alleviate the burden on business from Australian Government regulation, on 12 October 2005, the Government announced the appointment of a Taskforce on Reducing Regulatory Burdens on Business and its intention to introduce an annual red tape reduction agenda. This agenda incorporates a systematic review of the cumulative stock of Australian Government regulation. The Government approved this review process to ensure that the current stock of regulation is efficient and effective and to identify priority areas where regulation needs to be improved, consolidated or removed.

Furthermore, the regulatory reform stream of the Council of Australian Governments (COAG) National Reform Agenda focuses on reducing the regulatory burden imposed by the three levels of government. On 10 February 2006, COAG agreed that all Australian governments would undertake targeted public annual reviews of existing regulation to identify priority areas where regulatory reform would provide significant net benefits to business and the community. COAG also agreed that these reviews should identify reforms that will enhance regulatory

consistency across jurisdictions or reduce duplication and overlap in regulation and in the role of regulatory bodies.

Scope of the annual review

In undertaking the annual reviews, the Commission should:

1. identify specific areas of Australian Government regulation that:

    a) are unnecessarily burdensome, complex or redundant; or

    b) duplicate regulations or the role of regulatory bodies, including in other jurisdictions;

2. develop a short list of priority areas for removing or reducing regulatory burdens which impact mainly on the sector under review and have the potential to deliver the greatest productivity gains to the economy;

3. for this short list, identify regulatory and non-regulatory options, or provide recommendations where appropriate to alleviate the regulatory burden in those priority areas, including for small business; and

4. for this short list, identify reforms that will enhance regulatory consistency across jurisdictions, or reduce duplication and overlap in regulation or in the role of regulatory bodies in relation to the sector under review.

In proposing a focused annual agenda and providing options and recommendations to reduce regulatory burdens, the Commission is to:

- seek public submissions at the beginning of April in 2007, and at the beginning of February in each following year, and consult with business, government agencies and other interested parties;

- have regard to any other current or recent reviews commissioned by Australian governments affecting the regulatory burden faced by businesses in the nominated industry sectors, including the Australian Government's response to the report of the Taskforce on Reducing Regulatory Burdens on Business;

- report on the considerations that inform the Commission's annual review of priorities and reform options and recommendations; and

- have regard to the underlying policy intent of government regulation when proposing options and recommendations to reduce regulatory burdens on business.

The Commission's report will be published and the Government's response announced as soon as possible.

PETER COSTELLO

[received 28 February 2007]

Contents

Abbreviations

ABA	Australian Broadcasting Authority
ABCB	Australian Building Codes Board
ABS	Australian Bureau of Statistics
ACAT	Aged Care Assessment Team
ACCAN	Australian Communications Consumer Action Network
ACCC	Australian Competition and Consumer Commission
ACCS	Australian Community Children's Services
ACCV	Aged and Community Care Victoria
ACFI	Aged Care Funding Instrument
ACIC	Aged Care Industry Council
ACMA	Australian Communications and Media Authority
ACPET	Australian Council for Private Education and Training
ACSA	Aged and Community Services Australia
ACSAA	Aged Care Standards and Accreditation Agency
ADMA	Australian Direct Marketing Association
ADRC	Accreditation Decisions Review Committee
AEI	Australian Education International
AEMA	Australian Energy Market Agreement
AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
AFL	Australian Football League
ALRC	Australian Law Reform Commission
AMA	Australian Medical Association
AMTA	Australian Mobile Telecommunications Association
ANAO	Australian National Audit Office

ANHECA	Australian Nursing Homes and Extended Care Association
APIA	Australian Pipeline Industry Association
APRA	Australian Prudential Regulation Authority
AQF	Australian Qualifications Framework
AQIS	Australian Quarantine and Inspection Service
AQTF	Australian Quality Training Framework
ARC	Australian Research Council
ARTC	Australian Rail Track Corporation
ASIC	Australian Securities and Investments Commission
ASTRA	Australian Subscription Television and Radio Association
ATA	Australian Trucking Association
ATO	Australian Taxation Office
ATSA	Australian Transport Security Act
ATSR	Australian Transport Security Regulations
ATC	Australian Transport Council
AUQA	Australian Universities Quality Agency
BCA	Building Code of Australia
BSA	*Broadcasting Services Act 1992*
CACO	Community and Aged Care Officials
CAP	Conditional Adjustment Payment
CASA	Civil Aviation Safety Authority
CCAS	Child Care Accreditation System
CCB	Child Care Benefit
CCC	Community Child Care
CCMS	Child Care Management System
CCNSW	Child Care New South Wales
CCQA	Child Care Quality Assurance
CCTR	Child Care Tax Rebate
CHA	Catholic Health Australia
CIRA	Competition and Infrastructure Reform Agreement
CIS	(Aged Care) Complaints Investigation Scheme

COAG	Council of Australian Governments
COPO	Commonwealth Own Purpose Outlays
CPRS	Carbon Pollution Reduction Scheme
CRICOS	Commonwealth Register of Institutions and Courses for Overseas Students
CRC	Cooperative Research Centre
DBCDE	Department of Broadband, Communications and the Digital Economy
DDA	*Disability Discrimination Act 1992*
DDSO	Digital Data Service Obligation
DEEWR	Department of Employment, Education and Workplace Relations
DEST	Department of Education, Science and Training
DEWHA	Department of the Environment, Water, Heritage and the Arts
DOHA	Department of Health and Ageing
DRET	Department of Resources, Energy and Tourism
ECDSC	Early Childhood Development Steering Committee
ECEC	Early Childhood Education and Care
EHEA	European Higher Education Authority
ELICOS	English Language Intensive Courses for Overseas Students
ENA	Energy Networks Association
EPA	Environmental Protection Authority
EPBC Act	*Environmental Protection and Biodiversity Conversation Act 1999*
ERAA	Energy Retailers Association of Australia
ESC	Essential Services Commission (Victoria)
ESCOSA	Essential Services Commission of South Australia
ETSLG	Energy Technical and Safety Leaders Group
EYLF	Early Years Learning Framework
FDC	Family Day Care
FMA	Financial Management Authority

FTA	Free to-air-television
GPOC	Government Prices Oversight Commission
GTOs	Group Training Organisations
HACC	Home and Community Care
HECS	Higher Education Contribution Scheme
HELP	Higher Education Loan Program
HD	high definition
HML	Heavy Mass Limits
HREOC	Human Rights and Equal Opportunity Commission
IC	Industry Commission
ICRC	Independent Competition and Regulatory Commission
ISCA	Independent Schools Council of Australia
IPART	Independent Pricing and Regulatory Tribunal
ISDN	Integrated Services Digital Network
LAGS	Liquids, Aerosols and Gels
LDC	Long Day Care
KPIs	Key Performance Indicators
MBS	Medical Benefits Schedule
MCE	Ministerial Council on Energy
MCEETYA	Ministerial Council on Education, Employment, Training and Youth Affairs
MCVTE	Ministerial Council for Vocational and Technical Education
MRET	Mandatory Renewable Energy Target
MSIC	Maritime Security Identification Card
NAPLAN	National Assessment Program Literacy and Numeracy
NARA	National Audit and Registration Agency
NBN	National Broadband Network
NCAC	National Child Care Accreditation Council
NCC	National Competition Council
NEA	National Education Agreement
NECF	National Energy Customer Framework

NEL	National Energy Law
NEM	National Energy Market
NEMMCO	National Electricity Market Management Company
NEPM	National Environment Protection Measures
NGL	National Gas Law
NGR	National Gas Rules
NHHRC	National Health and Hospitals Reform Commission
NHMRC	National Health and Medical Research Council
NHWT	National Health Workforce Taskforce
NMI	National Measurement Institute
NPC	National Packaging Covenant
NQC	National Quality Council
NRL	National Rugby League
NRMC	National Resources Ministerial Council
NRTC	National Road Transport Commission
NPRM	Notice of Proposed Rule Making
NQA	National Quality Agenda
NSW	New South Wales
NTC	National Transport Commission
NTP	National Transmission Planner
NTPF	National Transmission Planning Function
NWC	National Water Commission
NWMRS	National Waste Minimisation and Recycling Strategy
OBPR	Office of Best Practice Regulation
OHS	Occupational Health and Safety
OECECC	Office of Early Childhood Education and Child Care
ORR	Office of Regulation Review (now OBPR)
OSCAR	Online System for Comprehensive Activity Reporting
OTER	Office of the Tasmanian Energy Regulator
OSHC	Outside School Hours Care

OTS	Office of Transport Security
PBS	Pharmaceutical Benefits Scheme
PC	Productivity Commission
PCA	Packaging Council of Australia
PIP	Practice Incentives Program
QCA	Queensland Competition Authority
RCS	Resident Classification Scale
REC	Renewable Energy Certificate
RET	Renewable Energy Target
RIS	Regulation Impact Statement
RTOs	Registered Training Organisations
SBAC	Small Business Advisory Committee
SBR	Standard Business Reporting
SCFPA	Standing Committee on Finance and Public Administration
SCRGSP	Standing Committee for the Review of Government Services Provision
SNA	Safety Net Adjustment
SOLAS	Safety of Life at Sea
STV	Subscription Television
TAFE	Technical and Further Education
TEQSA	Tertiary Education Quality and Standards Agency
TFP	Total Factor Productivity
TPA	Trade Practices Act
TRA	Trades Recognition Australia
UA	Universities Australia
USO	Universal Services Obligation
VCEC	Victorian Competition and Efficiency Commission
VET	Vocational Education and Training
VoIP	Voice over Internet Protocol

OVERVIEW

Key points

- Regulation of the social and economic infrastructure services sector is particularly heavy. This resort to a heavy regulatory presence arises because:
  - regulation is used to promote competitive behaviour where natural monopolies exist, for example, telecommunications and energy
  - of considerable government funding of service delivery, for example, aged care
  - there is information asymmetry with service users, for example, medical services
  - some service recipients, for example, the frail and aged and young children, are seen as vulnerable and requiring protection
  - many businesses in the sector operate across jurisdictions, for example, transport and energy retailers.
- Many industries in this sector are subject to review or reform activity, for example, transport, energy, higher education, telecommunications, aged care and child care. It is important to ensure that the reforms are implemented in a timely fashion and in a way that minimises the regulatory burdens. Much of the reform agenda relies on co-operation between governments. Reforms need to move beyond high level agreement on guiding principles to genuinely reduce the regulatory burden at the individual business level.
- This review has identified seven main areas — aged care, child care, information media, telecommunications, energy, air transport and education — where regulations can be made less burdensome.
- Regulation in aged care
  - without tackling the underlying policy framework that constrains the supply of aged care services, it is unlikely that the regulatory burden in the industry can be substantially reduced. To reduce the burden associated with regulation and price controls, and to improve the quality and diversity of aged care services, the government should explore options for: relaxing supply constraints in the provision of aged care services; providing better information to older people and their families so they can make more meaningful comparisons in choosing an aged care service; and removing the restriction on bonds as a source of funding
  - the aged care regulatory framework is fragmented due to regulation by numerous government agencies. This should be addressed by the current reviews of the accreditation process and standards in consultation with state and territory agencies. There also needs to be more effective communication with the industry on the delineation of responsibilities between the Department of Health and Ageing and the Aged Care Standards and Accreditation Agency regarding monitoring of provider compliance with these standards.
- Regulation in child care
  - clarify regulations to ensure a provider can have its Child Care Benefit approval removed if it is not accredited by the National Childcare Accreditation Council
  - streamlining of the accreditation arrangements should take place now, prior to the implementation of the proposed COAG reforms.

Key points (continued)

- Regulation in information media
  - the anti-siphoning regime imposes regulatory burdens because of the protracted commercial negotiations required for listed events. This burden should be reduced by substantially reducing the anti-siphoning list
  - radio local content rules and disclosure standard should both be made more flexible and associated reporting requirements reduced
  - additional local presence and content requirements triggered by ownership changes of radio stations should be abolished
  - the Australian Communications and Media Authority should have broader discretion to not investigate some code complaints.
- Regulation in telecommunications
  - the telecommunications consumer information obligations should be streamlined
  - the identity check requirements for prepaid mobile phones should be revised to lower costs to business while achieving their policy objective of allowing law enforcement agencies to identify mobile phone owners.
- Regulation in the energy sector
  - the Ministerial Council on Energy should commission work to consider the practicalities of implementation of the recently agreed pass-through to consumers of cost increases associated with the Carbon Pollution Reduction Scheme
  - governments should amend the Australian Energy Market Agreement to ensure clearer commitments to competition reviews by the Australian Energy Market Commission and ongoing price monitoring by the Australian Energy Regulator
  - all levels of government need to work cooperatively to reduce the burden associated with excessive reporting obligations, including through the adoption of a methodology consistent with Standard Business Reporting (SBR).
- Regulation in air transport
  - shift from a 'one size fits all' approach in aviation security regulation and develop arrangements that satisfy regulatory requirements at lower compliance cost.
- Regulation in education and training
  - reforms to streamline reporting obligations in the education sector, including in response to recommendations from the Bradley Report and the anticipated changes to reporting by schools, should be undertaken consistent with the methodology of the SBR initiative. Electronic reporting and secure on-line sign-on to the agencies involved should be introduced.
- Many industries complained of overly burdensome, duplicative and redundant reporting requirements. Extending the SBR principles and methodology to many of the sectors covered in this review could substantially reduce the reporting burden.
- The best practice regulation requirements should be strengthened by increasing transparency and providing greater scope for consultation with business.

Overview

Regulation is an important and effective mechanism to achieve economic, environmental and social goals, but places burdens on businesses. Unnecessary burdens arise where regulation is unduly complex or redundant or duplicates the regulations of other jurisdictions or regulatory bodies. Such regulation can impose additional financial costs on businesses, change how they operate in undesirable ways and can reduce their flexibility to respond to challenges and opportunities. The overarching objective of regulatory reform is to enhance the capacity of businesses to generate productivity growth to underpin growth in community welfare without undermining the policy intent of the regulations.

In February 2007, the Commission was asked to review, over a five-year period, the burdens on business arising from Commonwealth regulation. The terms of reference of the review are set out on pages IV-VI. The objective of the review is to ensure that the current stock of regulation is efficient and effective and to identify priority areas where regulation needs to be improved, consolidated or removed. The Commission's task is to identify improvements to regulation that will raise the productivity of businesses without compromising the underlying policy objectives.

For 2009, the task is to examine regulations that affect the social and economic infrastructure services sector — this includes energy, construction, transport, information media and telecommunications, health care and social assistance, education, aged care and child care.

The sector accounted for 33 per cent of Australian GDP ($338 billion) in 2007–08. Of the relevant industries, construction contributed the largest share, 7.9 per cent of GDP ($82.1 billion), followed by health care and social assistance with 6.3 per cent ($65.4 billion), while information media and telecommunications contributed the smallest share, 2.3 per cent of GDP ($23.9 billion)

This sector is also a significant employer, accounting for 43 per cent of overall Australian employment in May 2009 (over 4.6 million persons). Of this, health care and social assistance is the most significant employer, accounting for 11 per cent of overall employment (over 1.1 million persons), followed by construction with 9.1 per cent of overall employment (984 000 persons).

As part of this review process, the Commission received 51 submissions from participants prior to the release of the draft report. In addition, the Commission held over 50 meetings with stakeholders — individual companies and business groups in the sector, regulators and policy departments. Subsequent to the release of the draft report, the Commission held two roundtables, further discussions with stakeholders and received an additional 50 submissions.

Regulatory issues facing the social and economic infrastructure services sector

The social and economic infrastructure services sector is subject to both Commonwealth and state and territory regulations. The role of the Australian Government in affecting the regulatory environment arises directly through its broad powers in the Constitution to regulate corporations, telecommunications and broadcasting, interstate and international trade and being a party to international treaties.

Indirect Australian Government involvement in the regulatory framework affecting the social and economic infrastructure services sector arises from the Australian Government taking, by agreement with the states and territories, a co-ordinating role to harmonise regulations across Australia, including through model legislation and referred powers. Examples of this harmonisation role include energy, building and land transport regulations. Also, the Australian Government has the capacity to establish and fund specific policies and programs, including in areas such as health, education, aged care and child care. This funding also results in regulatory oversight by the Australian Government.

But there is also considerable state and territory government regulatory involvement. The states and territories have constitutional authority over much of the regulatory landscape affecting construction, health, education, land transport and domestic shipping. In addition, it is common for local government to be responsible for the local administration of aspects of state regulation, such as inspecting food preparation premises for compliance with hygiene and food safety standards and town planning.

While there is a burden of regulation on all sectors within the economy, the burden of regulation on the social and economic infrastructure services sector is especially heavy. This is due to the characteristics of the industries subject to review:

- natural monopoly infrastructure which requires regulation to ensure outcomes consistent with competitive behaviour, for example, telecommunications, electricity and gas supply

- operation across many jurisdictions leading to regulatory differences, for example, road, water and rail transport
- community expectations of service reflected in regulations which impose costs on businesses, for example, information media and telecommunications
- information asymmetry which results in users of these services having limited access to relevant information, for example, health and medical services
- the vulnerability of some users who require protection through regulations, for example, aged care and child care
- dependence of industries on government funding which imposes prudential and financial regulatory requirements, for example, education and training, aged care, child care and health.

A common theme underpinning the regulation of the social and economic infrastructure services sector has been the management of risk through regulation. This covers a range of risks including:

- prudential and financial risk for the Australian Government attached to the provision of funding, for example, funding of medical services, private schools and subsidies for child care and aged care
- budgetary risk for the Australian Government addressed by regulatory constrained funding models, for example, medical services and aged care
- health and safety risks attached to the services supplied to young children and the frail and aged.

It is important to clarify how much regulation is required to manage these risks. It can be easy to place extra regulation on sectors such as social and economic infrastructure services because of the existing relatively heavy burden of regulation. But there is a cumulative cost to pay for this approach and just because there is an existing heavy regulatory burden, it does not make every additional regulation justifiable.

Thus, while it is appropriate to attempt to reduce risks through regulation, it must be recognised that this risk reduction may come with added costs and unintended consequences. It must also be recognised that risk can never be entirely eliminated. Attempting to eliminate all risk is likely to lead to perverse outcomes because it can produce unwarranted expectations by service users and compliance burdens that are so heavy that they impede achievement of the broader policy intent.

Excessive minimisation or avoidance of risk through regulation can also lead to overly prescriptive regulations, 'black letter law' interpretation of regulations by regulators and excessive reporting requirements. Additional regulation can also be

seen as a visible and public solution to unfortunate but isolated problems that may arise in a particular sector. Consequently, the additional regulation is applied sector-wide, not just to those isolated cases or non-compliant businesses.

The consequences of such excessive attempts to manage risk underpin many of the concerns raised in this year's review. This excessive risk management can impede innovations in service delivery, increase costs, undermine staff morale and commandeer resources for compliance purposes away from the core aspects of service delivery. In some cases, it can lead to major ethical concerns regarding the rights of service recipients, for example, mandatory reporting of allegations of abuse in aged care homes. Also, the risk being managed appears to be not always that of the service recipients or to public funding, but that of the regulators and government agencies.

The federal political structure underpinning much of Australia's regulatory framework has also created burdens for businesses in this sector. These arise because of the jurisdictional inconsistencies which affect businesses that operate across states and territories. Also, such inconsistencies can produce multiple reporting requirements to Commonwealth and state government agencies — even for those businesses that operate within a state or territory. This concern with reporting requirements cuts across all sectors from higher education institutions with campuses in more than one state, transport companies that operate interstate, energy businesses that have networks that span states, to aged care and child care providers that may only operate in one state or territory, but must report to several agencies on similar or related matters.

Overlapping and inconsistent regulations are recognised by all Australian governments as impediments to improvements to productivity. Most recently, governments through the Council of Australian Governments (COAG) Reform Agenda have begun to address this challenge and move towards a 'seamless national economy'. In practice this is often addressed by the development (or proposed development) of intergovernmental agreements or arrangements and nationally uniform codes in such areas as transport regulation, higher education, child care, building regulation and energy markets.

These initiatives, if realised, will assist in the creation of a seamless national market for goods and services and are to be encouraged. But this review has shown that the potential benefits from uniformity, or at least consistency, remain to be realised. In the past, while state and territory governments have agreed to such national approaches they have been slow to implement them or have sought to maintain some of their jurisdictional differences. This has been the experience with many reforms in the transport sector and in the development of a national energy market.

Consequently, the burdens created by such jurisdictional inconsistencies underlie many of the concerns raised through submissions. In other sectors, such as child care and higher education, momentum needs to be maintained to realise the benefits of the new national approaches being developed.

History shows that agreement to national reform principles, while not always easy, can usually be brokered where unnecessary burdens are widely acknowledged. The difficulty arises in converting those principles to actionable, practical rules and regulations to be implemented at an individual business level. Too often 'the ball is dropped' with reforms, and the intended results of more uniform regulations do not materialise at the business level.

The intrinsically heavy burden of regulation on the social and economic infrastructure services sector places an additional responsibility on policy makers designing the regulation and those administering the regulation to be cognisant of the additional burdens they may be placing on businesses. Unfortunately, as submissions to this review reveal, this is not always the case.

Principles and guidance material for the development of good quality regulation have been developed by a number of bodies such as COAG, and the Australian Government including the Office of Best Practice Regulation (OBPR). However, this review has identified that some regulations, across various industries in the social and economic infrastructure services sector, have been implemented with minimal analysis of their potential impacts on business.

In reviewing the concerns raised in submissions, meetings and roundtables it became apparent that there is clearly scope to improve the transparency and accountability of the Australian Government's regulatory processes. This should help to improve the analysis of regulatory proposals, and therefore, the quality of regulation. It is recommended that:

- a central register of regulatory impact analysis be developed for Commonwealth regulation, with Regulation Impact Statements (RISs) and the OBPR's adequacy assessments being published at the time government decisions are made public
- departments and agencies update their annual regulatory plans as preliminary assessments are completed
- a consultation RIS be incorporated into the Commonwealth regulation-making process (in a similar manner to the COAG requirements)
- consideration be given to the appointment of a Business Advisory Committee to comment on RISs with business impacts
- a review of the best practice regulation requirements be undertaken.

Background to recommendations

The recommendations proposed in this review should go some way to reducing the regulatory burden on businesses. Also, by seeking to streamline and focus regulatory processes, the recommendations will produce a more integrated regulatory structure which is responsive to business concerns while fulfilling the policy intent of the governing regulations. The Commission's recommendations are provided at the end of this overview. The following is a brief discussion of the context and basis for the Commission's findings and recommendations, and has been grouped according to industry:

- aged care
- child care
- information media and telecommunications
- electricity, gas, water and waste services
- transport
- education and training
- medical services.

Aged care

Aged care providers are concerned about the centralised planning processes which result in a heavy regulatory burden in order to maintain and improve the quality of care. The Australian Government, through its regulatory arrangements, largely controls how many aged care places are provided, where these places are located, the relative weighting of different types of places, the price of these places and their specified quality.

Many of the regulatory burdens stem from the policy framework that restricts the supply of aged care places and limits the extent to which the price mechanism signals changes in market conditions to both aged care providers and care recipients. Without tackling the underlying policy framework it is unlikely that the regulatory burden on aged care providers can be substantially reduced. The Government should explore options for relaxing supply constraints in the provision of aged care services, allowing residents' needs and preferences to be better addressed, and for providing better information to older people and their families so they can make more meaningful comparisons in choosing an aged care service. Such reform would enable the Government to reduce its reliance on regulation and price controls in areas where there is effective competition. The Government should also explore options for removing the regulatory restriction on bonds as a source of

funding to remove the disincentive on providers to make investments in aged care facilities.

The other regulatory constraint which limits the ability of businesses to respond to the differing needs or preferences of residents is the cap on the number of 'extra service places'. Consideration should, therefore, be given to freeing up regional caps on the number of extra service places, as an interim measure, before abolishing the extra service category altogether.

Any reduction in the regulatory burden on aged care providers should not be at the cost of lower levels of service quality for aged care recipients. There is a strong rationale for government intervention to ensure that service providers at least meet community determined standards of care and that consumer protections are in place to ensure the frail and elderly are adequately protected. However, there is scope to achieve these objectives at a lower cost to business and the community through better regulatory design and administration.

The regulatory framework is complex and fragmented due to the existence of several programs regulated by numerous government departments and agencies across three tiers of government, resulting in an unnecessary cost imposition on providers. This should be addressed by the current reviews of the accreditation process and standards in consultation with relevant state and territory governments. Moreover, there needs to be more effective communication with the industry on the delineation of responsibilities between the Department of Health and Ageing and the Age Care Standards and Accreditation Agency regarding monitoring of provider compliance with these standards. To this end, it would be useful to issue all providers with a copy of the protocol between the two organisations which explains the actions each organisation takes when non-compliance is identified or suspected.

The accreditation system has made a positive contribution to the improved standard of aged care. Some changes, however, should be made to reduce the regulatory burden on residential aged care providers. In particular, the visits program should be redesigned using a risk management approach which has a greater focus on under-performing residential aged care homes.

Similarly, the building certification standards have contributed to improved standards of residential accommodation within the industry. However, they have now served their purpose and should be abolished and incorporated in to the Building Code of Australia once all residential aged care facilities have met the current certification standards.

While intended to protect vulnerable and aged consumers, some existing regulations (including police checks and the reporting of missing residents) have shown little

concern for minimising the costs of compliance to the businesses affected. The regulatory burden associated with such requirements could be reduced without undermining the welfare of residents. The extensive increase in across-the-board regulation in recent years, sometimes in response to isolated unfortunate events, does not reflect the high standards of aged care by the vast majority of providers.

Child care

Child care providers are concerned about the significant regulatory overlap and duplication between the Australian Government and state and territory governments that arises from their shared responsibility for regulating child care. COAG has agreed to establish a National Quality Agenda to remove the overlaps, gaps and inconsistencies from 1 July 2009.

It is imperative, given the lack of any assessment of compliance costs in the consultation RIS, that the forthcoming final RIS on the National Quality Agenda conducts a transparent assessment of the costs and benefits of the enhanced regulatory framework, particularly the magnitude of the purported compliance cost savings to service providers (and also to regulators). Moreover, further consultation with service providers on the estimates of costs and benefits should take place before the final RIS is provided to decision makers.

At the same time it is important that the Australian Government maintains efforts to unilaterally reduce regulatory burdens in areas where it has responsibility even though other reform processes, involving other jurisdictions, are on-going. For example, some streamlining of the child care accreditation arrangements should take place now, prior to the implementation of the COAG reforms, to remove unnecessary administrative burden on child care services.

Child care providers are also concerned with the lack of credible sanctions that are applied when child care services are found to be non-compliant with the quality assurance systems under the current regulations. Failing to utilise sanctions in the appropriate circumstances are a restriction on competition within the child care sector which discriminates against child care services that are meeting the accreditation standards. The Department of Education, Employment and Workplace Relations should amend the regulations so that it is clear that a service can have its Child Care Benefit approval removed if it is not accredited by the National Childcare Accreditation Council. At the same time, the Department could improve both the quality of the information it provides to parents and the way it is delivered to parents, to support more informed consumer choice.

The Council should also reform some of its internal processes to reduce the regulatory burden on child care services without affecting service quality, including the scrapping of unannounced validation visits (while maintaining unannounced spot checks); replacing paper validation surveys administered by child care services with an alternative delivery mechanism (such as telephone surveys); and improved coordination of visits of the Council and state and territory regulators to child care services.

In recent years, there have also been some additional regulatory requirements foisted on the industry, such as anticipated vacancy reporting, that have imposed costs on child care services without providing a significant offsetting benefit to service providers or the community. The Department should continue to improve the way child care services report anticipated vacancy information so that compliance costs are constrained and the information provided to parents is more useful.

Information media and telecommunications

In the information media and telecommunications sector, there are differing views on how the process for developing new regulations has operated. On balance, the Commission considers that the benefits of the co-regulatory approach to developing codes are not always being realised. The speed and efficiency with which new regulations are developed under the co-regulatory model might be enhanced if regulators were to take a more light-handed approach to the development of industry codes and provide industry with more clarity about the outcome of consultation processes.

Currently, ACMA's discretion to target investigations is limited, which can create a burden on both industry and ACMA from low priority investigations. ACMA should be provided with a broader discretion, similar to that provided to the Commonwealth Ombudsman, to target its enforcement activity on those complaints which are of greatest concern.

Information media

The sports anti-siphoning regime, whereby free-to-air television broadcasters are given preferential access to the rights to broadcast major sporting events, is a significant concern to the subscription television industry. The regime leads to higher costs during broadcast rights negotiations. The Commission considers that this imposes an unnecessary regulatory burden on these businesses and should be addressed by substantially reducing the anti-siphoning list.

Local content rules for regional radio broadcasters are unnecessarily burdensome because they are inflexible and entail excessive reporting requirements. Accordingly, the local content rules should be revised to make them more flexible and to reduce the reporting requirements without undermining the objective of maintaining the local content of radio stations' services.

The radio local presence and content rules triggered by changes in station ownership are aimed at maintaining local radio services. However, the rules impose such restrictive conditions and reporting requirements that they could have the perverse effect of increasing the risk of business failure because of the constraints on radio stations' ability to respond to changing circumstances. This could potentially undermine the objective of the provisions. The 'trigger event' local presence and content rules should be abolished.

Overall, it appears that the requirement for disclosure of commercial arrangements for commercial radio presenters is overly prescriptive and poses an excessive burden on the commercial radio industry. The objectives of the regulation could be met through a more flexible approach which reduces the costs to broadcasters. The disclosure standard should be made less prescriptive.

Telecommunications

In April 2009, the Australian Government released a discussion paper canvassing significant reforms to a range of telecommunications regulations. In light of this, the Commission has decided to focus its efforts on industry concerns that are not addressed by the discussion paper.

One of those concerns is that customer information requirements for the telecommunications sector are overly burdensome. Industry contends that the requirements are uncoordinated and do not meet customers needs. The Commission considers that the customer information requirements should be reviewed with the aim of streamlining the requirements and improving the clarity of the information provided to customers.

Industry participants are also concerned that prepaid mobile phone identity checks are costly, and of limited effectiveness in helping law enforcement agencies to identify mobile phone owners. At present there is little evidence upon which to make a judgement about the net benefit of the current arrangements. Accordingly, prepaid mobile phone identity checks should be reviewed with the objective of revising the regime to better meet its objectives while minimising the compliance cost to business.

Electricity, gas, water and waste services

Major national reforms to the regulatory frameworks covering electricity and gas supply commenced more than 15 years ago, but certain key reforms are still to be finalised, or have only recently been introduced. In many areas, therefore, further reforms are best left until sufficient time has elapsed to allow an assessment of the effectiveness and efficiency of the new arrangements.

Nevertheless, some changes should be made now to address industry concerns about the cost and complexity of access price reviews, the inefficiencies associated with retail price regulation, and aspects of current consultative and review processes.

The Australian Energy Regulator (AER) should explore ways to reduce the cost and complexity of regular access price reviews for electricity and gas transmission and distribution businesses. In the longer term, an independent and public review should examine alternative methodologies for determining maximum revenue or prices.

Consistent with commitments in the Australian Energy Market Agreement (AEMA), retail price regulation should be abolished by state and territory governments as soon as effective competition has been demonstrated. Allowing more cost reflective tariffs would improve incentives for new investment and the incentive for consumers to use energy commensurate with its economic cost.

Recently, governments amended the AEMA to allow pass-through to consumers of the energy cost increases associated with the Carbon Pollution Reduction Scheme (CPRS) and the Renewable Energy Target Scheme. The Ministerial Council on Energy should commission work to consider the practicalities of implementation of this agreed pass-through of costs. Governments should also agree to amend the AEMA to ensure stronger and clearer commitments to competition reviews by the Australian Energy Market Commission and an ongoing price monitoring role for the AER. Price monitoring will be particularly important in the period immediately after the implementation of a CPRS when there is likely to be considerable uncertainty and volatility in costs for energy suppliers.

Regulators should review their consultative processes against best practice consultation principles and work closely with industry to identify how consultation could be improved. In particular, there needs to be better coordination of reviews to address industry concerns about overlapping and duplicative work streams.

All levels of government need to work cooperatively to reduce the burden associated with excessive reporting obligations. The Standard Business Reporting model can provide a good model for achieving such improvements.

While playing an important leadership role in pursuing greater national consistency, the Australian Government has only limited direct responsibility in relation to the regulation of waste, water, sewerage and drainage services. Many of the concerns raised relate to state/territory responsibilities and consequently are beyond the scope of this review.

The concerns raised in relation to water regulation are best addressed as part of the major COAG work program in this area. Concerns about the regulation of waste services were examined only recently by the Commission in its Waste Management Report. The recommendations and regulatory principles developed in that report should be considered in the current development of a National Waste Policy.

Transport

The inconsistent state and territory government regulation surrounding the operation of road and rail freight imposes a considerable regulatory burden on business. This has been acknowledged by all Australian governments and has been a focus of recent government reforms.

Despite a number of previous attempts, there has been limited progress in advancing regulatory reforms in road and rail. In particular, the flexibility provided to jurisdictions through the use of model legislation has only maintained regulatory inconsistency. However, all jurisdictions have recently agreed to implement national regulatory frameworks to overcome inconsistencies in these sectors.

Care needs to be taken to ensure that a national regime does not impose any additional regulatory burdens — uniformity is not an end itself, but rather is desired because multiple systems create unnecessary regulatory burdens.

Australia's coastal shipping industry operates under a complex regulatory structure. Inconsistencies across jurisdictions remain with regard to maritime safety regulation and between the Australian and Victorian governments in regard to ballast water management. A single national maritime safety system is being established under the Australian Maritime Safety Authority with the intent to address jurisdictional inconsistencies with safety regulation. Inconsistencies relating to ballast water management can be addressed through expediting the development and implementation of the National System for the Prevention and Management of Marine Pest Incursions.

Aviation is mainly regulated by the Australian Government and has also been subject to scrutiny as part of the Australian Government's current review of national aviation policy. The urgency in implementing a new aviation security regime after

September 2001 resulted in a significant increase in the amount of regulation and a number of ensuing problems.

For example, airlines are required to take responsibility for matters that are outside their control and provide information that is already in the public domain. Existing aviation security advisory forums should be utilised to provide a focus on consultation with industry to improve regulatory outcomes in this area. Also, the use of approved exemptions would shift away from a 'one size fits all' approach to aviation security regulation and enable the industry to develop alternative arrangements that would meet or exceed the regulated requirements while reducing compliance burdens.

Education and training

The education and training sector is subject to excessive and duplicative reporting requirements, slow accreditation processes in the vocational education and training sector, jurisdictional inconsistencies and overlap, and regulatory frameworks that do not reflect current developments in the structure of the education sector.

The sector is undergoing substantial reform to its regulatory and institutional frameworks which provides an opportunity to reassess and reduce the regulatory burdens imposed on providers. In higher education and vocational education and training, the Australian Government recently announced its intention to implement major reforms to the regulatory architecture, in response to the Bradley Review of Australian Higher Education. In the schools sector, COAG is continuing work on implementing a nationally consistent National Education Agreement which will remove some current reporting requirements, but substantially increase the detailed information required to be reported at the individual school level. A new funding agreement for independent schools was also introduced in 2008 for the 2009–2012 period.

Given the Australian Government's commitment to changes to the regulatory and institutional frameworks in the education and training sector, it is not appropriate for the Commission to recommend specific actions in response to many of the concerns raised with this review.

The Commission encourages the Australian, state and territory governments to work cooperatively to progress the necessary reforms, for example in the development of the proposed Tertiary Education Quality Standards Agency, which is intended to encourage best practice, streamline and simplify current regulatory arrangements to reduce duplication and provide for national consistency.

The reforms of the regulatory frameworks must in particular address the excessive burden of reporting obligations. The common languages and definitions introduced by the Standard Business Reporting (SBR) program should be utilised as far as practicable. Any additional information required should be kept to an absolute minimum, and be accompanied by the development of a supplementary taxonomy that could be used in conjunction with the SBR financial taxonomy to be made available from 31 March 2010.

The SBR principles and methodology should also be used to reduce the burden of the separate requirements for overseas school students and for the extensive reporting that will be required from schools under the new funding arrangements. Where very detailed information is being sought at the individual school level, it will be essential to ensure the processes in place to collect these data are robust. There will be a huge volume of data collected and it will be difficult to ensure that the data are reliable and can be readily analysed. The process of collection will be a significant factor in determining the cost of collection and the ultimate usefulness of the data.

Medical services

The administrative requirements placed on general practitioners (GPs) and their practices by the Australian Government have been an ongoing concern to the medical profession. Moreover, these issues have been examined in detail by previous reviews and studies, including by the Commission.

There has been some progress in reducing the red tape placed on GPs. For example, there is the current review of Medicare items and the introduction of the streamlined authority program in respect of approval for some Pharmaceutical Benefits Scheme (PBS) medicines. However, a number of the 'red tape' issues impacting on GPs addressed in the previous reviews remain in place. These issues should be addressed by implementing the remaining recommendations from the Commission's 2003 Review of General Practice Administrative and Compliance Costs and from the Regulation Taskforce's 2006 review relating to general practice. These include introducing a single provider number for each general practitioner and changing the PBS authority approval process.

Recommendations

The following are the Commission's recommendations in response to material concerns raised by participants:

Aged care

RECOMMENDATION 2.1

To enable the Australian Government to reduce the burden associated with regulation and price controls, and to improve the quality and diversity of aged care services, it should explore options:

- ***for relaxing supply constraints in the provision of aged care services***
- ***for allowing consumers' needs and preferences to be better understood and addressed***
- ***for providing better information to older people and their families so they can make more meaningful comparisons in choosing an aged care service.***

RECOMMENDATION 2.2

The Australian Government should explore options for removing the regulatory restriction on bonds as a source of funding.

RECOMMENDATION 2.3

Contingent upon the freeing up of supply constraints in the provision of aged care services outlined above in Recommendation 2.1, the Australian Government should abolish the 'extra service' residential care category. In the interim, where there appears to be unmet demand for such 'extra service' places in a particular region, the Department should consider freeing up the regional cap and adopting a lighter-handed monitoring approach, only intervening where extra service provision is resulting in an unreasonable reduction of access for supported, concessional or assisted care recipients.

RECOMMENDATION 2.4

The Department of Health and Ageing should conduct a publicly available evaluation of the current safeguards that protect elderly people receiving care, including the police check requirements, to explore whether the benefits of the existing safety framework could be achieved in a less costly manner.

RECOMMENDATION 2.5

The Australian Government should amend the missing resident reporting requirements in the Accountability Principles 1998. It should allow a longer time period for providers to report missing residents to the Department. It should also adopt a more risk managed or tiered approach, by allowing different reporting time periods based on a provider's record on missing residents. This recommendation would not impact on the reporting of missing residents to police services by providers.

RECOMMENDATION 2.6

The Australian Government should review the Aged Care Standards and Accreditation Agency visits program to residential aged care facilities including the associated visit performance targets. The review should consider whether the visits program would benefit from a risk management approach designed with a greater focus on under-performing homes, that could achieve the same objectives (of ensuring compliance with accreditation standards) with less visits imposed on residential aged care providers overall.

RECOMMENDATION 2.7

The Accommodation Bond Guarantee Scheme ensures the refund of accommodation bonds to aged care residents in the event that a provider becomes insolvent. Given this government guarantee to residents, the Australian Government should amend the prudential standards to remove the requirement on aged care providers to disclose to care recipients or prospective care recipients:

- ***a statement about whether the provider complied with the prudential standards in the financial year***
- ***an audit opinion on whether the provider has complied with the prudential standards in the relevant financial year***
- ***the most recent statement of the aged care service's audited accounts.***

RECOMMENDATION 2.8

The Australian Government should amend the Residential Care Subsidy Principles 1997 to remove requirements on aged care providers to lodge separate written notices with the Secretary of the Department of Health and Ageing demonstrating compliance with Conditional Adjustment Payment reporting.

RECOMMENDATION 2.9

The Department of Health and Ageing should review the efficacy of audited general purpose financial reports and consider whether other reporting mechanisms would deliver better outcomes for providers both in terms of comparative financial performance and compliance cost.

RECOMMENDATION 2.10

The Department of Health and Ageing and the Aged Care Standards and Accreditation Agency must clarify their respective roles to the industry regarding the monitoring of provider compliance with the accreditation standards. To achieve this, an effective communication strategy should be implemented in conjunction with the immediate release of the protocol between the two organisations (which explains the actions each organisation takes when non-compliance is identified or suspected). Legislative amendments should also be considered, if required.

RECOMMENDATION 2.11

The Department of Health and Ageing, in consultation with relevant state and territory government departments, should use current reviews of the accreditation process and standards to identify and remove, as far as possible, onerous duplicate and inconsistent regulations.

RECOMMENDATION 2.12

The Australian Government should abolish the annual fire safety declaration for those aged care homes that have met state, territory and local government fire safety standards.

RECOMMENDATION 2.13

The Department of Health and Ageing should submit a Proposal for Change to the Australian Building Codes Board requesting the privacy and space requirements contained in the current building certification standards be incorporated into the Building Code of Australia. Newly constructed aged care facilities would then only be required to meet the requirements of the Building Code of Australia. Once all existing residential aged care facilities have met the current building certification standards those standards should be abolished.

RECOMMENDATION 2.14

The Australian Government should allow residential aged care providers choice of accreditation agencies to introduce competition and to streamline processes for providers who are engaged in multiple aged care activities.

RECOMMENDATION 2.15

The Commonwealth, state and territory governments should resolve any outstanding issues with the proposed community standards and reporting processes and implement the National Quality Reporting Framework as soon as possible, consistent with the methodology and principles supporting Standard Business Reporting.

Child care

RECOMMENDATION 3.1

The Australian Government should amend the Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000 so that it is clear that a service can have its Child Care Benefit approval removed if it is not accredited by the National Childcare Accreditation Council.

RECOMMENDATION 3.2

The Department of Education, Employment and Workplace Relations should improve both the quality of child care service information provided to parents, and the way it is delivered by:

- ***making it mandatory for the National Childcare Accreditation Council to publish on its website information on child care services' accreditation status (and the reasons for any 'not accredited' decision) and the Quality Profile Certificate (or quality rating) of specific child care services***
- ***publishing on its website information on those child care services that are non-compliant with Child Care Quality Assurance, including the reasons for their non-compliance, and the consequences/outcomes that have resulted from their non-compliance***
- ***providing direct links to this information on the mychild.gov.au website.***

RECOMMENDATION 3.3

The Department of Education, Employment and Workplace Relations should continue to improve the way child care services report anticipated vacancy information so that industry compliance costs are constrained and the information provided to parents is more useful.

RECOMMENDATION 3.4

The Department of Education, Employment and Workplace Relations should remove the requirement on the National Childcare Accreditation Council to conduct 'unannounced' validation visits of child care services, but continue with (unannounced) spot checks.

RECOMMENDATION 3.5

The National Childcare Accreditation Council should replace paper validation surveys given to parents with an alternative delivery mechanism, such as a telephone validation survey, so that child care services are no longer required to act as a survey dispensing/collection service.

RECOMMENDATION. 3.6

The Department of Education, Employment and Workplace Relations should complete the integration of the three existing Child Care Quality Assurance systems as soon as possible.

RECOMMENDATION 3.7

The National Childcare Accreditation Council and state/territory regulators should coordinate their visits to child care services as far as possible, to reduce the risk of compliance activity spiking within a specific timeframe during the year.

Information media and telecommunications

RECOMMENDATION 4.1

The Australian Communications and Media Authority should be provided with a broader discretion, similar to that provided to the Commonwealth Ombudsman, to not investigate some code complaints.

RECOMMENDATION 4.2

The Australian Communications and Media Authority and the Department of Broadband, Communications and the Digital Economy should conduct a comprehensive joint review of all of the customer information requirements imposed on telecommunications businesses, and the processes used in developing new requirements. Specifically they should:

- ***review all of the current customer information requirements in consultation with industry and consumer organisations, with the aim of streamlining the requirements to remove duplication, reduce the burden on business, and improve the comprehensibility and clarity of information provided to customers, consistent with the principles set out in the Productivity Commission's Report on its Review of Australia's Consumer Policy Framework***
- ***review the processes for developing new customer information requirements to ensure that such processes take account of the existing requirements and that the new requirements form part of a comprehensive and comprehensible package of customer information.***

RECOMMENDATION 4.3

The Australian Government should review the costs and benefits of identity checks for prepaid mobile phone services in consultation with law enforcement and security agencies. The review should have the objective of substantially revising the regime to better achieve its objectives while eliminating unnecessary costs to business.

RECOMMENDATION 4.4

The anti-siphoning regime imposes regulatory burdens because of the protracted commercial negotiations required in respect of listed events. To address this issue the Australian Government should substantially reduce the anti-siphoning list.

RECOMMENDATION 4.5

The policy objective of the local content rules for radio could be met through more flexible rules. The Australian Government should introduce amendments to make provision for regional broadcasters to meet their local content obligations over the course of a longer time period, rather than through rigid daily content obligations. For certain categories of licence, such as racing and remote area licences, consideration should be given to whether there is a need for local content requirements.

More flexible local content obligations should be accompanied by streamlined reporting requirements which target compliance activity on broadcasters who have been identified as having a high risk of non-compliance.

RECOMMENDATION 4.6

The Australian Government should introduce amendments to abolish the trigger event provisions for radio broadcasters. Instead, local content provisions should be relied on to ensure broadcast of locally significant material.

RECOMMENDATION 4.7

A greater risk management approach should be taken to the radio Disclosure Standard. The Australian Communications and Media Authority should revise the Disclosure Standard to make it less prescriptive.

RECOMMENDATION 4.8

The Department of Broadband, Communications and the Digital Economy and the Attorney-General's Department, in consultation with stakeholders, should seek agreement on whether requirements for captioning of broadcasts are most appropriately dealt with through broadcasting regulations or the Disability Discrimination Act. The legislation should then be amended accordingly so that broadcasters are only required to comply with a single set of regulations.

RECOMMENDATION 4.9

The Australian Government should introduce amendments to abolish the requirement for a minimum number of hours of high definition television to be broadcast by free-to-air television broadcasters. Whether abolished or not, the requirement on free-to-air television broadcasters to report on compliance with the high definition quota is redundant and should be removed.

Electricity, gas, water and waste services

RECOMMENDATION 5.1

The Australian Energy Market Agreement should be amended to:

- ***provide a clear timetable for future reviews by the Australian Energy Market Commission (AEMC) of the effectiveness of competition in energy markets in those states and territories not yet reviewed by the AEMC***
- ***clarify the process for follow up reviews of competition in those jurisdictions where an initial review by the AEMC has recommended the removal of price***

regulation, but that recommendation has not been accepted by the relevant jurisdiction

- *require ongoing price monitoring by the Australian Energy Regulator, for a period of at least three years, where retail price regulation has been removed.*

RECOMMENDATION 5.2

The Ministerial Council on Energy should commission ongoing work involving the states and the Australian Energy Market Commission to consider how the cost identification process used by existing regulators in each state will need to be modified to be responsive to changes in costs as a result of the Carbon Pollution Reduction Scheme.

RECOMMENDATION 5.3

All levels of government need to work cooperatively to reduce the burden associated with reporting obligations by:

- ***eliminating unnecessary requests for information, including where possible reducing the frequency of requests***
- ***where appropriate, and agreed with business, sharing information between regulators***
- ***standardising the language and forms used, and the type of data requested and wherever possible aligning reporting obligations with existing company data gathering and reporting***
- ***facilitating on-line submission of information.***

Reforms to reporting obligations impacting on energy, water and waste services should, as far as possible, be consistent with the systems being developed as part of Standard Business Reporting (SBR) so as to facilitate an extension of the SBR taxonomy and the use of SBR services for report creation and delivery in those sectors in the future.

Transport

RECOMMENDATION 6.1

The Australian Government, through COAG, should expedite the development and implementation of the National System for the Prevention and Management of Marine Pest Incursions.

RECOMMENDATION 6.2

The Aviation Transport Security Act 2004 should be amended to enable the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government, on the advice of the Office of Transport Security, to grant exemptions, variations and alternative procedures to the existing aviation security regulations that would meet the required regulatory outcome.

RECOMMENDATION 6.3

The Aviation Security Advisory Forum should provide a greater focus on consultation with industry with regard to existing and proposed aviation security regulation.

RECOMMENDATION 6.4

The price notification arrangements applying to regional airlines using Sydney Airport should be subject to independent review on their expiry in 2010.

Education and training

RECOMMENDATION 7.1

The Department of Education, Employment and Workplace Relations, in consultation with state and territory authorities, should ensure that reforms to streamline reporting obligations in the education sector, including for schools and in response to recommendations from the Bradley Report, are undertaken consistent with the methodology and principles of the Standard Business Reporting initiative. Electronic reporting and secure on-line sign-on to the agencies involved should be introduced.

Medical services

RECOMMENDATION 8.1

The Australian Government should implement the remaining recommendations from the Productivity Commission's 2003 Review of General Practice Administrative and Compliance Costs and the recommendations from the Regulation Taskforce's 2006 review relating to general practice which include:

- ***introducing a single provider number for each general practitioner***

- ***removing the Pharmaceutical Benefits Scheme authority approval requirement or allowing GPs to re-use an authority number for a repeat prescription where a patient's condition is unlikely to change***
- ***rationalising the incentive programs for GPs.***

Improving regulatory impact analysis

RECOMMENDATION 9.1

The Australian Government should improve the transparency and accountability of its best practice regulation assessment processes by:

- ***developing a central register of regulatory impact analysis. The register would include:***
  - ***Regulation Impact Statements (and the Office of Best Practice Regulation's adequacy assessments) at the time government decisions are made public, and***
  - ***post-implementation reviews (and the Office of Best Practice Regulation's adequacy assessments) at the time these reviews are made public***
- ***subject to review of the new Small Business Advisory Committee's effectiveness, considering the extension of this model beyond small business to include other businesses within a broader Business Advisory Committee***
- ***improving the existing annual regulatory plan process, by making it mandatory for departments and agencies to update their plans as preliminary assessments are completed***
- ***incorporating a 'consultation' Regulation Impact Statement in the regulation making process (in a similar manner to the COAG requirements) for use in public consultations where possible, or as part of confidential consultation with the Small Business Advisory Committee (or Business Advisory Committee should the concept be broadened beyond the small business sector).***

RECOMMENDATION 9.2

The Australian Government should commission an independent public review of the current best practice regulation requirements no later than five years after the requirements came into effect (that is, 20 November 2011).

1 About the review

Governments regulate in the public interest to prevent undesirable social, economic and environmental outcomes, or to promote beneficial outcomes. This can include regulating to ensure a fair and competitive marketplace, protect the health and safety of workers, encourage innovation or preserve the natural environment. Regulation is, therefore, a necessary and accepted part of modern society.

However, excessive, inconsistent or poorly designed regulations can impose unnecessary costs on businesses and on the wider Australian economy through higher prices, and reduced innovation and choice. In such cases, regulations can be removed or altered to reduce costs and increase benefits for business and the wider community.

The Council of Australian Governments (COAG) recognises that the costs of existing regulation may be unnecessarily high and is considering how this regulatory burden on the community can be reduced as part of a broader reform process. These actions can improve the efficiency and competitiveness of the Australian economy, leading to increased living standards in the community.

1.1 What the Commission has been asked to do

As part of the COAG process, the Commission has been asked to conduct ongoing annual reviews of the regulatory burdens on business which stem from Commonwealth regulation. This includes where Commonwealth regulation overlaps with state government regulation. The Commission has been conducting the review as a series over five years, and each year a different sector has been reviewed. The inaugural review was published in 2007.

The Commission is to identify key areas where regulation imposes unnecessary burdens on business. Further, the Commission is required to identify regulatory and non-regulatory options for action, and provide recommendations where appropriate. These options and recommendations must take into account the underlying policy intent of the government regulation.

The focus areas for the five annual reviews are specified in the terms of reference as follows:

- primary industries in 2007 (completed)
- manufacturing and distributive trades in 2008 (completed)
- social and economic infrastructure services in 2009 (current — box 1.1)
- business and consumer services in 2010
- economy–wide generic regulation and any regulation missed in earlier reviews in 2011.

Box 1.1 Industries included in the 2009 review – social and economic infrastructure services

The business activities that are considered to be within the scope of this year's review are based on particular divisions of the Australian and New Zealand Standard Industrial Classification (ANZSIC). These include:

Division D: Electricity, gas, water and waste services

- electricity supply
- gas supply
- water supply, sewerage and drainage services
- waste collection, treatment and disposal services

Division E: Construction

- building construction
- heavy and civil engineering construction
- construction services

Division I: Transport, postal and warehousing

- road transport
- rail transport
- water transport
- air and space transport
- other transport
- postal and courier pick–up and delivery services
- transport support services

(continued on next page)

Box 1.1 (continued)

- warehousing and storage services

Division J: Information media and telecommunications

- publishing
- motion picture and sound recording activities
- broadcasting
- internet publishing and broadcasting
- telecommunications services
- internet service providers, web search portal and data processing services
- library and other information services

Division O: Public administration and safety

- public administration
- defence
- public order, safety and regulatory services

Division P: Education and training

- preschool and school education
- tertiary education
- adult, community and other education

Division Q: Health care and social assistance

- hospitals
- medical and other health care services
- residential care services
- social assistance services

Source: ABS (2006).

The full terms of reference are set out on pages IV-VI.

1.2 Industry characteristics

The social and economic infrastructure services sector is a major contributor to economic activity in Australia. It accounted for 33 per cent of Australian GDP ($338 billion) in 2007-08. Of the relevant industries, construction contributed the

largest share, 7.9 per cent of GDP ($82.1 billion), followed by health care and social assistance with 6.3 per cent ($65.4 billion), while information media and telecommunications contributed the smallest share, 2.3 per cent of GDP ($23.9 billion) (table 1.1).

The social and economic infrastructure services sector is also a significant employer, accounting for 43 per cent national employment in May 2009 (over 4.5 million persons). Of this, health care and social assistance was the most significant employer, accounting for 11 per cent of national employment (over 1 million persons), followed by construction with over 9 per cent of national employment (984 100 persons).

However, the social and economic infrastructure services sector accounted for a proportionally low volume of exports — 10.8 per cent in 2007-08. Indeed, most industries in the sector had negligible exports. The exceptions to this were education, and transport, postal and warehousing, which together accounted for 93 per cent of the exports from the sector in 2007-08. Education contributed 6 per cent towards national exports in 2007-08 ($14.2 billion), up nearly a quarter on the previous year. It is now Australia's third largest export industry, behind only coal and iron ore. Transport accounted for 4 per cent ($9.4 billion) of national exports in 2007-08.

Large variations exist in industry size and structure between the relevant industries. In construction, close to 38 per cent of businesses were classified as small or medium (employing between 1 and 19 people and between 20 and 199 people respectively). Similarly, close to 54 per cent of businesses in health care and social assistance were classified as small or medium businesses. In these industries, the proportion of large businesses, which employed 200 or more workers, was negligible — 0.3 per cent. This contrasts with electricity, gas, water and waste services, where a small portion of businesses, 2.9 per cent, were large businesses. Further, electricity, gas, water and waste services consisted of just under 2000 businesses, compared with over 320 000 businesses in construction, close to 120 000 businesses in transport, postal and warehousing, and over 90 000 businesses in health care and social assistance. Overall, there was close to 576 000 businesses in the social and economic infrastructure services sector in 2006–07 (table 1.2).

Table 1.1 **Social and economic infrastructure sector summary statistics**

		Electricity, gas, water and waste services	*Construction*	*Transport postal and warehousing*	*Information media and telecoms*	*Public admin and safety*	*Education and training*	*Health care and social assistance*	*All industries covered*
Gross value added 2007–08 (current prices)									
	$m	24 827	82 139	53 454	23 866	43 048	45 382	65 350	338 066
Contribution to GDP	(per cent)	2.4	7.9	5.1	2.3	4.1	4.4	6.3	32.5
Exports (2007–08)[a]									
	$m	N/A[b]	115	9 394	746	848	14 164	N/A	25 267
Contribution to services sector exports	(per cent)	N/A	0.2	18.3	1.5	1.7	27.6	N/A	49.3
Contribution to national exports	(per cent)	N/A	0.1	4.0	0.3	0.4	6.0	N/A	10.8
Employment (May 2009)									
Number of persons	('000)	136.7	984.1	599.2	224.3	693.1	808.8	1 189.4	4 635.6
Contribution to national employment	(per cent)	1.3	9.1	5.6	2.1	6.4	7.5	11.0	43.0
Businesses (June 2007)									
		1 968	322 404	117 323	23 998	N/A[c]	16 265	92 318	574 276
Contribution to total national business count	(per cent)	0.1	16.0	5.8	1.2	N/A	0.8	4.6	28.5

a Export data are not classified by ANZSIC categories, and the data in this table are from approximate SITC categories **b** Export data for the electricity, gas and water; and health and community services sectors do not appear to be collected by the ABS. **c** Data does not include public sector organisations.

Sources: Gross value added data from ABS, *Australian National Accounts*, Cat. No. 5204.0; Export data from DFAT, *Composition of Trade Australia*, 2007-08; Employment data from ABS, *Labour Force, Australia, Detailed*, Cat. No 6291.0.55.001 May 2009 values; Business data from ABS, *Counts of Australian businesses including entry, and exits*, Cat. No. 8165.0. June 2007

Table 1.2 **Business Size** [a,b,c]

Number of businesses (percentage of total in sector), June 2007

	Small business (1 to 19 employees)	*Medium business (20 to 199 employees)*	*Large business (200 or more employees)*	*Non employers*	*Total*
Electricity, gas, water and waste services	477 (24.3)	93 (4.7)	57 (2.9)	1 335 (68.0)	1 962
Construction	117 204 (36.3)	6 324 (2.0)	375 (0.1)	199 335 (61.7)	323 238
Transport, postal and warehousing	35 811 (30.4)	3 141 (2.7)	282 (0.2)	78 522 (66.7)	117 756
Information media and telecommunications	8 814 (36.1)	468 (1.9)	39 (0.2)	15 105 (61.8)	24 426
Education and training	6 150 (37.4)	894 (5.4)	69 (0.4)	9 339 (56.8)	16 452
Health care and social assistance	45 795 (49.7)	4 038 (4.4)	318 (0.3)	42 012 (45.6)	92 163
All industries covered	**214 251 (37.2)**	**14 958 (2.6)**	**1 140 (0.2)**	**345 648 (60.0)**	**575 997**

[a] These data may not correspond to table 1.1, as data has been rounded to preserve the confidentiality of individual businesses. [b] Percentages may not add to 100 due to rounding. [c] Does not include public sector organisations.

Source: ABS, *Counts of Australian businesses including entry and exits*, Cat. no. 8165.0.

Regulation in the social and economic infrastructure services sector

The social and economic infrastructure services sector is characterised by a high degree of shared regulatory responsibility between the three levels of government. State governments retain constitutional responsibility for regulation of energy, water, waste management and most transport infrastructure. The Australian Government is responsible for regulation of telecommunications and access to infrastructure through the *Trade Practices Act 1974*. Further, some state government regulatory responsibilities, for example waste management, are delegated to local governments. Consequently, there is often weak demarcation, and overlap, of regulatory responsibilities between the different levels of government. For example, responsibility for public transport and health facilities (nursing homes), are shared between all levels of government, including local government.

Whilst there is a heavy burden of regulation on all sectors within the economy, the burden of regulation on the social and economic infrastructure services sector is especially heavy.

This is due to the unique characteristics of the industries under review which encompass:

- natural monopoly infrastructure
- operation across many jurisdictions
- community expectations of service, especially 'essential services'
- vulnerability of end users combined with regulatory risk aversion
- dependence of industries on government funding.

Natural monopoly infrastructure

The core networks in many economic infrastructure services industries are natural monopolies. Historically, governments have owned and operated the infrastructure in these industries — for example roads, electricity and telephone networks.

In the 1990s, many of these economic infrastructure networks were corporatised or privatised and/or opened to competition. These industries are therefore subject to an additional layer of regulation which aims to protect consumers and the community by promoting competitive market outcomes, through markets that operate fairly and efficiently. This regulation can include, for example, third party access to infrastructure, including access prices.

Jurisdictional and regulatory differences

Many businesses in the social and economic infrastructure sector operate across several jurisdictions. This is especially true of transport services. This cross-border operation leads to a high cumulative burden of regulation, especially when the relevant regulation is duplicative or inconsistent. Examples include differences in higher mass limits across jurisdictions in the road transport industry, and jurisdictional differences in ships' ballast water regulations in the shipping industry.

Essential services and cost shifting

Many of the industries examined in this review are considered to be 'essential services', with community expectation that the government will ensure their provision and service quality. Governments have often used regulation to ensure the accessibility of these services on an equitable basis for all Australians. Telstra's 'Universal Service Obligations' (USOs) are an example of such regulation. USOs aim to ensure that all Australians have access to telecommunications services on an equitable basis and include, for example, the requirement for Telstra to provide

public telephones across Australia. In effect, this regulation shifts the cost burden of providing those services from government to industry. The cost of these regulations is especially high when the regulations are not updated with changes in the market and advances in technology. This failure to keep abreast of the latest developments is particularly a concern in industries with rapid technological change. For example, one component of Telstra's USOs is a 'Digital Data Service Obligation' under which Telstra must ensure that a 64 kilobits per second Integrated Services Digital Network (ISDN) service, or satellite link of comparable quality, is available to all people in Australia on an equitable basis. However, this regulation has not been updated since its initial implementation in 1999, even though ISDN technology has been superseded by faster broadband technologies.

Risk aversion and vulnerability of end users

A further cause of regulatory burden on this sector has been the trend towards 'risk aversion' in public policy. Governments respond to many adverse outcomes — loss of life, money, possessions and amenity — with increased regulation. This can lead to a high cumulative burden of regulation, including regulation which is excessive, interventionist, or highly prescriptive.

This phenomenon of risk aversion is especially prevalent in health, aged care and child care because the end users of these services are vulnerable and consequently their ability to inform and protect themselves is limited. Any adverse incidents in these industries are often met with intense media attention. In response to this media attention, governments often implement regulation to be seen to be 'doing something'. That is, while there is clearly a need to protect those unable to protect themselves, there can be a disproportionate desire to regulate risk out of the system. Not only is elimination of risk infeasible, it can lead to unintended adverse consequences in service delivery by reducing flexibility and innovative practices. It can also result in confusing or complicated reporting arrangements which take up the staff resources of providers at the expense of service delivery. Regulations in health, aged care and child care are generally highly prescriptive, with excessive reporting requirements. An example of the regulatory framework typically faced by an aged care home is provided in box 1.2.

Dependence on government funding

Many social infrastructure services are fully or partially funded by government due to their characterisation as 'essential services'. In many cases, governments attach conditions to funding access. This can be done either as a 'carrot' by increasing, or

Box 1.2 **Regulatory framework for aged care homes**

Aged care homes are subject to many regulatory measures including special provisions to protect the vulnerable. In addition to generic regulation, such as tax and occupational health and safety regulation, aged care homes face the following regulatory framework:

- government approval of aged care providers and vetting of all key personnel
- accreditation of all services
- unannounced and scheduled visits to monitor accreditation standards
- minimum building standards (building certification)
- annual fire safety declaration
- food safety regulations
- police checks for all staff and volunteers
- compulsory reporting of all suspected resident–on–resident and staff–on–resident abuse
- a free complaints investigation scheme open to the whole community
- a regime of sanctions for non–compliant providers
- an aged care commission to receive appeals
- prudential reporting in respect of any bonds held
- multiple reporting in respect of missing persons
- compliance with caps on 'extra service' places
- compliance with needs based planning framework.

providing funding if requirements are met, or a 'stick' — decreasing or removing funding if requirements are not met. For example, in aged care, providers face sanctions if they do not comply with requirements under the *Aged Care Act 1997*, including having their approval as a provider of aged care services revoked or suspended.

A further side effect of the dependence of health and aged care on government funding is that regulation is used to limit the cost of these services to government. In health care for example, some regulation actively limits the number of services medical practitioners can provide to patients. The Australian Medical Association (AMA) provides the following example:

> The funding of new services in the Medicare Benefits Schedule (MBS), normally comes with prescriptive guidelines and rules that dictate how many times a service can be delivered for a patient, when it can be delivered, who it can be delivered to, how it must be delivered, what records must be kept and so on. (sub. 33, p. 2)

Similarly, the needs based planning framework for aged care providers acts as a rationing mechanism, determining the number of places offered in a particular region.

1.3 The regulatory reform context

Foundations of the current review: Taskforce on Reducing Regulatory Burdens on Business

In October 2005, the Australian Government announced a taskforce to identify practical options for reducing the regulatory burden on business arising from Government regulation – the Taskforce on Reducing Regulatory Burdens on Business (Regulation Taskforce 2006).

The Taskforce's focus was on Commonwealth regulation that was 'unnecessarily burdensome, complex, [or] redundant', with a remit to also identify burdens arising from 'duplicate legislation in other jurisdictions' (Regulation Taskforce 2006, p. i).

The Taskforce reported in January 2006, and identified close to 100 reforms of existing legislation, as well as proposing 50 areas of regulation to be investigated in greater depth by the Australian Government or COAG. In addition, the Taskforce suggested some 30 improvements to the processes and institutions responsible for regulation making and enforcement.

The Government accepted many of the report's recommendations in 2006 and implemented regulatory reforms. Further, additional reviews have been announced or set in train. The report of the Taskforce forms the foundation of this annual review cycle, of which this report is the third of five reviews.

COAG's National Reform Agenda

Regulatory reform was further advanced in 2006-07, when COAG agreed to a long-term National Reform Agenda (NRA), one component of which aims to reduce the regulatory burden imposed by all levels of government.

In 2008, COAG signed an agreement to deliver a seamless national economy. This agreement committed the Commonwealth and state and territory governments to reform 27 priority areas, including accelerating the implementation of reforms for existing 'hot spots'. Reforms as part of this agenda commenced in 2008-09 in line

with an implementation plan. The reforms of specific relevance to the social and economic infrastructure services sector are:

- reforms to health workforce regulation
- implementation of national rail safety legislation and a nationally consistent rail safety regulatory framework
- implementing a single national approach to maritime safety for commercial vessels
- development of a national framework for regulation, registration and licensing of heavy vehicles
- development of a National Construction Code on building, plumbing, electrical and telecommunications standards
- development of a national trade licensing system.

Various broader reforms agreed to by COAG also impact on the social and economic infrastructure services sector. These include the implementation of nationally uniform Occupational Health and Safety (OHS) laws, the development of a more harmonised and efficient system of environmental assessment and approval and payroll tax harmonisation.

Standard Business Reporting

A further COAG initiative for reducing regulatory burden on business is the development of Standard Business Reporting (SBR), to be implemented by 31 March 2010 (Swan and Tanner 2008). The practical consequences of SBR will be the streamlining of business reporting requirements for financial data, including the removal of unnecessary duplication of financial data in government forms, the ability to automatically pre–fill data, and a single online secure sign on point for financial reporting. Once implemented, the SBR program has the capability to be expanded to encompass non–financial data, including in industries under review this year such as aged care and education. Detailed information on SBR can be found in appendix B.

Previous and current reviews concerning regulatory reform

Parallel to this review, the Commission is benchmarking regulatory compliance burdens across all jurisdictions in Australia, since the costs of regulatory burden are compounded for business which operate across jurisdictions with inconsistent regulations. In 2008, the Commission reported on the cost of starting a business

(business registrations) and, in 2009, the Commission is benchmarking food safety and OHS.

In addition to the reforms initiated through COAG, there are many current, or recently completed, industry reviews which involve the regulatory framework of the social and economic infrastructure services sector. A selection of these reviews is provided below:

- the National Health and Hospitals Reform Commission Report, on a long term national health and aged care plan
- the Bradley Review into Australian higher education
- the development of National Quality Agenda for the childcare industry by the Department of Education, Employment and Workplace Relations
- the National Broadband Network discussion paper on reforming the existing telecommunications regime
- the Department of Infrastructure, Transport and Regional Development's National Aviation White Paper on the future of the air transport industry.

A selection of recent and current reviews involving the social and economic infrastructure services is provided in appendix C.

State and territory government reviews

State and territory governments have committed to actively undertake reviews of existing legislation as part of the COAG agenda.

Since 2005, for example, the Victorian Government through the Victorian Competition and Efficiency Commission (VCEC) has undertaken an annual stocktake of business regulation and regulators as part of its initiative to reduce regulatory burden on Victorian businesses (for example, VCEC 2005). In 2006, the New South Wales (NSW) Government, through the Independent Pricing and Regulatory Tribunal (IPART) conducted an investigation into the burden of regulation in NSW and improving efficiency (IPART 2006), as well as a review into State taxation (IPART 2008). The Queensland Department of Tourism, Regional Development and Industry conducts an annual red tape reduction stocktake.

Environmental regulation is an area currently subject to a number of reviews. VCEC undertook an inquiry into the metropolitan retail water sector in 2008 (VCEC 2008), and recently submitted a final report into environmental regulation in

Victoria to Government. In NSW, IPART recently released a review in climate change mitigation measures in the state (IPART 2009).

1.4 The approach and rationale of this review

A more complete discussion of the approach taken to defining regulation, the costs associated with poor regulation and the limitations of these annual reviews can be found in the first report of this series, *Annual Review of Regulatory Burdens on Business: Primary Sector* (PC 2007).

Defining Regulation

Regulation can be defined as any 'rule' that influences or controls the way people and businesses behave. It is not limited to legislation and formal regulations, but also includes quasi-regulation, such as codes of conduct, and co-regulation (box 1.3).

Box 1.3 Common types of regulation

- *Primary legislation* — Acts of Parliament, including those that underpin treaties signed by Australia.
- *Subordinate legislation* — rules or instruments which have the force of law, but which have been made by an authority to which Parliament has delegated part of its legislative power. These include statutory rules, ordinances, by-laws, disallowable instruments and other subordinate legislation which is not subject to Parliamentary scrutiny.
- *Quasi–regulation* — rules, instruments and standards by which government influences business to comply, but which do not form part of explicit government regulation. Examples include government–endorsed industry codes of practice or standards, government–issued guidance notes, industry-government agreements and national accreditation schemes.
- *Co-regulation* — a hybrid, in that industry typically develops and administers particular codes, standards or rules, but the government provides formal legislative backing to enable the arrangement to be enforced.

Defining Unnecessary Burden

While regulation necessarily imposes costs on those being regulated, an unnecessary burden arises when the policy objective of the regulation could be achieved with a lower cost to affected parties.

This may arise where regulation is poorly designed and/or implemented, for example through:

- excessive coverage including overlap or inconsistency
- complex approval and licensing processes
- heavy–handed regulators
- exceedingly prescriptive measures and burdensome reporting.

'Regulatory burdens' have been broadly defined to include:

- the time and financial costs directly involved in complying with regulations, such as form filling, mandatory returns and so on
- changing the ways by which goods and services would otherwise be produced by business
- changing or restricting the goods and services that would otherwise be produced by business
- the costs of forgone or reduced opportunities resulting from constraints on the capacity of business to enter markets, innovate or respond to changing technology, market demand or other factors.

To be examined in this year's review, 'regulatory burdens' needed to satisfy the following three criteria:

- there are compliance costs imposed by the nature of the regulation or the actions of the regulator that appear to be unnecessary in order to achieve the regulation's objectives
- the regulations mainly affect the social and economic infrastructure services sector, whether directly or indirectly
- the regulatory burdens are the consequence of regulation by the Australian Government, which includes areas where state and territory government regulations overlap with Commonwealth regulation or involve Australian Government policy participation.

Scope and limitations of the review

The terms of reference define the scope of the review and the coverage of its recommendations.

The focus is on Commonwealth regulation

The terms of reference for this review refers only to Commonwealth regulation, thus, the Commission will not be examining regulations that are solely the responsibility of state, territory or local governments. However, this does not preclude areas where there is duplication or overlap of regulatory responsibilities between the Australian Government and other jurisdictions.

Indeed, there are likely to be areas where particular regulations — or the activities of particular regulators — overlap and possibly conflict. Even where there has been national agreement to remove duplication and inconsistency across jurisdictions these problems may continue due to delays and jurisdictional inconsistencies in implementing such reforms (PC 2007).

The focus is on business impact

The terms of reference for this review focus on the regulatory burdens on business. This includes businesses of any legal form and size — from multinational corporations to unincorporated sole traders.

Importantly, the cumulative impact of business regulation will also be taken into account. Business is subject to regulation at its establishment, and during its production, marketing and expansion phases. An additional layer of regulatory burdens can arise when a business operates across jurisdictional boundaries. The cumulative impact of this regulation means that even when the impact of a single regulation in isolation is small, the combined burden can be significant. This provides justification for seeking to remove even the smaller unnecessary burdens.

Policy objects of the regulation

The terms of reference for the review do not allow scope to examine the underlying policy objectives of the regulation. The concern of the review is on the translation of policy intent into regulation, not with the objectives themselves. Therefore, while some comment might be made on objectives where the Commission considers them to be demonstrably inadequate, focus is placed on the unnecessary costs of regulations required to meet the policy objectives.

Identifying the significant issues

The development of the list of most important issues and the decision to defer issues to the fifth year in the cycle (the review year) is a matter in which the Commission utilised analysis and judgement. The process followed by the Commission was as follows:

1. A concern or complaint was ruled out of scope entirely if it did not relate to existing regulation which impacts on business and cannot be related to Commonwealth regulation or to a national agreement or arrangement. Generally, a matter was also ruled out of scope if it clearly related to the objectives of regulation rather than its business impact.
2. Where concerns and complaints were recently reviewed this was taken into account. In situations where other reviews are being conducted in industries covered by this review, judgement was made about the adequacy of the terms of reference, the independence and make–up of the review body, transparency, consultation and timeliness.
3. Where interested parties did not raise any concerns in relation to an area of Commonwealth regulation, it was generally taken as prima facie evidence that there is no perceived problems of excess burden. However, the Commission is mindful of review fatigue and is also aware that industries characterised by smaller enterprises are less likely to have the resources to submit substantive submissions.
4. Where the concern appeared indicative of systemic problems with the regulatory framework, the Commission chose to view narrowly expressed concerns with relatively low impact in a wider context.

Quantifying impacts, including unnecessary burdens

The Commission would ideally base assessments of each issue on the unnecessary costs of each burden, and the potential gains from altering or removing the burden. Accordingly, the Commission, in its issues paper and informal meetings with industry stakeholders, asked participants for as detailed information as possible regarding the costs associated with compliance with regulation, and with specific focus on the components of cost that are unnecessarily burdensome, or arise from duplicative or inconsistent regulation.

However, there were significant challenges associated with quantitative approaches to measuring and assessing whether the regulatory burden on businesses was ‘excessive’. Many participants were unable to provide information on the pecuniary cost of regulation, and even where data were provided, this was for the overall costs

of regulation, often from all tiers of government, rather than the specific cost from unnecessary burden. Further, the Commission also faced challenges ensuring the integrity of the data, for example ensuring that the data were not compromised by selection bias or measurement errors.

Qualitative indicators of excessive regulatory burdens

As a result of the substantial difficulties in quantifying the cost of regulatory burdens, the Commission based its prioritisation of reforms on a largely qualitative approach supplemented by case studies where available.

Regulations that were developed in line with best practice principles were considered less likely to impose undue burdens on the economy.

Assessment of concerns

In assessing the course of action required for all relevant concerns raised by participants, the Commission first examined and clarified the policy objectives of the regulation in terms of the underlying economic, social and/or environmental objectives.

Where appropriate, consideration was given to possible alternative means of meeting those objectives. Analysis of the associated benefits and costs was also undertaken.

1.5 Conduct of the study

The Commission received the terms of reference for the series of five annual reports in February 2007, and began work on the current review into the social and economic infrastructure services sector in late 2008. An issues paper was issued in December 2008, with a call for submissions by 28 February 2009. In January, February and March 2009, the Commission held informal meetings with various stakeholders across all industries covered in the review. The Commission received 51 submissions prior to the release of the draft report on 26 June 2009.

Roundtables and consultative meetings with stakeholders were held to ascertain views on the recommendations in the draft report. The Commission received a further 50 submissions following the release of the draft report. The Commission wishes to thank all those who have participated in this review.

1.6 Structure of the report

Chapters two to eight address the concerns raised by businesses in their submissions and contain explanations of the issues raised, along with the Commission's recommendations. Chapter two relates to aged care, chapter three to child care, chapter four to information media and telecommunications, chapter five to electricity, gas, water and waste services, chapter six to transport and chapter seven to education and training. Chapter eight draws out those issues which were pertinent across a range of industries within the social and economic infrastructure services sector. Chapter nine makes recommendations to improve the existing regulatory impact analysis processes which aim to ensure the quality of new regulation. The appendices contain supporting information — appendix A provides more information on the Commission's consultation process, an overview of SBR is contained in appendix B, and a selection of recent and ongoing reviews relevant to social and economic infrastructure services is provided in appendix C.

2 Aged care

Key points

- The aged care industry is characterised by centralised planning processes which result in a heavy regulatory burden on aged care providers in order to maintain the quality of care. Without tackling the underlying policy framework that constrains supply it is unlikely that the regulatory burden can be substantially reduced.
- Recent reviews of the aged care system have called for increased choice for consumers and reduced regulation on aged care providers. Limiting the number of subsidised aged care places and associated price controls impede competition between providers, undermining their capacity to respond to the needs of older people and their incentive and ability to plan for future growth in the industry, driven by the ageing population. To address these issues the government should explore options for:
  - relaxing supply constraints in the provision of aged care services
  - providing better information to older people and their families so they can make more meaningful comparisons in choosing an aged care service
  - removing the regulatory restriction on bonds as a source of funding.
- The regulatory framework is complex and fragmented due to the existence of several programs regulated by numerous government departments across three tiers of government resulting in an unnecessary cost imposition on providers. This should be addressed by the current reviews of the accreditation process and standards, in consultation with relevant state and territory departments. Moreover, there needs to be a clearer delineation of responsibilities between the Department of Health and Ageing and the Aged Care Standards and Accreditation Agency regarding monitoring of provider compliance with accreditation standards.
- The accreditation system has made a positive contribution to the improved standard of care within the industry since its establishment. However, some changes should be made to reduce the regulatory burden on residential aged care providers, including redesigning the accreditation visits program using a risk management approach designed with a greater focus on under-performing residential aged care homes.
- While intended to protect vulnerable and elderly consumers, some existing regulations have shown little concern for minimising compliance costs to providers as well as reducing adverse side effects such as encroaching on the rights of clients and their quality of life. The extensive increase in regulation in recent years does not reflect the high standards of care by the vast majority of providers.

2.1 Aged care industry background

The aged care industry is focused on delivering care to the elderly as the ageing process reduces their ability to care for themselves. The industry is expected to come under increasing pressure in the coming decades as a result of Australia's ageing population, which is being driven by declining fertility rates and an increase in longevity. In addition to the predicted much larger numbers of people requiring aged care there will also be pressure applied by the increasing diversity of care needs, preferences, and affluence of elderly people.

Since the previous government commenced its aged care reforms in 1996 there have been a number of significant changes to the industry. Some of the key trends highlighted previously by the Commission (PC 2008c) are:

- increasing numbers of older Australians requiring subsidised care — the number of residential and equivalent community care places increased by nearly 52 per cent between 1998 and 2007
- greater reliance on user contributions — their share of total residential care expenditure increased from 22 to 25 per cent between 2003-04 and 2005-06
- increasing emphasis on community care — its share of subsidised places under the *Aged Care Act 1997* increased from 2 to 20 per cent between 1995 and 2007
- a greater proportion of residents in high level care — their share increased from 58 to 70 per cent between 1998 and 2007
- a decreasing proportion of smaller residential facilities — the share of facilities with 40 or fewer beds decreased from 53 to 34 per cent between 1998 and 2007
- increasing interest by private for-profit providers — their share of residential care beds increased from around 29 per cent in 1998 to 33 per cent by 2008.

Australian Government expenditure for residential and community aged care has risen over time in response to the ageing population. In 2008-09 it is expected to amount to $9.3 billion, compared to $6.7 billion in 2004-05, and $3.0 billion in 1995-96.

There has been renewed debate about the adequacy of Australia's aged care system in its current form in response to this rising funding burden and the increasingly diverse care needs and preferences of older Australians. Most recently, the National Health and Hospitals Reform Commission (NHHRC) final report encourages greater competition in aged care and less regulation (NHHRC 2009). Similar

recommendations have been made in the past by the Hogan Review (2004) and the more contemporary Commission research paper 'Trends in Aged Care Services: some implications' (PC 2008c).

2.2 Overview of aged care regulation

Aged care in Australia is largely regulated by the Australian Government through the *Aged Care Act 1997* (the Act). The Act is accompanied by principles that expand on, and/or support the Act. The 22 sets of principles currently in operation are described in detail in the Department of Health and Ageing's (the Department's) 'Report on the Operation of the Aged Care Act 1997, 1 July to 30 June 2008' (DOHA 2008a).

While focusing on funding arrangements, the Act and associated Aged Care Principles also set out the way the aged care system operates, including the planning and distribution of funded services, approval and responsibilities of service providers, user rights, eligibility for care, quality assurance and accountability. The Act also regulates the prices that aged care providers can charge their clients. The vast majority of clients pay some part of the charges associated with these regulated prices, with the extent of this co-payment depending on means testing by income and assets tests.

The Act covers a number of types of aged care including residential care, community care (Community Aged Care Packages), flexible care (Extended Aged Care at Home, Extended Aged Care at Home – Dementia and Multi-purpose Services), innovative care and transition care.

The regulation of residential aged care and community care packages is supported by quality assurance and consumer protection measures such as:

- the accreditation of aged care homes by the Aged Care Standards and Accreditation Agency (the Agency)
- building certification requirements
- a Complaints Investigation Scheme (CIS)
- an Aged Care Commissioner
- prudential regulation in relation to accommodation bonds.

According to DOHA (2008c) both residential and community care are funded through government subsidies paid directly to aged care providers on behalf of care recipients. A care recipient can only receive a subsidy if *four* conditions are met:

- they must be an *approved care recipient* for the type of care (residential/community, high/low, permanent/respite) they are receiving. This approval is granted by Aged Care Assessment Teams (ACATs) who act as gatekeepers to subsidised care
- their care must be provided by an *approved provider*
- care must be provided in an *allocated place*. The number and distribution of places is governed by the 'needs based planning arrangements' (box 2.1)
- residential care must also be of a *specified quality* determined by the accreditation process.

The largest part of the Australian Government's support for community care is provided outside the Act, through the Home and Community Care (HACC) program with expenditure of $1.1 billion in 2008-09. This program is jointly administered and financed by Commonwealth, state and territory governments under the *Home and Community Care Act 1985*. The HACC program serves as the mainstay of community care by providing basic maintenance and support services to older people wishing to live independently at home.

State, territory and local government regulation also impacts on the provision of aged care through regulations covering building planning and design, occupational health and safety, fire safety, food and drug preparation/storage and consumer protection.

2.3 Concerns about regulation of aged care

Aged care providers are concerned with the increase in regulatory burden in recent years driven by an apparent 'zero risk' approach by the Department. Recently introduced regulation (such as the strengthening of police check requirements and the reporting of missing residents), as well as the increase in the number of unannounced visits to residential aged care facilities, have been focused on attempting to protect the welfare of residents. But these changes have been made with little apparent concern for minimising the costs of compliance to business or minimising unintended consequences.

In some areas the Department and the Agency have not employed a well-designed risk management approach when determining how stringently or widely to enforce a regulation or standard, preferring a 'one size fits all' approach. Such an approach is costly because it not only (appropriately) penalises the poor performers, but it also imposes costs on the vast majority of providers who are adhering to the regulations and meeting or exceeding the standards.

Whole-of-government regulation making processes (including the Regulation Impact Statement or RIS process), if working effectively, should ensure that only regulations that bring a net benefit to the community are introduced (Australian Government 2007a). However, in the area of aged care there is little evidence that these government-mandated processes have imposed sufficient discipline when introducing regulation, to identify and minimise any unnecessary compliance costs as well as any adverse side effects. Even where regulatory action is justified, alternatives that could lessen compliance costs, unintended consequences, and the cumulative burden of regulation appear to have been given little consideration.

Moreover, without additional funding, existing resources must stretch to cover the costs of complying with the new regulations. Meeting regulatory requirements can come at the expense of providing better care as staff are directed to paperwork — a perverse outcome in a regulatory system that is designed to improve the quality of care. The negative consequences of the current regulatory burden were raised by UnitingCare Australia at the recent Senate Inquiry on residential and community aged care in Australia:

> The need for regulatory controls is not disputed. We are absolutely committed to a transparent system that ensures that all citizens get the care they need and that all taxpayers can see where their money is going, but our current system of regulation is expensive and cumbersome and has perverse outcomes in terms of quality of life and priorities for staff time and effort. We believe the purpose of a regulatory system should be to support the policy intent of the legislation, protect citizens and ensure accountability. We need clear guidelines both as providers and consumers for identification and management of risks and clear indicators of quality of life. We need a respectful and cooperative working relationship between the department and providers built on a recognition of the negative impacts of regulatory and accreditation and complaint systems that are built on negative determinants. (SCFPA 2009, para. 4.70)

Constraints on the supply of subsidised aged care places

Allocating aged care places to approved providers

By far the most burdensome regulations identified by submissions from the aged care sector were the quantity and price restrictions associated with the planning and allocation system. As the Commission said in a recent research paper:

> These restrictions combine to limit the scope of effective competition between providers, weaken incentives for innovation and delivery, distort investment decision making, and risk the long-term sustainability of aged care services. (PC 2008c, p. 85)

The Australian Government regulation of aged care extends to controlling the supply of subsidised aged care places through the needs-based planning framework

(box 2.1). This framework controls the number, composition and location of the subsidised places made available.

Box 2.1 **Needs–based planning arrangements**

Each year since 1985, the Australian Government makes available new residential and community care places for allocation in each state and territory. Initially the planning arrangements sought to provide 100 aged care places for every 1000 people aged 70 years or over. Since 2004-05 provision has been expanded and is scheduled to reach 113 aged care places for every 1000 people aged 70 years or over by June 2011.

Initially all 100 places were residential places but over the last twenty years there has been greater emphasis on community care and a re-balancing from low level residential care to high level residential care. Under the current arrangements 25 out of every 113 places are community care places, 44 places are for residential low care and 44 are for residential high care.

Operational aged care provision ratios differ from these planning ratios, largely because of the policy of 'ageing in place' (which allows a resident who enters a place for low care to remain in that place if and when he/she comes to need and receive high care). As at 30 June 2008, some 69 per cent of residents in aged care facilities were receiving high level care.

The Government also balances the provision of services between metropolitan, regional, rural and remote areas, as well as between people needing differing levels of care. The Secretary of the Department of Health and Ageing, acting on the advice of the Aged Care Planning Advisory Committees, allocates places to each Aged Care Planning Region within each state and territory.

Following the allocations of new places to regions within each state and territory, the Government conducts an open tender to allocate these places to approved providers that demonstrate they can best meet the aged care needs within a particular planning region. Because of the time required for building approval and construction, providers have two years to make residential places operational. Community care packages tend to become operational sooner after allocation.

For each aged care planning region the Government expects service providers to meet regional targets for supported and concessional residents, based on socio-economic indicators. The lowest regional target ratio is 16 per cent and the highest is 40 per cent. These targets aim to ensure residents who cannot afford to pay for accommodation have equal access to care.

At the same time some aged homes may be approved to offer 'extra service' to recipients of residential care. This involves a higher than average standard of accommodation, services and food (but not care). However, approval of 'extra service' status must not be granted if it would result in an unreasonable reduction of access for supported, concessional or assisted care recipients. Not more than 15 per cent of places in each state or territory may be approved to be offered as 'extra service'.

Source: DOHA (2008a).

Individual access (or demand) for these places is also controlled, through an assessment of need, based on an evaluation of disability by specialist medical teams (known as Aged Care Assessment Teams or ACATs) that grade people according to the degree of care they require. These teams are jointly funded by the Commonwealth and state/territory governments but managed by the states and territories.

Catholic Health Australia (sub. 18) claims that aged care in Australia is subject to excessive regulation because of the rationing of aged care places by the Australian Government using its planning and allocation system. As Ergas and Cullen (2006) have said, one of the worst impacts of the current arrangements is that they prevent aged care providers from achieving efficiencies in scale and scope:

> Many current providers seem too small to achieve economies of scale and scope; but the restrictions on the number of places makes it difficult for entrants to secure a sufficient number of beds in any locality to themselves achieve scale and scope economies and displace less efficient incumbents. (p. 11)

Catholic Health Australia suggests that relaxing this barrier to entry would create more competition in the market for aged care services, lessening the reliance on regulation to ensure high quality services.

Assessment

The Australian Government uses these regulatory planning controls in order to contain government spending on aged care. But as the Hogan Review (2004) recognised, such regulation can:

- impede the extent of competition between aged care providers by making it difficult for new providers to enter the market
- stifle innovation in service design and delivery
- restrict enterprise mix and investment in the sector.

Similar sentiments have recently been expressed by the NHHRC (2008):

> There is little incentive for aged care providers to be entrepreneurial and responsive to older people and their families — essentially, they have a 'captive market' — and no matter how well they provide care they cannot increase their market share simply by attracting a larger number of older people, as they cannot simply expand existing facilities or open new ones due to restrictions on places. (NHHRC 2008, p. 171)

Constraining the supply of aged care beds by regulation necessitates price controls so that aged care providers do not have the ability to exploit the localised monopoly power that the regulatory restriction on supply creates. As a consequence, price

signals are muted and this results in demand/supply mismatches because providers do not respond appropriately to the changing need for places nor the types of places required.

The biggest downside risk of these price controls is that prices will not be allowed to cover costs, reducing the incentives to invest in aged care. According to Catholic Health Australia this 'investment strike' is already occurring:

> The [Aged Care] Act creates an environment in which there is no incentive to encourage aged care providers to build new services. We need 100,000 new residential aged care beds in a decade. If we don't change the regulation to give incentive we face a massive short-fall. (Govorcin 2009)

One of the unintended consequences of these quantity and price restrictions is that they impede the ability of regulators to improve the quality of aged care, despite the efforts of the Aged Care Standards and Accreditation Agency in raising the quality standard across the sector. As Hogan (2007) said:

> With restraints on capacity through bed allocations and little spare capacity anywhere, efforts to impose sanctions that might close down defective facilities are frustrated by the lack of spare places to which residents of delinquent institutions might be transferred. (p. 7)

As can be seen from table 2.1, there is little scope for consumer choice owing to the high occupancy rates (i.e. number of bed days 'used' as a percentage of the number of bed days 'available') of residential aged care facilities. In practical terms, residential aged care providers have essentially no spare capacity. According to Ergas (2009):

> … this means there are usually very few places open in any particular locality … In 2005-06, for example, in a third of the 71 aged-care planning regions there were (on average) fewer than three vacant places each day for every 1000 people aged 70 or over. (p. 31)

Aged care providers are seeking a regulatory framework that allows greater flexibility to respond to consumers and at the same time reduce the reliance on regulation to ensure quality standards are maintained. National Seniors Australia (NSA), a peak consumer body representing Australians aged 50 and over, are also supportive of such changes, provided a regulatory safety net remains in place:

> NSA believes in increased competition in the aged care sector and the removal of restrictions on places and price controls [which] may be an effective means in achieving increased competition. NSA sees no reason why providers should not be able to make available as many places as they can, provided there remains in place stringent minimum standards for quality of care. Increased competition can drive quality of care improvements, but NSA believes that a regulatory safety net should remain in place. (sub. DR95, p. 3)

Table 2.1 **Occupancy rates for permanent residents**[a]

Per cent

Year	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*	*Aust*
2004-05	96.74	95.47	97.50	98.91	96.54	98.16	97.89	99.12	96.81
2005-06	97.13	94.46	97.43	98.95	96.61	97.03	98.18	98.08	96.63
2006-07	95.88	93.87	96.21	98.97	96.40	96.76	96.28	96.71	95.79
2007-08	95.56	93.73	94.90	98.32	95.91	96.01	95.46	93.61	95.25

a Does not include respite residents. Due to its 'occasional' nature, respite care will have a far lower occupancy rate.

Source: ANAO (2009).

One possibility, previously suggested by the Commission, would be to dispense with having 'dual' regulatory controls over the number of aged care places — the aged care planning and allocation system and Aged Care Assessment Teams (ACATs). This would involve:

- retaining accreditation of residential aged care homes
- relying on the ACATs as gatekeepers to control entitlements (or demand) for aged care services, while reforming the current ACAT assessment process to remove its pre-disposition to categorise a person based on currently available services rather than actual need
- eliminating needs-based planning arrangements and introducing safety net provisions to ensure sufficient places for those requiring supported or concessional access[1] (PC 2008c, p. 86).

The final report of the NHHRC (2009) expressed similar deregulation oriented views:

> We recommend that the current restrictions on the numbers of aged care places an approved provider can offer be lifted. This means good aged care providers will be able to take as many people as wish to use their services, and older people will no longer have to accept the only place they can find. Aged care services will compete with each other to attract older people. Older people who are unhappy with their care will find it easier to shift to a different service. (NHHRC 2009, p. 109)

To maintain aged care services in rural and regional areas (on equity grounds), after the (geographical) planning restrictions are eased, there may be a need to provide some further government financial incentives beyond existing measures such as the

[1] Supported residents are those who entered care for the first time on or after 20 March 2009 and have assets equal to or less than $91 910.40. Concessional residents are those who entered care before 20 March 2009, receive an income support payment, have not owned a home for the last two or more years and have assets of less than 2.5 times the annual single basic age pension.

residential care viability supplement and zero real interest loans. These further incentives could be provided by competitive tender with bids sought on the amount of government subsidy needed for capital and operating costs to provide a service.

Removing the restrictions on aged care places would mean that sole responsibility for investment in aged care and determining the range and quality of services (above the regulated minimum) would rest with aged care providers. Providers could then provide as many places as they expect they can fill under their forecasts of market conditions.

As a consequence, government funding of aged care must be redirected from the providers to the clients. Hogan (2007) suggests that this could be achieved by issuing vouchers to residents and potential residents for that proportion of the cost of care covered by government:

> The recipients and their families might then take the vouchers to aged care facilities to judge the best place in which to secure the appropriate level of care. (p. 7)

Where individuals do not have the capacity to make their own decisions on the choice of provider, such as the very elderly (who have no support available from relatives or other carers) and those with dementia, intervention would be required by ACAT members and geriatricians or state guardianship bodies as appropriate (Hogan Review 2004).

Hogan (2007) sees this proposed aged care funding arrangement as similar to existing health care arrangements in Australia using the Medicare card:

> The Medicare card held by Australian residents provides access to the services of general practitioners, in the first instance, on the initiative of the individual card-holder. The Medicare card is a voucher. The fiscal budget is exposed to the decisions of each individual in the population over whom no direct control is exercised. The Australian Government is exposed to the moral hazards of open access to government funding. What applies to the population as a whole, and to the elderly for access to medical advice, is with-held from the provision of aged care services. (p. 7)

Such a proposal may expose the Government to greater budgetary risk than under the current arrangements — but it would be a similar type of risk to that which already occurs in health care, child care, various welfare payments (such as the Newstart Allowance and Disability Support Pension) and in the near future with higher education in Australia. But this risk could be effectively managed if ACATs had a more rigorous eligibility assessment system than at present (PC 2008c).

Rather than strengthen the current ACAT assessment process, the NHHRC (2008) proposed that the number of people at any time receiving subsidised aged care should be limited to the target ratio for provision:

> This would be done by Aged Care Assessment Teams having a maximum number of approvals for care that could be in effect at any one time for people living within an aged care planning region.
>
> The maximum number of approvals would be calculated on the basis of a target ratio per 1000 older people in the same way as the current planning ratio for aged care places. Where the number of people assessed exceeds the approvals available, the assessment could provide a basis for assigning priority for the next available approval according to assessed need. (p. 172)

Although still a voucher approach, this proposal appears to be little different from the current arrangements. While it may achieve the Australian Government's objective of reducing budgetary risk by containing government spending on aged care it appears to shift the regulatory burden from a supply cap (the number of aged care places) to a demand cap (the number of ACAT approvals) which also implies that unmet need may arise.

It is not clear how such an approach would improve competition between providers or the incentives for innovation in design and service delivery within an aged care planning region. It is also doubtful that this proposal would reduce the current distortions in investment decision making for aged care services. There seems little point in removing the restrictions of the number of aged care places if restrictions on the number of ACAT approvals remain in place — since aged care operators' business decisions will still be constrained by the planning decisions of government. Also fundamentally, it may not reflect the real 'needs' for aged care.

This issue was identified by National Seniors Australia, in its response to the NHHRC (2008) interim report:

> National Seniors is concerned that the [NHHRC] Commission's proposal for replacing the restriction on the number of aged care places with a restriction on the number of ACAT approvals may not lead to the desired competition between aged care providers. While this proposal aims to free up the supply of aged care places, it also constrains demand … (NSA 2009, p. 2)

Abolishing the aged care planning and allocation framework would also allow scope to relax price controls. Removing restrictions on the number of aged care places will bring forth greater competition in the aged care market, lessening the need for price controls on charges for the provision of aged care. Price regulation would only need to be maintained where there was a lack of competitive pressure in the market, perhaps in some rural and regional areas. In these circumstances easing price restrictions could be delayed until effective competition was established.

Many of the regulatory burdens in this industry stem from the underlying policy framework that restricts the supply of aged care places and limits the extent to which the price mechanism can signals changes in market conditions to both aged

care providers and care recipients. In the Commission's view, the Government should consider possibilities for relaxing supply constraints in the provision of aged care services as a means of improving the quality and diversity of services and reducing the reliance on regulation and the need for price controls in areas where there is effective competition. Without tackling the underlying policy framework it is unlikely that the regulatory burden in the aged care industry can be substantially reduced.

As COTA National, the national peak policy organisation of the state and territory Councils on the Ageing, remarked:

> … deregulating the provision of supply of both community and residential care would create major challenges for the industry and requires careful planning and transition arrangements. However, the future lies in that direction, not in maintaining tight regulation. (COTA National, sub. DR94, p. 5)

Catholic Health Australia had similar concerns:

> … the transition from the current highly regulated supply arrangements to a more open system would pose significant risks of disruption to the provision of high quality aged care services if implemented without appropriate staged and transparent transition arrangements … Accordingly, CHA considers that implementation of reform in this direction will need to be accompanied by transparent transition arrangements developed in consultation with aged care providers, including clear sequencing of reforms, timelines and milestones. (CHA, sub. DR98, p. 4)

It is beyond the scope of this review to propose the path that should be taken to free up the supply of aged care places. This should be considered in a broader context, much broader than this review of regulatory burdens on business. But one option that could be considered in any approach to liberalise aged care places is to adopt a staged approach to relaxing controls over the number of places so that there is sufficient lead time to allow service providers to adapt to such a major change. And, as discussed earlier, until there is significant increase in the supply of places, providers will still be able to exploit a degree of localised market power. As a consequence, easing price restrictions should be delayed until effective competition is established.

A number of options could be adopted to implement such a staged approach. Ergas (2009), for example, has suggested that the removal of supply constraints could start with high-level care, for two reasons:

> First, demand for high-level care is likely to increase over time in response to the demographic changes … Liberalising the supply of high-level care places would therefore be consistent with the patterns that would be observed in an effectively competitive market and would facilitate the transition to such a market.

> Second, fiscal risk and, more generally, moral hazard are less of a concern in high-level care than in other forms of long-term care. High-level care residential care is not desirable for its own sake, and few individuals would choose to consume high-level care merely because it was available at a subsidised charge. Moreover, to the extent to which there is a concern about fiscal risk, that risk can be managed through the ACAT process. Noting that that process appears to be most effective at the higher levels of impairment. (p. 36)

At the same time, the aged care market would also function more effectively if consumers and/or their representatives had access to adequate information. To fully satisfy consumers' needs and preferences they need to be fully informed about the service they are purchasing — in terms of quality, prices, access rights and obligations.

On the issue of providing better information to consumers, the Hogan Review (2004) recommended:

> … exploring, with consumers and the industry, a star rating system to assist consumers to more readily compare services and to provide incentives for providers to become more competitive in providing quality services. (p. 284)

The Senate, in its inquiry into Quality and Equity in Aged Care, noted Hogan's recommendation but went further, arguing:

> … that the Agency develop a rating system that allows residents and their families to make informed comparisons between different aged care facilities … the rating system should not be limited to a 'star rating' but should include easily understood descriptions of a range of attributes, such as type and range of services provided; physical features of homes; staffing arrangements; costs of care; and current accreditation status. (SCARC 2005, p. 42)

The Aged Care Standards and Accreditation Agency website currently provides the most recent 'site audit' or 'review audit' of each residential aged care home. In addition, the Department has recently established a 'Sanctions and Notices of Non-Compliance' website, which provides information about sanctions and notices of non-compliance imposed on, or issued to, approved providers of Commonwealth funded residential aged care services. In response to this new departmental website Catholic Health Australia (2009) commented:

> In setting up this new website, the Government has created a league table, but is only sharing negative information with aged care consumers. If we are going to have league tables they should be done properly with balanced information.
>
> The current website does not provide residents, family members, or consumers any detail of the action taken by an aged care service to remedy a sanction. Nor does it show consumers who is providing best practice care.

> CHA wants quality indicators or best practice monitoring so that consumers can learn about aged care services that are doing a good job, as well as those that the Department has found need improvement. (CHA 2009)

National Seniors Australia, in its submission to the review of the accreditation process for residential aged care homes currently being undertaken by the Department, also called for more useful information being provided to consumers:

> The Department and/or the Agency should make available more specific information to consumers about a facility's outcomes (as opposed to procedures), including:
>
> - the number and nature of complaints against a facility
> - how the facility rates against performance measurements and other facilities
> - how the facility performed against performance measurements (rather than whether the facility was merely compliant or not)
> - a summary of what consumers said about a facility. (NSA, sub. DR95, attachment, p. 6)

Most recently the NHHRC's final report said:

> We recommend requiring aged care providers to make standardised information on service quality and quality of life publicly available on **agedcareaustralia.gov.au**, to enable older people and their families to compare aged care providers. (NHHRC 2009, p.22)

Any enhanced information system for consumers would need to take account of the potential impacts on providers and the extent of government involvement. Notwithstanding these issues, there could be some significant benefits in providing consumers with better information to aid making decisions about the relative merits of different service providers. A well-designed quality rating system is likely to increase the sensitivity of consumers to the quality of care. This in turn will lead to more informed decision-making by consumers and generate greater incentives for service providers to increase quality.

RECOMMENDATION 2.1

To enable the Australian Government to reduce the burden associated with regulation and price controls, and to improve the quality and diversity of aged care services, it should explore options:

- ***for relaxing supply constraints in the provision of aged care services***
- ***for allowing consumers' needs and preferences to be better understood and addressed***
- ***for providing better information to older people and their families so they can make more meaningful comparisons in choosing an aged care service.***

Accommodation bonds as a source of capital funding for residential high care places

In residential care there are essentially three types of payments:

- care fees
- living expenses
- accommodation payments (including accommodation bonds).

Care fees

Payments for care are determined using the Aged Care Funding Instrument (ACFI) (discussed more fully in a later section), which calculates basic care subsidies according to each clients level of need in three care domains (activities of daily living, behaviour supplement, complex health care supplement). This results in a payment to providers of between $0 and $138.11 per day (DOHA 2009a). People in residential aged care may be required to contribute up to $58.96 per day to their care fees on a sliding scale depending on their income. People who receive a full means-tested pension pay nothing toward the cost of their care (DOHA 2009b).

Living expenses

In addition to any care payment, people pay a 'basic daily fee' for living expenses. This is fixed at 85 per cent of the single basic aged pension or $33.41 per day for all residents (DOHA 2009b). However in the recent 2009-10 Federal Budget it was announced that the Government will amend the *Aged Care Act 1997* to reset the basic daily fee from 85 per cent to 84 per cent of the single age pension base rate, so that the base pension rise (announced in the Budget) is shared between aged care providers and pensioners (Elliot 2009a).

Accommodation payments

The type of accommodation payment a person is required to pay depends on whether they enter low-level care or high-level care. An accommodation bond may be required of people entering low care (or extra service) residential facilities. But people entering ordinary high-level care can only be asked for a daily accommodation charge. The money raised through these capital contributions is intended to be used in the following ways:

- to meet capital works relating to residential care
- to retire debt relating to residential care

- where no capital expenditure is reasonably necessary to comply with the certification principles and meeting accreditation requirements — to improve the quality and range of aged care services (DOHA 2005).

For low care residents most of the bond is repayable on departure subject to a minimum sum, the retention payment, being deducted annually for a maximum period of five years. Providers can, however, continue to earn interest on the full bond amount for the entire period of care. Since 1 July 2004 there has not been a five-year limit on accommodation charges for people in ordinary high-level care.

While the average (mean) length of stay for permanent residents leaving residential care in 2007-08 was 147.8 weeks (170.4 weeks for women and 109.8 weeks for men) — considerably less than five years (or 260 weeks) — the current trend is for residents to remain for longer periods, particularly since the introduction of the 'ageing in place' policy (which allows a resident who enters a low-care place to remain in that place if and when he or she comes to need and receive high care). In 2007-08, the distribution of length of stay for existing permanent residents at 30 June 2008 was towards longer periods of stay. Only 7 per cent of permanent residents had been in residential aged care for less than three months, while 19 per cent had been resident for between three months and one year, 52 per cent for one to five years and 21 per cent for five years or more (AIHW 2009).

The regulations do not cap bond amounts. However, providers cannot levy a bond that leaves a resident with assets worth less than a threshold amount — $36 000 as at 20 March 2009 (DOHA 2009b). The average accommodation bond agreed with a new resident in 2007-08 was $188 798. The total value of accommodation bonds held at 30 June 2008 was around $7.7 billion (DOHA, sub. DR96, p. 6).

According to Ergas (2009):

> … the level of bonds charged has increased substantially over the years (with the average bond increasing by a factor of five in nominal terms over the period 1996–2006), and the value of many bonds now appears to exceed the replacement cost of a residential place (p. 33)
>
> In 2007-08, more than half of residents who paid accommodation bonds to secure entry to residential aged care paid a bond worth more than $150 000. Some 22 per cent of bonds were worth less than $100 000 and 22 per cent were worth more than $250 000. By comparison, the Australian Department of Health and Ageing estimates the average replacement cost of a residential-care place to be in the order of $150 000. (footnote, p. 33)

The type of accommodation payment a resident pays for their entry to care depends on the resident's assessed care need at the time of entry. As long as the resident remains in the same aged care facility, that accommodation payment cannot be

changed from one type to another. For example, where a bond-paying resident's care needs increase from low care to high care the original bond agreement cannot be changed into an accommodation charge agreement. However, if a resident moves from one home to another because the first is unable to provide the higher level care needs, then a new accommodation payment agreement may be negotiated (DOHA 2005).

Hogan (2007) outlined the complicated nature of the accommodation bond, which delivers value to the liability holder (the aged care provider) distinct from the retention payment mentioned above:

> What makes the accommodation bond different from corporate debt is that the owner does not receive interest on it. Thus the entity holding the bond enjoys an income stream which in other markets would accrue to the asset holder. So the net present value of this income stream is an asset in the hands of the liability holder. This may help to understand why the selling price of an aged care facility that accepts accommodation bonds includes a premium which reflects the income stream arising from the value of the bonds, despite their being liabilities. (p. 2)

Accommodation charges are levied on residents in high care provided their assets exceed a certain amount ($91 910.40 as at 20 March 2009). The maximum accommodation charge for people entering high care is currently $23.22 per day for pensioners and $26.88 per day for non-pensioners. For those with assets less than or equal to $91 910.40, the Australian Government pays an accommodation subsidy of up to $26.88 per day (DOHA 2009b). The ACFI classifies a resident as 'high care' if they are in any one of the following categories:

- medium or high care needs in activities of daily living
- high behaviour needs
- medium or high complex health care needs (DOHA 2008d).

St. Andrew's Village Ballina criticised the level of capital funding available to residential aged care providers and proposed that the restriction on accommodation bonds should be removed for high care residents:

> I am concerned with regard to capital funding. Both concessional funding amounts and accommodation charge amounts are not enough to allow for capital development to be undertaken … Bonds should [also] be introduced for high care. (sub. 36, p. 3)

Baptist Community Services expressed concern that the regulation preventing accommodation bonds being extended to residential high care places denies residents a choice of payment options. And by forcing high care residents to pay the same accommodation charge, irrespective of the type of accommodation, it results in unfair outcomes for high care residents:

> The present system … denies the resident the right of choice. There are some residents for whom payment of an upfront lump sum would be their preferred choice. There are others for whom a weekly charge would be the preferred option. There may be others who would prefer the charge to be against their estate.
>
> Also the present system is unfair for residents. A resident living in a multi-bed ward with a shared ablution area is being charged the same as a resident who has a single room with its own ensuite facility. Surely the charge should reflect the type of accommodation! An example of this unfairness is Warabrook Centre and Kara Centre, roughly five minutes apart in Newcastle. At Kara the majority of residents are in four-bed wards. At Warabrook, all the residents have fully air-conditioned single rooms with ensuites. The accommodation charge for all residents is the same. (sub. DR84, p. 1)

Assessment

The regulatory restriction on the use of accommodation bonds to fund high care facilities changes the way these facilities would otherwise be funded. This can lead to commercial opportunities being missed by aged care providers and limits their capacity to respond to changing market circumstances.

The Commission recently described a number of problems created by accommodation bonds being available to providers of low and extra service places but not ordinary high care places. These arrangements:

- increase the likelihood of providers having to use the capital made available through low care and extra service accommodation bonds to cross-subsidise the capital requirements of ordinary high care places — putting upward pressure on the level of these bonds
- discriminate against elderly Australians requiring ordinary high care places — by making investment in ordinary high care facilities less attractive than in any other types of aged-care facility (Hogan 2007, p. 2)
- limit the capital funds available to providers of ordinary high care places relative to those available for low care places (notwithstanding the cross-subsidisation described above)
- could result in increased attempts by some providers to facilitate clients entering residential care through low care places, even though some of these people may require a higher level of care
- undermine the long-term viability of the aged care system by making investment in ordinary high care places less attractive to providers, despite those in need increasingly entering residential facilities at the higher end of the care spectrum. (PC 2008c, pp. 75-6)

In addition, Catholic Health Australia say that the current balance of care provision ratios (outlined in box 2.1) combined with the accommodation bond policy, will also create an artificial barrier to meeting the demand for more community care in any future aged care market free of constraints on places — due to their negative effects on the funding of new or rebuilt high care services:

> If care recipients were to be given greater choice, it is likely that a significant number of them, especially at the low care level, would opt to have their care needs met in their own homes for as long as possible, thereby threatening the current supply of low care bonds and the viability of future high care developments. Under the current balance of care ratios, this choice is restricted (with only 22% of aged care places available for community care…)
>
> Hence the current partial application of bonds in residential care also presents a structural impediment to reform … (CHA, sub. DR98, p. 3)

In 2008 the Commission suggested that high care clients should be given the option of paying an accommodation bond (as previously suggested by the Hogan Review 2004):

> The equity, efficiency and sustainability of residential care would be improved by placing low care and high care on an equal footing in terms of meeting their capital requirements. This would involve all permanent clients of residential care, subject to a safety net, having the choice of paying either:
>
> - a lump sum bond
> - a daily or periodic rental charge (at a level equivalent to the stream of capital available to providers through the bond). (PC 2008c, p. 76)

Consumer groups, such as COTA National are also supportive of bonds (as well as other financial products) as a source of funding for all residential care places to give consumers flexibility regarding payment options:

> … there should develop a variety of options as to how users can pay for both contributions to care, and for accommodation. These would include bonds, conventional loans, periodic payments (rents), and deferred charges. Similar levels of consumer protection should apply to all these forms, and there should be requirements as to transparency and comparability of user charges. However there should be no restriction against the use of any of these options. Each may suit particular consumer's situations and preferences. (COTA National, sub. DR94, p. 7)

Most recently the NHHRC (2009) arrived at a similar position (to the Commission) in its final report as long as the current restriction on the supply of aged care places is removed (as proposed by recommendation 2.1), and this results in sufficient competitive pressure on accommodation options to keep downward pressure on bond prices:

> We recommend that consideration be given to permitting accommodation bonds or alternative approaches as options for payment for accommodation for people entering

high care, provided that removing regulated limits on the number of places has resulted in sufficient increased competition in supply and price. (NHHRC 2009, p. 22)

RECOMMENDATION 2.2

The Australian Government should explore options for removing the regulatory restriction on bonds as a source of funding.

Regulation of 'extra service' places

According to DOHA (2008a) some aged care homes may be approved to offer 'extra service' to recipients of residential care. The extra service provisions allow aged care residents (both low and high care residents) access to a higher standard of:

- accommodation (room size, furnishings and fittings, temperature control, ensuites and living areas)
- food
- other services (cable television, hairdressing, newspaper delivery).

Aged care homes approved for extra service places charge residents extra fees. The Australian Government sets the maximum fees that residential care providers may charge for extra services, while basic care subsidy payments are reduced by 25 cents for each dollar of extra service income received by the provider.[2] In addition:

- providers must first have their prices approved by the Department before they can charge their aged care clients
- any increase in the extra service fee for any place must not exceed 20 percent plus CPI
- providers can only change the prices they charge once every twelve months (DOHA 2005).

Extra service does not affect the basic care provided to recipients as all residential care providers are required to meet designated care standards for all care recipients. Not more than 15 per cent of places in each state or territory may be approved as extra service. There are also caps on the maximum proportion of places that may be extra service places in a particular region.

[2] Under current arrangements, the Commonwealth subsidy payable in respect of a resident in extra service is reduced by 25 per cent of the extra-service fee that the resident pays. Providers are allowed to recoup this from the resident. The net impact is that a resident effectively pays 125 per cent of the extra-service fee. (Ergas 2009, footnote, p. 35).

Aged and Community Services Australia question the need for the government regulation of extra service places:

> The Australian Government regulates this area by setting criteria for granting the (extra service) status and sets regional targets for the level of extra service provision. This regulation works to constrain choice by predetermining the type of extra service a resident might want… It should be dispensed with as a first step in opening up choices for older people. (sub. 38, p. 5)

Assessment

The introduction of 'extra service' places has broadened choice for older people seeking residential care, although these places only account for a small share of allocated places on a national basis — around 6.5 per cent in 2008 and well below the 15 per cent cap. Of the total number of places approved for extra service, 10 052 were high care places and 2632 were low care places (DOHA 2008a).

However the national results mask considerable variation at a regional level. According to the Productivity Commission (2008c), in a 2003 consultant's survey, around one in five providers indicated they would apply for as many extra service places as they could get, if there was no cap in place.[3] Indeed, the survey reported that a number of providers had extensive waiting lists at a regional level and that providers' own market research has indicated that there is a demand for more of these places in some regions.

More recent consultations with industry suggest the Gold Coast is the only major region in Australia that has demand in excess of the current regional cap. Providers reported that one of the major factors preventing them from entering extra service provision in large numbers is the approval process related to the granting of extra service places and the setting of fees. According to one provider, Baptistcare:

> The setting of fees and approval processes are very rigid and can sometimes take up to two years in advance to be established, depending on the allocation and capacity to build the facility, during which time circumstances change, sometimes quite considerably from the initial application. … the provider should be able to offer extra services and negotiate appropriate fees with their residents and their families. (Baptistcare, sub. DR63, p. 3)

In any event, the 15 per cent cap applied in each state and territory seems superfluous, given there are regulations in place preventing the approval of extra service places if they result in an unreasonable reduction of access for supported, concessional or assisted care recipients (box 2.1).

[3] WestWood Spice 2003, *Factors Affecting the Provision of Extra Service*, Final Report for the Department of Health and Ageing, April.

If recommendation 2.1 is implemented, relaxing the supply constraints in the provision of aged care services, there would no longer be any need for a residential care category called 'extra service'. In a less regulated market, aged care providers would be able to respond to the tastes and preferences of a wide range of consumers. This would result in a mix of residential services characterised by differing standards of accommodation, food and services above the regulated minimum.

In the interim, it is unlikely in most regions that any growth in demand for extra service places (from such a low base) would create problems for those seeking access to standard places. For this reason, the regional quota system for extra service places appears to be unnecessary. Providers of residential care should be allowed to determine the number of extra services places they wish to provide, with the Department adopting a lighter-handed monitoring approach, only intervening where extra service provision is demonstrably reducing access to standard service places for supported, concessional or assisted care recipients.

RECOMMENDATION 2.3

Contingent upon the freeing up of supply constraints in the provision of aged care services outlined above in Recommendation 2.1, the Australian Government should abolish the 'extra service' residential care category. In the interim, where there appears to be unmet demand for such 'extra service' places in a particular region, the Department should consider freeing up the regional cap and adopting a lighter-handed monitoring approach, only intervening where extra service provision is resulting in an unreasonable reduction of access for supported, concessional or assisted care recipients.

Regulation to ensure residents' safety

While intended to protect vulnerable and aged consumers, some existing regulations have shown little apparent concern for minimising compliance costs to providers, as well as in some specific cases, little apparent concern for encroaching on the rights of clients and their quality of life. Examples of such regulations include the recent strengthening of police checks, reporting of missing residents, the compulsory reporting of assaults and the ramping-up of unannounced visits by the accreditation agency in recent years.

Police checks

Most submissions from aged care providers support the need for police checks on staff and certain volunteers working in aged care homes as a means of protecting

resident safety — although some providers questioned the extent to which they achieved their objective of preventing unsuitable people working in aged care given the 'moment in time' nature of police checks.

High staff turnover rates in the aged care industry also make the current arrangements time-consuming and costly (Catholic Health Australia, sub. 18, p. 3). Submissions suggest that the objective of protecting the health and wellbeing of residents could be achieved in a less costly manner.

Industry association estimates of the annual compliance costs of police checks vary significantly. Aged and Community Services Australia (sub. 38) estimate the current police check arrangements cost industry approximately $5 million per annum. On the other hand, Aged Care Association Australia (sub. DR68) says the industry estimate of the annual cost of police checks is now in excess of $30 million per annum.

At an organisational level, Blue Care, the largest provider of aged care services in Queensland (76 residential facilities, 4200 beds, 5500 staff and 1800 volunteers) estimated the total annual cost of conducting probity checks in terms of fees and staff time is in excess of $418 000 per year for its organisation (UnitingCare Australia, sub. DR70).

Aged and Community Services Australia (sub. 38) view the measure as an 'unfunded compliance cost' that provides a disincentive for staff to join the aged care industry and is expensive to implement, particularly when external legal advice is needed to make assessments of whether or not a conviction on a criminal record constitutes a form of assault barring an individual from employment.

Assessment

The aim of the police check requirements is to prevent unsuitable people from working in Australian Government subsidised aged care facilities. Aged care services are required to undertake a police check for staff and certain volunteers (those with unsupervised access) every three years (box 2.2). People with convictions for murder, sexual assault, and serious physical assault where a term of imprisonment has been imposed, are not permitted to provide care or services in either a supervised or unsupervised capacity.

According to the Department, no Regulation Impact Statement (RIS) was developed prior to police check requirements being implemented from 1 March 2007 (Accountability Amendment Principles 2006 (No. 1)). These amendments were given an exemption from the previous RIS requirements by the Office of Best

Practice Regulation (OBPR) because they were assessed as being 'minor or machinery in nature and did not substantially alter existing arrangements.'

Box 2.2 Police check requirements

In April 2006, the Government announced that aged care providers would be subject to police check requirements for certain staff and volunteers. All approved providers were required to complete a Police Check Declaration form indicating their compliance with the requirements.

These requirements permitted people with convictions for serious offences to have access to aged care recipients, where they are under supervision. Approved providers were only required to ensure staff members and volunteers who have unsupervised access to care recipients undertake a police check every three years to determine their suitability to provide aged care.

In January 2009, the police check requirements were strengthened by making it mandatory for all staff with unsupervised or supervised access to care recipients to have a police check. The requirements in relation to volunteers did not change.

The recent amendments make clear that trades people who perform work for the approved provider (for example, independent contractors such as plumbers, electricians and delivery people) will not fall within the definition of a staff member.

The matter of who bears the cost of a police check is for negotiation between the approved provider and their staff and volunteers.

Source: DOHA (2008b).

In addition, no Regulation Impact Statement (RIS) or assessment of business compliance costs was required for the recent strengthening of the police check requirements under the new best practice regulation requirements (described in chapter nine). The Department undertook a 'preliminary assessment' of the regulatory proposal and assessed it as having no/low business compliance costs and no/low impacts on business and individuals or the economy. This preliminary assessment was confirmed with the OBPR which administers the Australian Government's best practice regulation requirements.

According to the Best Practice Regulation Handbook no further analysis should be carried out in circumstances where proposals will have no or low compliance costs to business:

> … compliance costs to business would be low if only a few businesses are affected and the costs are negligible or trivial, for example:
>
> - changes to regulation that are machinery in nature, involving technical changes that will not have an appreciable impact on business and are consistent with existing policy

- there would be a very small initial one-off cost to business and no ongoing costs
- businesses would not need to seek advice about the change from external advisers. (Australian Government 2007a, p. 20)

The recent strengthening of police check regulation has increased compliance costs and these costs are unlikely to be either 'non-existent' (i.e. zero) or 'low' (i.e. negligible or trivial) because they are not machinery in nature; there are on-going costs associated with new staff obtaining police checks (industry estimates range from $5m to $30m for the *overall* police check requirements); and external legal advice is sometimes needed to make assessments of whether or not a conviction on a criminal record constitutes a form of assault barring an individual from employment.

Bapistcare were critical of the lack of analysis carried out under the current regulation requirements:

> It is our view that the Government's own impact assessment of the cost was not done properly and the cumulative impact of this requirement was not taken into account. (Baptistcare, sub. DR63, p. 2)

During consultations as part of this review process, most approved providers indicated they, rather than their employees, paid for police checks due to the competitive market for labour. Moreover, following the strengthened requirements, all aged care staff, whether unsupervised or not, and unsupervised volunteers, are required to have a police check and all approved providers must keep records to demonstrate they have met the police check requirements.

One of the objectives of the new three-tier best practice regulation system, is to identify such proposals and subject them to analysis that would not have been undertaken separately under the previous RIS requirements:

> … the Government has mandated a three-tier system for assessing regulation, including:
>
> - limited analysis for proposals that have no or low impacts
> - quantification of compliance costs (using the Business Cost Calculator or an approved equivalent) for proposals that will entail medium compliance costs
> - in-depth analysis, documented in a Regulation Impact Statement, for all proposals that will have a significant impact on business and individuals or the economy. (Australian Government 2007a, p. 18)

Indeed, the Australian Government developed the Business Cost Calculator (www.finance.gov.au/obpr/bcc/index.html) for this specific purpose, to assist agencies in conducting compliance cost analysis (only), where more in-depth analysis — in the form of a RIS — was seen as unnecessary, given the significance

of the impacts. As chapter nine outlines, this tool was used just seven times in 2007 - 08 for proposals assessed as likely to have medium business compliance costs by the OBPR. The police check regulation could have benefited from the application of this compliance cost tool — because its results could have informed its design and achieved the same objectives with less compliance costs on business.

To lessen the compliance burden on aged care providers (or their staff) Aged and Community Services Australia (sub. 38, p. 4) proposed the introduction of a 'Working in Aged Care Card'. Its proposal is similar to the 'Blue Card' used in Queensland for people working in child-related areas and regulated by the Commission for Children and Young People and Child Guardian. The Blue Card is transferable across all areas and businesses regulated by the Commission. This proposal is supported by a number of providers, aged care associations, and a consumer group (ACAA, sub. DR68; UnitingCare Australia, DR70; IRT, sub. DR71; National Seniors Australia, sub. DR95)

The Department maintains that police checks are transferable between aged care providers so long as police certificates are not more than three years old and they do not record that a person has been convicted of murder or sexual assault, or convicted of and sentenced to imprisonment for any other form of assault. In other words, there is no obligation on aged care providers to request another police check if prospective employees present with an unexpired police certificate with no record of the assault convictions discussed above.

Catholic Health Australia (sub. 18, p. 3) suggest one national system of police checks for people wanting to work in either the aged care or child care sectors. Given the moment in time nature of police checks, it also proposed that a national agency could be responsible for alerting employers between police check renewals (currently every three years) which may impact on a person's suitability to continue work in the industry. COAG (2009a) are currently developing a nationally consistent approach to working with children and child safe organisations across jurisdictions which is expected to be in place by December 2009. But this approach is more about ensuring consistency between jurisdictions rather than developing a single national agency that facilitates police checks.

Subsequent to the release of the Commission's draft report, the Department said:

> The Department of Health and Ageing is working with other agencies, such as FaHCSIA to harmonise police check processes to minimise duplication of administrative processes while maintaining standards of care. (DOHA, sub. DR96, p. 2)

The Department should go further and conduct an 'ex-post' evaluation of the current safeguards that protect elderly people receiving care, including the police check requirements, to gauge the extent of the compliance costs on business and

identify whether these (and any other additional costs) could be reduced without compromising the safety of those people receiving care. It would be important that the aged care industry are consulted and that they are encouraged to provide the Department with their compliance cost estimates and that this evaluation is made public.

As part of this ex-post evaluation of the current safeguards, the Department should consider the establishment and funding of a continually updated database of police clearance certificates for existing and prospective employees in the aged care industry. Given the sensitive information contained in an individual's criminal record it is important that appropriate care is taken to protect this information against misuse or inappropriate disclosure in any evaluation of the current process (and any less costly alternatives).

To protect the collection and handling of this type of information the Office of the Privacy Commissioner suggests:

> … that a Privacy Impact Assessment (PIA) could be conducted as part of the evaluation process to examine the privacy implications arising out of the current police check requirements for aged care staff and volunteers and any proposed changes to that process. (sub. DR55, p. 2)

Assuming any privacy issues can be resolved, a database could facilitate information sharing amongst approved providers and reduce their regulatory burden, since every provider would have (potential) access to all current police clearance certificates, regardless of which provider initially requested any individual police check. A continually updated database would also greatly strengthen the integrity of the police check mechanism in its use to protect resident safety.

RECOMMENDATION 2.4

The Department of Health and Ageing should conduct a publicly available evaluation of the current safeguards that protect elderly people receiving care, including the police check requirements, to explore whether the benefits of the existing safety framework could be achieved in a less costly manner.

Reporting of missing residents

Aged care associations were critical of recent amendments to the Accountability Principles 1998 that introduced a requirement for approved providers to notify the Department within 24 hours in the case of unexplained absences of residential care clients where such absence has already been notified to the police (box 2.3).

The reporting of missing residents measure was announced in June 2008 by the Minister for Ageing following recent reports of a number of missing persons from aged care services, including:

- a North Queensland resident died after wandering
- a Canberra resident was found in bushland
- a NSW Central Coast man disappeared for four days, but was found dehydrated and suffering hypothermia and eventually died (Elliot 2008a).

Between 1 January 2009, when the reporting of missing residents requirements came into effect, and 30 June 2009, 374 persons have been notified as missing to the department and police (Department of Health and Ageing, pers. comm., 13 August 2009).

Box 2.3 Notifying the Department when residents are reported missing to police

From 1 January 2009, under amendments made to the Accountability Principles 1998, approved providers are required to notify the Department if there is an unexplained absence of a care recipient from a residential aged care service and the provider is sufficiently concerned that the police have been notified. After the provider has notified the missing resident's family and the police it should then notify the Department.

Notification will only be required when the approved provider has decided that a person is unaccountably missing and is sufficiently concerned to notify the police. The notification should be made as soon as practicable and in any case within 24 hours of reporting to police.

The Department's response to the notification will be to check the approved provider to ascertain whether there is an ongoing risk to residents. For example, further action would not be taken where a 'missing' resident turns up, having spent a day with family or friends without having previously advised the provider using available mechanisms. Whereas, if a resident is reported as 'missing' without reasonable explanation and it is considered that the approved provider did not have adequate systems and processes in place to prevent the absence, then an investigation would ensue and compliance action may be considered.

Source: DOHA (2008b).

Aged Care Association Australia considered notifying the Department to be a poor utilisation of residential facility managers' time — time which could be more effectively spent finding the missing resident (ACAA sub. DR68). Notification to the Department can result in a series of phone calls between the Department and the residential care provider. According to UnitingCare Australia (sub. DR70, p. 5),

'DOHA officers make multiple phone calls to facility managers when each incident is reported'.

In some cases, the initial phone call between the facility and the Department is just the start of much wider investigative and review processes. Aged and Community Care Victoria described the interplay that can occur when a resident goes missing from a residential aged care facility in the following terms:

> The example of a resident who goes missing now requires notification to the Commonwealth Department of Health and Ageing as well as the Victorian Police. Not only will the compliance area of the department commence its own investigation which could lead to a notice of required action (e.g. to remedy a security deficit), or a sanction (effectively a punitive measure), but these matters are frequently referred to the Aged Care Standards and Accreditation Agency who may in turn undertake a partial or full review of the nursing home or hostel. (sub. 34, pp. 4-5)

Assessment

According to the Department, no Regulation Impact Statement (RIS) or assessment of business compliance costs was required for the recent amendments to the Accountability Principles 1998. The Department undertook a 'preliminary assessment' of the regulatory proposal and assessed it as having no/low business compliance costs and no/low impacts on business and individuals or the economy. This preliminary assessment was confirmed with the Office of Best Practice Regulation (OBPR) which administers the Australian Government's best practice regulation requirements.

DOHA (2008b) says direct notification to the Department will enable it to determine whether appropriate action has been taken by the approved provider in respect of the missing resident and whether there are adequate systems and processes in place to ensure other residents' safety (box 2.3).

While the police will be focused on the welfare of the missing resident, the Department has a wider objective, not only the safety of the missing resident but also the safety of other current and future residents. From this perspective, it is appropriate that the Department is notified so it can be informed about any general security issues within a particular aged care facility.

The requirement for the Department to be informed within 24 hours after the provider reports each absence to the police seems excessive. Subsequent to the release of the Commission's draft report, the Department said:

> Routine and timely reporting to the Department about missing residents allows the Department to undertake a real time risk assessment in respect of whether a home may have systemic defects that allow residents to go missing. In a number of situations, an

> immediate visit by investigators has identified situations at a home that has or could impact on the residents' safety. (sub. DR96, p. 7)

At the same time, it would be less burdensome on providers if they were required to report incidents of missing residents (notified to the police) within a longer time interval. This would address the industry's concern that the initial focus should be on resolving the immediate problem (i.e. the missing resident), with any systemic problems to be dealt with once the initial emergency has passed (ACAA, sub. DR68). When the safety of the missing resident is of most importance to the Department the residential aged care facility should not be overloaded with issues that could be dealt with later — more time should be given to allow residential aged care facilities to report missing residents.

The Department should also adopt a more risk managed or tiered approach, by allowing different reporting time periods that would depend on a provider's record on missing residents. This would mean that residential aged care facilities that are prone to residents going missing would have a greater reporting burden than those that are not prone to missing residents. In this way the Department could still achieve its objective of protecting resident safety, but at less cost to all residential aged care facilities in terms of compliance reporting.

RECOMMENDATION 2.5

The Australian Government should amend the missing resident reporting requirements in the Accountability Principles 1998. It should allow a longer time period for providers to report missing residents to the Department. It should also adopt a more risk managed or tiered approach, by allowing different reporting time periods based on a provider's record on missing residents. This recommendation would not impact on the reporting of missing residents to police services by providers.

Compulsory reporting of assaults

Some aged care providers have questioned the need to report all allegations or suspicions of resident physical abuse to both the police and the Department. Catholic Health Australia expresses the view that the reporting requirements to the Department are redundant:

> The current requirements to report all allegations and suspicions of assault to the Department as well as the police is burdensome and serves no useful purpose. As the Department's Guidelines acknowledge, investigation of incidents of alleged assault is the responsibility of the police. (sub. 18, p. 3)

Aged and Community Services Australia state the new requirements have led to some providers developing new reporting systems, with one service provider estimating the establishment cost (including policy development and staff training) at $27 000 (sub. 38). Aged and Community Services Australia goes further suggesting this regulation erodes the civil liberties of residents who may not consent to the reporting of the event:

> Aged care providers are legislatively required to report cases of abuse, which could be resident to resident or familial, regardless of whether or not the person who has been abused consents to this occurring … This Government policy denies an older person living in residential care the basic right to decide for themselves whether they wish to report the event and have any further action taken. Prior to this requirement abuse would be reported to the Police where the older person elected to do so. This approach protected the rights of the older person. (sub. 38, pp. 4-5)

Assessment

Since 1 July 2007 all Australian Government subsidised aged care homes must report incidents or allegations of sexual assault or serious physical assault. 'Reportable assault' is defined as unlawful sexual contact or unreasonable use of force that is inflicted upon a person receiving residential aged care.

According to the Department, no RIS was developed prior to the compulsory reporting of sexual and serious physical assaults being implemented by the *Aged Care Amendment (Security and Protection) Act 2007*. Advice provided by the Office of Regulation Review (now the OBPR) indicated that a RIS was not required as the amendments 'are of a minor or machinery nature and do not substantially alter existing arrangements.'

Under the amendments to the *Aged Care Act 1997*, aged care providers are required to:

- report to the police and the Department within 24 hours incidents involving alleged or suspected reportable assaults
- take reasonable measures to ensure staff members report any suspicions or allegations of reportable assaults to the Approved Provider
- take steps to protect the security of residents in the facility
- take reasonable steps to protect the identity of any person who lodges a report
- keep consolidated records of all incidents involving allegations or suspicions of reportable assaults. (DOHA 2008a, p. 55)

Approved providers have the discretion not to report allegations or suspicions of reportable assaults where the resident concerned (i.e. the alleged perpetrator) has been assessed as suffering from a cognitive or mental health impairment. In such

cases, there is a requirement for the provider to put in place and document within 24 hours arrangements for the management of the behaviour of the resident who had, or was alleged to have, committed the otherwise reportable assault. Catholic Health Australia would like this discretion for all cases of reportable assaults:

> As is the case for assaults involving residents with assessed cognitive or mental health impairment, it would be more efficient to rely on the Accreditation Agency's processes to ensure that each home has systems in place and has taken appropriate corrective action. (CHA, sub. DR98, p. 9)

In 2007-08, the Department received notification of 925 alleged reportable assaults. Of those, 725 were recorded as alleged unreasonable use of force, and 200 as alleged unlawful sexual contact. It is not clear how many of these allegations resulted in arrests, charges or convictions as this information is not collected by the Department.

The requirement for the Department to be informed within 24 hours appears to be a necessary pre-condition to protect current and future resident safety given:

- the frailty and vulnerability of clients that are generally in need of guardianship and protection
- the consequences that could arise if alleged assaults continued for any length of time.

While it would be less burdensome on providers if they were required to report assault allegations to the Department within a longer time interval, or have the discretion not to report assaults at all as proposed by Catholic Health Australia, it is unlikely that the Department could meaningfully achieve its objective of protecting resident safety. If a longer time interval for reporting were to occur the risk of on-going detriment to residents would still be present.

Mandatory reporting raises several ethical issues. It is recognised that the current requirements may lead to the erosion of individual rights for some elderly individuals when deciding whether or not to pursue such matters. However, the particular circumstances of residential accommodation of the type provided in aged care homes warrants other considerations to be taken into account. Highly dependent residents may feel intimidated or unable to pursue the matters on their own behalf. Also, failure to report such abuse may increase the risk for other residents.

Unannounced visits

In the 2006 Budget, the Australian Government introduced a policy which requires that each aged care home receives at least one unannounced visit each year. The

Aged Care Standards and Accreditation Agency (the Agency) uses this requirement as one of its performance targets. Agency performance is also assessed against the more general target of maintaining an average visiting schedule of 1.75 visits per home per year — the Agency exceeded this in 2007-08 with an average of 1.84 visits per home. The Agency has a national program of visits (both announced and unannounced) to ensure these targets are met (box 2.4).

Box 2.4 Visits to residential aged care facilities by the Agency

According to the Aged Care Standards and Accreditation Agency there are three types of visits undertaken, of which two involve unannounced visits:

- support contacts – are announced or unannounced contacts between the Agency and an aged care home for the purpose of:
  - ensuring compliance with the accreditation standards and other responsibilities under the *Aged Care Act 1997*
  - assisting the home to undertake continuous improvement
  - identifying whether there is a need for a review audit
  - providing additional information or education.
- site audits – are assessments of the quality of care provided by homes against all 44 expected outcomes of the accreditation standards. The assessment team reviews documents interviews staff, residents, relatives and other people, and observes the practices of the home. A site audit is scheduled after a provider applies for a further period of accreditation. There are no unannounced site audits.
- review audits – are similar to site audits but occur when there are concerns about a home's compliance with the accreditation standards. A review audit can be announced or unannounced and the Agency may arrange to conduct a review audit of a home on its own initiative, or at the request of the Department, if either the Agency or Department:
  - has reason to believe the home is not complying with the accreditation standards
  - there has been a change to the home such as a change of ownership or key personnel
  - there has been a transfer of allocated places
  - there has been a change in the premises of the home
  - the home has not complied with arrangements made for support contacts.

Source: ACSAA (2008).

Aged and Community Care Victoria is critical of the unannounced visits regime undertaken by the Agency, suggesting that it took senior managers away from important tasks (thus lowering productivity) and was not sufficiently targeted at the poorest performers within the industry:

> To think that an assessor can simply arrive on the doorstep of a facility and deprive the facility of its manager or key personnel who are undertaking other important scheduled roles is unnecessarily burdensome.
>
> These unannounced visits are not just conducted on facilities where there has been an established pattern of complaints, non-compliance or previous failure to meet standards ... [they are] out of proportion to the overall risk of substandard care. (sub. 34, p. 9)

Illawarra Retirement Trust (IRT) sees unannounced visits as 'inefficient and not effective for services that have a sound track record' (sub. DR71, p. 4). At the same time it encouraged the Department and the Agency to have a common understanding of the risk management approach:

> IRT has several examples of unannounced visits that have occurred within six weeks either side of a full 3 year scheduled review. In all circumstances, there has been continuing full compliance with [the] 44 outcomes.
>
> It is important that there is a common understanding of what Department of Health and Ageing and the Agency believes a 'risk management approach' is, and some transparency regarding the method of prioritisation [of] risk. In particular, risks having a real or potential impact on the safety and well-being of residents should be prioritised over technical administrative 'breaches'. (IRT, sub. DR71, p. 4)

COTA National, the peak policy organisation of the state and territory Councils on the Ageing, also raised concerns with the burdens unannounced visits place on residential aged care providers:

> COTA … recognises that unannounced visits can create major issues for providers that have nothing to do with compliance standards. For example, providers having to cancel staff training and indeed resident activities, recall managers from important commitments, and similar, due to unannounced visits. (COTA National, sub. DR94, attachment 2, p. 8)

Assessment

In 2007-08 the Agency conducted:

- 4731 support contacts, of which 3056 were unannounced
- 426 site audits
- 87 review audits, of which 49 were unannounced and 22 were at the request of the Department.

In addition, the Department conducted 3127 visits in 2007-08, which included 1145 unannounced visits. These visits were undertaken under the Aged Care Complaints Investigation Scheme (CIS) which commenced operation on 1 May 2007 (discussed later in the chapter).

In March 2008, the Minister announced that in 2008-09 the Agency will undertake 7000 visits to Australian Government funded aged homes which will be a combination of announced and unannounced visits (Elliot 2008a). This equates to around 2.5 visits per home per year. As table 2.2 demonstrates, the unannounced visit program has been on a strong upward trend since 1999-00.

Table 2.2 **Number of unannounced visits undertaken by the Agency**[a]

Year	*Number of unannounced visits*
1999-00	107
2000-01	360
2001-02	449
2002-03	242
2003-04	553
2004-05	563
2005-06	914
2006-07	3 627
2007-08	3 105

[a] Unannounced visits can either be support contacts or review audits.

Source: ACSAA Annual Reports (various years) and SCARC (2005).

From the Department's perspective, one unannounced visit per annum is the baseline that all homes must be subject to, and any visits beyond this (either announced or unannounced) will be subject to the discretion of the Agency taking into account the homes previous accreditation, compliance and complaints history (DOHA, sub. DR96). In other words, the Agency's risk management approach does not extend to consideration of whether one mandatory unannounced visit for a particular provider is, in some cases, unwarranted.

Subsequent to the release of the Commission's draft report, the Agency outlined its risk management approach:

> The first level of this risk management approach involves site visits, in the form of announced support contacts and unannounced support contacts designed to assess a home's performance against the standards. In doing so, such site visits ascertain whether a home's performance has changed since earlier visits. Site visits are part of the strategy that serves to identify those providers that are the industry's poorest performers.
>
> The second level of the risk management approach is to review the information the Agency has obtained about the home including the performance of the home prior to the visit and determine which areas of its activities will be the focus of the visit.
>
> An accreditation scheme that has a targeted visit program based on a combination of assessed risk (based on information including that provided by the approved provider) coupled with random visits, will give better assurance that the accreditation body has an accurate view of the status of the home. (ACSAA, sub. DR65, p. 7)

If targeted appropriately, unannounced visits can be a useful tool to promote and maintain a high quality of care and accommodation in the residential aged care sector and protect the health and wellbeing of residents. Unannounced visits focused on under-performing homes create the right incentives for poorly performing aged care providers to improve their quality standard (or face sanction by the Department). However, if they apply across the sector irrespective of performance they will not be the most cost-effective or efficient way of improving the health and well-being of residents in under-performing homes.

This is not to say that unannounced visits do not have an important role in ensuring compliance with the accreditation standards. However, the challenge for the Agency is to optimise the level of such visits and also the balance between 'targeted' and 'random' unannounced visits across the industry in a way that achieves the necessary compliance without burdening the vast majority of compliant providers with unnecessary visits.

In the Commission's assessment, while both random and targeted unannounced visits should be a part of the visits program, the focus should be on targeted visits. Only facilities that meet certain risk profile parameters should be subject to targeted unannounced visits. And to reduce the burden on providers, only a further small proportion of facilities should be subject to random unannounced visits.

According to the Agency such unannounced visits are normally one or two days in duration and in rare cases can extend beyond two days:

> … under the current arrangements most homes receive one unannounced visit each year and the duration is variable based on the purpose of the visit. Most two team member visits are concluded in a day. It would be extremely rare for an unannounced visit to extend beyond two days. (ACSAA, sub. DR65, p. 3)

There does not appear to be a widespread problem of sub-standard care in the aged care industry. According to the Agency (2008):

> Of the homes accredited as at 30 June 2008, 1.6 per cent were identified as having some non-compliance. (p. 26)
>
> It is regrettable that the relatively few incidents of poor care are portrayed in the media and by interest groups as a proxy for the industry more broadly. A review of the most recent site audit or review audit decisions taken prior to 31 December 2006 showed that 92 per cent of homes were assessed as complying with all 44 expected outcomes to the accreditation standards. A further five per cent of homes had only one or two non-compliant expected outcomes, and these were quickly rectified. (pp. 2-3)

From the evidence provided it would appear that the standard of care across the industry is excellent — 98.4 per cent of providers are compliant with the government's own accreditation standards (ACSAA 2008, p. 26). But as the

Agency says, this figure is a 'point in time' figure, so it is also important to recognise that in any year around 10 per cent of homes will have identified non-compliance (ACSAA, sub. DR65). However, as quoted above, in most cases this non-compliance is quickly addressed and does not normally result in revocation of accreditation or a reduction in the period of accreditation. As at 30 June 2008, 92.3 per cent of aged care homes were accredited for three years — the maximum accreditation period available.

The level of problems raised in 2007-08 did not point to the need for increasing the number of Agency visits to 7000 in 2008-09, particularly given the increased burden on the industry that this entails. Indeed, if the Agency's current risk management approach had a greater focus on under-performing homes, using a more targeted approach, it is likely that the overall number of visits could have been reduced, while potentially improving resident-focused care.

The Agency appears to be supportive of a less visit-focused approach to monitoring provider compliance with the accreditation standards:

> … having approved providers reporting data to the Agency has the potential to reshape the current visit-centric processes … Such reporting could include corporate information and clinical and lifestyle indicators that would inform the Agency's case management. It is understood that most approved providers already collect such information for their own purposes. (ACSAA, sub. DR65, p. 3)

Subsequent to the release of the Commission's draft report, the Department signalled that it will give consideration to what changes are required to the visits program as part of the broader review of the accreditation process currently underway (DOHA, sub. DR96).

RECOMMENDATION 2.6

The Australian Government should review the Aged Care Standards and Accreditation Agency visits program to residential aged care facilities including the associated visit performance targets. The review should consider whether the visits program would benefit from a risk management approach designed with a greater focus on under-performing homes using a more targeted approach, that could achieve the same objectives (of ensuring compliance with accreditation standards) with less visits imposed on residential aged care providers overall.

Financial reporting regulation

Reporting of prudential requirements

Aged and Community Services Australia is critical of the reporting requirements associated with accommodation bond prudential arrangements set out in the *Aged Care Act 1997* and the User Rights Principles 1997:

> The cost of reporting on accommodation bonds by one service has been estimated at $10 712 … this may not seem onerous if viewed in isolation but the sum total of such requirements is a significant financial and resource impost on aged care providers. Streamlining of these reporting requirements would reduce this compliance cost. (sub. 38, p. 4)

Assessment

The principal objective of the prudential requirements is to protect accommodation bonds paid to approved providers by residents of aged care homes. Approved providers must comply with three prudential standards (the liquidity standard, records standard, and the disclosure standard). According to the Explanatory Memorandum for the Aged Care (Bond Security) Bill 2005, to comply with these standards, approved providers holding bonds are required to:

- submit an annual prudential compliance statement to the Department confirming whether the provider can repay liabilities for accommodation bond balances that can be expected to fall due in the following financial year
- give an audited copy of the annual prudential compliance statement to any resident who has a bond held by the provider
- give the resident, or a prospective resident, *if requested*, the most recent statement of the aged care service's audited accounts, or if the service is operated as part of a broader organisation — the most recent statement of the audited accounts of the organisation's aged care component.

According to the Department:

> … the Disclosure Standard ensures that residents and prospective residents have access to information about the financial status of any approved provider holding accommodation bonds and their performance in meeting their prudential obligations (sub. DR96, p. 6).

Approved providers reported through their annual prudential compliance statements that they held more than 58 000 bonds with a total value of around $7.7 billion at 30 June 2008. The average holding per approved provider was $7.9 million. The

Department issued 17 'warning letters' and one notice of non-compliance to approved providers for prudential non-compliance in 2007-08.

According to DOHA (2008a) the prudential requirements are 'supplemented' by the Accommodation Bond Guarantee Scheme (Guarantee Scheme) established under the *Aged Care (Bond Security) Act 2006*. This scheme guarantees that residents' accommodation bond balances will be repaid in the event that their provider becomes bankrupt or insolvent and defaults on its refund obligations to residents. Provisions in the accompanying *Aged Care (Bond Security) Levy Act 2006* allow the Australian Government to recoup costs it incurs from other providers (to the extent that costs are unable to be recovered from the defaulting approved provider or former approved provider).

The Guarantee Scheme has been triggered three times since its inception. The Department is currently pursuing recovery of the refunded amounts from the defaulting companies. The Government has refunded nearly $20 million to affected residents.

Given the existence of the Guarantee Scheme, which guarantees the refund of accommodation bonds to residents in the event that a provider becomes insolvent, there seems little justification for providers having to make available to care recipients or prospective care recipients information on:

- a statement about whether the provider complied with the prudential standards in the financial year
- an audit opinion on whether the provider has complied with the prudential standards in the relevant financial year
- the most recent statement of the aged care service's audited accounts.

According to the Department, even though there is a safety net (i.e. the Guarantee Scheme), there is still a need for residents and prospective residents to be informed about the financial status of an approved provider because it reduces the 'moral hazard' created by the Guarantee Scheme:

> The Accommodation Bond Guarantee Scheme is intended as a safety net and does not replace the need for approved providers to manage residents' accommodation bonds in a responsible manner. In this respect, the requirement for disclosure for prospective residents and existing care recipients works to reduce the moral hazard created by the Guarantee Scheme through assisting people to make informed decisions about the security of their bonds. (sub. DR96, p. 4)

Moral hazard can be defined as any undesirable change in behaviour due to the fact of becoming insured. If residents and prospective residents' bonds were not 'insured' (i.e. they did not have the backing of a Guarantee Scheme) then they

would have strong incentives to only reside or consider residing with financially prudent providers — which would then encourage or signal to providers that it would be in their own interest to meet their prudential obligations.

But, under the current arrangements an 'insured' resident or prospective resident will not suffer the financial consequences of the decisions they make in regards to the security of their bonds. It therefore appears unlikely that mandatory disclosure to residents and prospective residents (about the financial status of any approved provider and their performance in meeting their prudential obligations) will lead to any significant reduction in moral hazard. Residents and prospective residents would still be able to request such information from the provider if they wished. They can then draw their own conclusions as to the provider's financial status if this information is subsequently not provided.

The Department, as the regulator, is the only entity that requires such information to assist it to take action to ensure the Guarantee Scheme is seldom triggered, so as to minimise costs on the remaining aged care providers and also minimise potential disruption to the accommodation arrangements of clients of aged care facilities.

Removing these disclosure requirements to care recipients or prospective care recipients would not remove the requirement to submit an annual prudential compliance statement to the Department but it would reduce the disclosure burden associated with servicing care recipients and prospective care recipients.

RECOMMENDATION 2.7

The Accommodation Bond Guarantee Scheme ensures the refund of accommodation bonds to aged care residents in the event that a provider becomes insolvent. Given this government guarantee to residents, the Australian Government should amend the prudential standards to remove the requirement on aged care providers to disclose to care recipients or prospective care recipients:

- ***a statement about whether the provider complied with the prudential standards in the financial year***
- ***an audit opinion on whether the provider has complied with the prudential standards in the relevant financial year***
- ***the most recent statement of the aged care service's audited accounts.***

Conditional Adjustment Payment reporting

Aged and Community Services Australia (sub. 34, p. 4) criticised the reporting requirements associated with the Conditional Adjustment Payment (CAP).

Providers must fill out and submit annual notices to the Department between two and four months prior to the actual CAP requirements being lodged (DOHA 2009g).

The specific issue for aged care providers is not the undertaking of the CAP requirements above (although the usefulness of audited general purpose financial reports are discussed in the next section), it is the requirement to lodge separate 'written notices' with the Secretary of the Department demonstrating compliance with each of the three requirements.

Assessment

The CAP was introduced in 2004-05 following a recommendation from the Hogan Review (2004) and is intended to provide an incentive to residential aged care providers to improve their efficiency and productivity by improving corporate governance and financial management practices.

The amount of CAP payable is calculated as a percentage of the basic subsidy amount payable in respect of a resident. In 2004-05 the CAP percentage was 1.75 per cent. It then rose annually in 1.75 per cent increments to 7.0 per cent in 2007-08 . Consistent with the recommendation of the Hogan Review, which saw the CAP introduced as an interim measure, the Australian Government initially only committed to paying the CAP for four years (2004–2008). However, it provided a further $407.6 million in the 2008-09 Budget to increase the level of the CAP to 8.75 per cent.

In response to the recent review of the CAP arrangements — which examined its effectiveness at increasing efficiency and the future need for, and level of this assistance — as part of the 2009-10 Budget, the government froze the CAP at 8.75 per cent over the forward estimates to 2012-13.

CAP funding is voluntary and conditional on approved providers complying with the requirements set out in the Residential Care Subsidy Principles 1997. To receive the subsidy the participating approved provider must:

- encourage and offer opportunities for staff training
- prepare, and make available, audited General Purpose Financial Reports (GPFRs) each year to residents, potential residents, their representatives and any person or agency authorised by the Secretary of the Department
- participate in periodic Departmental workforce surveys.

There seems little justification for the Department to separately ask providers whether or not they have offered staff development/training, prepared audited

general purpose financial reports (GPFRs), or participated in (departmental) workforce surveys. The Department should be able to glean this information from its own records when it, or its contractor (in the case of the workforce survey), receive the actual responses from providers. For example, if a provider lodges its GPFR with the Department, there is no need for a provider to then also lodge a 'CAP Annual Notice' for financial reporting — because the Department has already received the GPFR. The requirements to lodge separate written notices do not appear to provide any useful information to the Department — they are just a compliance burden on providers and should be abolished.

RECOMMENDATION 2.8

The Australian Government should amend the Residential Care Subsidy Principles 1997 to remove requirements on aged care providers to lodge separate written notices with the Secretary of the Department of Health and Ageing demonstrating compliance with Conditional Adjustment Payment reporting.

Audited general purpose financial reports

As discussed above, aged care providers are required to submit audited General Purpose Financial Reports (GPFRs) to maintain their Conditional Adjustment Payment (CAP) funding. Concerns were raised by Grant Thornton Australia (GTA) in relation to the usefulness of such reports in gauging industry performance and also the costs to providers of preparing the information:

> The analysis of general purpose financial reports (GPFRs) provides little value to providers as a tool for assessing industry performance or promoting productivity gains through benchmarking. These reports are more appropriate for large publicly listed companies and their preparation is burdensome for aged care providers. (GTA 2008, p.11)

Aged Care Association Australia is of the view:

> … that the requirement for the retention of the CAP that a provider undertake GPFRs is inefficient and ineffective and that this requirement should no longer be required of providers … ACAA would contend that the requirement for the retention of the CAP to produce audited general purpose financial reports to be replaced by an annual financial benchmark document which entails the submission of an agreed set of financial details which would allow a comprehensive analysis of the industry's viability by a reputable third party organisation. (ACAA, sub. DR68, p. 5)

Assessment

The Hogan Review (2004) suggested that an essential ingredient in improving efficiency in the aged care sector is an improvement in the aged care information

infrastructure to support policy review and development work. The Review recommended:

> … the existing aged care information infrastructure should be substantially expanded, building on the existing expertise within the Australian Institute of Health and Welfare and should include quality and financial performance data. (Hogan Review 2004, p . 290)

Under the CAP reporting requirements developed in response to the Hogan Review, providers must prepare and submit audited general purpose financial reports for the residential care segment of their business according to Australian accounting standards.

Grant Thornton Australia suggests that more comprehensive analysis could be undertaken using less resources, by harnessing data already employed by providers to monitor their own performance, and by contracting the work to an agency independent from aged care funding and policy development, such as the Australian Institute of Health and Welfare:

> The quality of financial data could be improved by:
>
> a. Discontinuing the requirement to provide GPFRs and replacing them with Special Purpose Financial Reports. This would facilitate the benchmarking of key service costs and revenue drivers as well as support prudential regulation analysis.
>
> b. Delegation of the responsibility for collating, analysing and publishing results to an agency independent of aged care funding and policy development, such as the Australian Institute of Health and Welfare. (GTA 2008, p.11)

This issue was also raised at a recent Senate Inquiry on residential and community aged care in Australia, which recommended:

> … the Department of Health and Ageing review the Audited General Purpose Financial Reports with an aim to identifying any necessary reporting changes to ensure that the information available provides a clear and comparative understanding of provider performance (SCFPA 2009, para. 3.31)

There would appear to be scope for the Department to review the current financial reporting arrangements and explore whether there are any alternative reporting mechanisms that deliver superior outcomes for providers both in terms of industry financial benchmarking and compliance cost.

RECOMMENDATION 2.9

The Department of Health and Ageing should review the efficacy of audited general purpose financial reports and consider whether other reporting mechanisms would deliver better outcomes for providers both in terms of comparative financial performance and compliance cost.

Duplicate regulation within and between governments

Duplicate regulatory arrangements are detrimental, not only because they add to compliance costs to aged care providers (for no offsetting benefit to residents), but also because at times they can impose inconsistent requirements on providers. It is important that where duplication or overlap exists and results in an unnecessary cost imposition on providers, Commonwealth and state authorities monitor these areas intently and take coordinated action in the resolution of any issues that arise.

Aged care associations and aged care providers have expressed concern at the number of Australian Government reporting processes and investigations/reviews that may be initiated when incidents occur within residential aged care facilities. In particular, concurrent investigations into non-compliance by the Aged Care Standards and Accreditation Agency (the Agency) and the Department (under the Complaints Investigation Scheme).

Overlapping of responsibilities between the Agency and the Department

Concerns were raised by Aged and Community Care Victoria regarding duplicating responses and doubling-up of investigations into non-compliance when areas of non-compliance have been initially identified by the Agency:

> Part of its obligation is to notify the Department of these non-compliances. This can result in the approved provider having to write up and provide two slightly different reports to the two agencies responding to the identified issues. If the areas of non-compliance are significant and result in the sanction process being invoked, then this dual reporting is further extended.
>
> In addition to the … different reporting requirements and on-site visits of the two entities, the facility is also trying to manage the time requirements of implementing remedial actions while also spending substantial time responding to the requirements of the multiple on-site visits. (sub. 34, pp. 7-8)

Assessment

Duplicate or inconsistent regulation increases the costs imposed by governments on aged care providers. As the Hogan Review (2004) made clear:

> It is incumbent on government to ensure that only regulation which is essential to achieve the objectives of the program is imposed on providers. In the first instance, therefore, governments need to ensure that only regulation which is necessary for the achievement of program objectives is imposed on providers (p. 272).

Overlapping responsibilities between the Agency and the Department could potentially arise because both organisations have responsibilities for monitoring

compliance of aged care homes under the *Aged Care Act 1997* (the Act). However, it is difficult for the Commission to discern the extent and magnitude of duplication. Arguably, because of a lack of effective communication between the Department, the Agency, and the industry, duplication could be more perception than reality for some providers. Subsequent to the release of the Commission's draft report, the Agency has noted the problems with this lack of communication and proposed addressing this situation, with the assistance of the Department:

> Within the sector and community there is often confusion and sometimes misinformation concerning the objectives of accreditation schemes and particularly in relation to the residential aged care accreditation arrangements. (ACSAA, sub. DR65, p. 1)
>
> The Agency is of the view that the delineation is not well understood by the community and (some) approved providers. The Agency and the Department should develop a strategy to correct this. (ACSAA, sub. DR65, p. 3)

The Department is required to take action when providers of aged care homes are non-compliant with their responsibilities set out in Parts 4.1 (Quality of Care), 4.2 (User Rights) and 4.3 (Accountability) of the Act. This includes taking into account providers' compliance with the accreditation standards. While the Agency is focused on a provider's compliance with accreditation standards, the Department's role is wider, encompassing providers' responsibilities in matters such as certification, fees and charges and specified care and services.

The Agency manages the process of accreditation of residential aged care facilities in accordance with the Accreditation Grant Principles 1999. The Agency assesses and monitors aged care facilities against the accreditation standards. Where a facility fails to meet the expected outcomes under the accreditation standards, the Agency may place the facility on a 'Timetable for Improvement' within which compliance must be achieved; may recommend to the Department that sanctions be imposed; and/or may decide to vary a facility's period of accreditation or revoke accreditation (DOHA 2005).

If the Agency identifies a failure by an aged care facility to comply with the accreditation standards and that failure has or may place the safety, health or wellbeing of residents at serious risk, then the Agency must inform the Department immediately in writing, about the failure and any concerns it may have. The Agency may also make recommendations on whether sanctions should be applied. The Department may take action in proportion to the nature and level of non-compliance, including the imposition of sanctions (DOHA 2005).

The Act sets out a series of formal steps the Department may take where non-compliance is identified. These steps can lead to the imposition of sanctions. Different sanctions may be imposed depending on the circumstances of the non-

compliance (box 2.5). Sanctions action taken by the Department, having regard to the information required to be taken into account by part 4.4 of the Act (Consequences of non-compliance), may include reports by the Agency or reports by authorised officers of the Department (DOHA 2005).

Box 2.5 What sanctions can be imposed?

The Secretary of the Department may impose one of the following sanctions in writing:

- revoking or suspending approval as a provider of aged care services
- restricting approval to existing services or places
- restricting funding to existing residents
- revoking or suspending the existing allocation of places
- varying the conditions of approval for allocated places
- prohibiting further allocation of places
- revoking or suspending extra service status
- prohibiting granting of approval for extra service status
- revoking or suspending certification
- prohibiting the charging of accommodation charges/bonds
- requiring payment of grants
- such other sanctions as are specified in the Sanctions Principles.

In 2007-08, the Department took sanction action against 14 approved providers, including the issue of 15 notices of decision to impose sanctions. The Department also issued 75 notices of non-compliance.

Information about current sanctions imposed by the Department is provided on the Department's website. The site is updated weekly. Information on sanctions which have expired or have been lifted, is listed on an archive site.

Source: DOHA (2005; 2008a).

Overlap between the organisations is most likely when departmental authorised officers monitor compliance with accreditation standards in those circumstances where notices of non-compliance or sanctions are contemplated. According to the Department:

> Authorised officers may be directed to conduct unannounced visits to an aged care home. These visits are known as 'spot checks'. On other occasions authorised officers may be directed to conduct a 'site visit', which would include notifying the approved provider of the intended visit and agreeing to a mutually acceptable time. (DOHA 2005, p. 15:5)

Once non-compliance with the accreditation standards has been referred to the Department (from the Agency), or the Department unilaterally decides to commence compliance action, it is not clear why there should be any on-going role for the Agency.

While the Agency and the Department have a protocol regarding actions each organisation takes when non-compliance is identified or suspected, this protocol allows both organisations to make independent decisions — which increases the potential risk of duplication:

> The protocol supports coordination of actions to deal with non-compliance, with the Department and the Agency making independent decisions about appropriate action. (ACSAA 2008, p. 8)

To add to provider confusion regarding each organisation's roles and responsibilities monitoring compliance with the accreditation standards, the Department's Aged Care Complaints Investigation Scheme (CIS) can refer accreditation issues to the Agency that have arisen from complaints to the Department. In responding to a complaint, the CIS may refer issues to external agencies better placed to deal with the matters raised. During 2007-08, the CIS made 2000 referrals to external agencies. Of these referrals, approximately 1770 (or 88 per cent) were made to the Agency by the CIS (box 2.6).

According to the Department, the CIS focuses on issues which affect individual residents and the Agency focuses on systemic issues, with the protocol in place to minimise overlap between the two organisations:

> Broadly speaking, the CIS investigates cases which affect individual residents and takes action to remedy concerns for that individual. The CIS refers all issues, which appear systemic in nature, to the Agency for consideration and action.
>
> If considered appropriate, the Agency may then assess the home to ascertain if it has appropriate systems in place.
>
> To achieve the best outcome for residents of aged care, the Department and the Agency have implemented protocols to regulate referral and compliance monitoring processes. (sub. DR96, pp. 6-7)

As recognised by the Agency, there needs to be concerted effort made by the Department and the Agency to more effectively communicate the delineation of compliance monitoring responsibilities to aged care providers. To this end it would be useful to issue all providers with a copy of the protocol between the two organisations which explains the actions each organisation takes when non-compliance is identified or suspected. Legislative amendments should also be considered if this would provide a clearer delineation of compliance monitoring responsibilities between the Department and the Agency.

Box 2.6 **Complaints Investigation Scheme**

The CIS was established on 1 May 2007 and covers both residential and community aged care services.

Anyone can contact the CIS with a concern, including care recipients, family members, care providers, staff members and health professionals. Complaints can be made openly, anonymously or on a confidential basis and can be about anything that affects the quality of care for aged care recipients. The majority of the complaints to CIS involve health and personal care (continence management, clinical care and infectious diseases), consultation and communication, physical environment, personnel and abuse (physical and verbal).

The CIS has the power to conduct investigations on its own initiative and issue Notices of Required Action (NRA), where a provider is found to be in breach of their responsibilities under the Act.

Each NRA sets out the details of the breach, what the provider must do to address the breach and the timeframe in which this action must be taken. The intention of the NRA is to give the provider an opportunity to address the breach before compliance action is considered. In 2007-08 the CIS issued 214 NRAs.

CIS officers may visit the approved provider when investigating a complaint. Visits may be announced or unannounced. In 2007-08 the CIS conducted 3127 visits of which 1145 were unannounced.

During the course of investigating a case, the CIS may refer issues to an external agency more appropriately placed to deal with the matters raised. For example, criminal issues are referred to the relevant jurisdiction's police service, while issues that relate to the conduct of a health professional are referred to the relevant health professional regulatory body, such as the Nurses Registration Board, Medical Board and the Health Care Complaints Commission.

Between 1 July 2007 and 30 June 2008, the CIS made 2000 referrals to external agencies. Approximately 88 per cent (or 1770) of these referrals were made to the Aged Care Standards and Accreditation Agency on accreditation issues.

Source: DOHA (2008a).

Providers have indicated strong support for the release of the protocol between the Department and the Agency and also support better communication by these organisations with the industry. For example, UnitingCare Australia said:

> We confirm our support for information to be released on the protocols in place between the Department of Health and Ageing and the Aged Care Standards and Accreditation Agency in overseeing provider compliance. We hope that this information will clearly outline where the responsibility of each [organisation] begins and ends as well as assist the industry understanding the exchange of information and the expectations of each [organisation] on the other with respect to responses to such information. We would support any further communications by the Department and the

> Agency to better explain the delineation of their respective roles and accountabilities to better equip approved providers in staff and consumer education. (sub. DR70, p. 5)

As a general rule, once non-compliance with the accreditation standards has been referred to the Department (from the Agency), or the Department unilaterally decides to commence compliance action, the compliance monitoring role of the Agency should stop, pending the outcome of any compliance action taken by the Department. There would appear to be little justification for both the Department and the Agency to be concurrently involved in conducting independent investigations of the same issue of non-compliance by a particular aged care provider.

On 25 July 2009, the Minister for Ageing announced a review of the operation of the Aged Care Complaints Investigation Scheme. The terms of reference include considering 'the relationship between the CIS, the Aged Care Commissioner, the Aged Care Standards and Accreditation Agency Ltd, and other relevant bodies' (Elliot 2009b). The Australian Government should use this review to assist in clarifying the respective roles of the Department and the Agency.

RECOMMENDATION 2.10

The Department of Health and Ageing and the Aged Care Standards and Accreditation Agency must clarify their respective roles to the industry regarding the monitoring of provider compliance with the accreditation standards. To achieve this, an effective communication strategy should be implemented in conjunction with the immediate release of the protocol between the two organisations (which explains the actions each organisation takes when non-compliance is identified or suspected). Legislative amendments should also be considered, if required.

Duplicate regulation between the Australian and state/territory governments

Aged care providers have also expressed concern at the overlap between federal and state regulation in a number of areas. The main issue raised by age care associations is the duplication of processes between the Commonwealth accreditation-based quality assurance scheme (and in some cases also the Department) and state and local government regulation. Particular examples mentioned include: infectious disease outbreaks, occupational health and safety reporting, food safety, nursing scope of practice and fire safety.

Infectious disease outbreaks

According to Aged and Community Care Victoria the regulatory burden in aged care for infectious disease outbreaks like gastroenteritis is more onerous than in health (private and public hospitals) or human services (child care centres):

> In incidents such as gastroenteritis outbreaks, private and public hospitals and human services and residential aged care facilities are all required to notify the relevant state health authorities' infectious diseases units for assistance with incident management.
>
> In the aged residential care sector, there is also a requirement upon the provider to notify the Department of Health and Ageing, who, in turn, will likely respond directly through its own compliance investigation as well as triggering the Aged Care Standards and Accreditation Agency to also undertake a partial or full accreditation review of the residential aged care facility. (sub. 34, p. 5)

Aged and Community Services Australia (sub. 38) and Aged and Community Care Victoria (sub. 34) said this duplication of reporting requirements resulted in resources being drawn away from resolving the infectious disease outbreak with the relevant state health authority.

Occupational health and safety

Aged and Community Care Victoria also suggest that there is duplication of occupational health and safety regulation between state authorities and the Aged Care Standards and Accreditation Agency:

> In Victoria, occupational health and safety is governed by the Occupational Health & Safety Act 2004 and the Victorian WorkCover Authority is charged with the responsibility and authority to operate the legislation. In turn WorkSafe Victoria is the manager of Victoria's workplace safety system.
>
> Under Standard 4 of the Commonwealth residential Aged Care Standards, which govern quality and systems around physical environment and safe systems, there is an observed tendency of individual reviewers to make judgement and recommendations about occupational health and safety matters. For the Aged Care Standards and Accreditation Agency to attempt to do this is unnecessary duplication of a well established regulatory role of state government. (sub. 34, pp. 6-7)

Food safety

Aged and Community Services Victoria indicate that the Commonwealth accreditation arrangements which focus on the safe handling of food and the preparation of meals impose additional operational costs on accredited providers who are subject to the Victorian Food Act 1984:

> In Victoria, food safety is governed by the Food Act 1984 ... In relation to residential aged care facilities this Act is the means through which the National Food Safety Standards are applied, municipal councils register food businesses as defined in the Act and whereby food safety programs are a prescribed pre-condition for food business registration.
>
> Under this legislation annual reviews of food preparation facilities and systems in businesses including hospitals and aged care facilities have been occurring for 11 years in Victoria … Any attempt by the Aged Care Standards and Accreditation Agency to have non-experts comment or make recommendations in relation to food safety is another confusing duplication of regulation. (sub. 34, p. 7)

Assessment

Under the *Aged Care Act 1997*, aged care homes must be accredited to receive Australian Government subsidies. The Aged Care Standards and Accreditation Agency (the Agency) manages the accreditation of aged care homes in accordance with the Accreditation Grant Principles 1999. Under the accreditation process the Agency assesses the performance of homes against the 44 expected outcomes of the four Accreditation Standards:

- management systems, staffing and organisational development
- health and personal care
- resident lifestyle
- physical environment and safe systems.

The Agency is an independent company, wholly-owned by the Australian Government, established under Corporations Law and the *Commonwealth Authorities and Companies Act 1997*. The core functions of the Agency are to:

- manage the residential care accreditation process using the Accreditation Standards
- promote high quality care and assist industry to improve service quality by identifying best practice, and providing information, education and training
- assess and strategically manage services working towards accreditation
- liaise with the Department about services that do not comply with the Accreditation Standards.

At the same time, residential facilities are also required to comply with state and local government regulation on those matters referred to above, matters which apply to a range of public facilities including residential aged care facilities.

According to the Department, a public review of both the accreditation process and standards is currently underway:

> The Department is currently reviewing the Accreditation Standards and the accreditation process used by the Aged Care Standards and Accreditation Agency to assess Commonwealth funded residential aged care homes against the Standards. The review of the accreditation process aims to explore opportunities to reduce the administrative burden on aged care providers and facility staff, while promoting a robust, resident centred, accreditation system, which promotes high quality care. (sub. 44, p. 5)

According to the Department the scope of the review of the accreditation process includes the:

- legislative role of the accreditation body
- the role of accreditation in stimulating continuous improvement
- accreditation processes
- types of audits and visits
- fee structure
- accreditation decision considerations.

A discussion paper has been released, which provides the basis for consultation with consumers of residential aged care services, the aged care industry, and the general public about the review of the accreditation process. Following the public consultation process, the Department will develop options for reforming the accreditation process for consideration by the Minister in September 2009.

At the same time, a review of the accreditation standards is being undertaken separately within the Department. The review will focus on:

- identifying areas requiring clarification and improvement
  - addressing apparent omission and duplications
  - identifying any need for restructuring and strengthening of links with the legislation
- developing a framework for ongoing review.

A tender process will be undertaken by the Department to engage a consultant to progress the review of the standards and pilot the revised standards in a number of aged care facilities. The draft standards are expected to be ready for consideration by the Minister at the end of 2009.

Subsequent to the release of the Commission's draft report, the Department disagreed with the view that there was duplication between the Agency and State/local government regulators. The Department nevertheless indicated the concerns of approved providers would be incorporated in the current reviews of the accreditation process and standards.

> The Department is of the view that that there is no duplication between State/local Government legislation and the activities of the Agency as the Agency assesses whether a home has systems in place to identify and ensure compliance with all relevant legislation, regulatory requirements, professional standards and guidelines.
>
> Agency quality assessors do not assess whether or not the Service is actually complying with various State/Territory regulations, as it remains the responsibility of the approved provider to ensure compliance.
>
> Nevertheless, the concerns of approved providers in respect of this matter will be incorporated into the reviews of the accreditation process and Standards, with a view to minimising confusion about the requirements in respect of regulatory compliance. (sub. DR96, p. 8)

The Department should use these current review processes, in consultation with state and territory governments, to determine the extent to which duplicated or inconsistent regulatory arrangements impose unnecessary costs on aged care providers. Once identified, onerous duplicate and inconsistent regulations should be removed, as far as possible, so that aged care providers can work within a consistent regulatory framework without unnecessary cost impositions. At a minimum, aged care providers should not be reporting separately to two levels of government in relation to a single issue. Compliance with one level of government should be sufficient to satisfy the needs of other levels of government.

RECOMMENDATION 2.11

The Department of Health and Ageing, in consultation with relevant state and territory government departments, should use current reviews of the accreditation process and standards to identify and remove, as far as possible, onerous duplicate and inconsistent regulations.

Nursing scope of practice

Aged and Community Care Victoria are also concerned with the Agency attempting to widen the scope of practice of Victorian Division 2 registered nurses. It says:

> It interferes with the productivity in the sector, confuses providers and makes for unnecessary duplication of regulation when individual assessors undertaking reviews for the Aged Care Standards and Accreditation Agency attempt to delimit the scope of practice of Victorian Division 2 Registered Nurses (known in other states as enrolled

nurses) when their scope of practice under their registration has already been determined in Victoria. (sub. 34, p. 7)

Assessment

This scope of practice issue was considered in a case that went before the Federal Court in 2004 (box 2.7). The Federal Court affirmed that Division 2 nurses cannot administer medication to aged care residents. This has resulted in the Victorian laws remaining more prescriptive than the Commonwealth's *Aged Care Act 1997* and Aged Care Principles in relation to the competency of different categories of staff to administer medication.

Box 2.7 **Federal Court decision on Victorian enrolled nurses**

In April 2004, the Federal Court determined that a Swan Hill Hostel unlawfully discriminated against eight enrolled nurses (Registered Nurse Division 2) who were dismissed after refusing to administer medications to residents.

The Court also ruled that the Hostel was a 'health service' meaning that under Victorian law, hostel management must ensure only Division 1, 3, or 4 registered nurses administer medications to residents.

The nurses' employment was terminated in early 2003 after management attempted to reclassify them as personal care workers in a bid to have them administer medication to the hostel's residents. The enrolled nurses employed by the facility were told that if they refused the direction to reclassify as personal care workers and administer medication, their employment would be terminated.

The Australian Nursing Federation took the matter to the Federal Court on the basis that the requirement for enrolled nurses to reclassify as 'personal care workers' and administer medication was in breach of the Nurses (Victorian Health Services) Award 2000 because the Victorian *Drugs, Poisons and Controlled Substances Act 1981* provides that only a Registered Nurse Division 1, 3, or 4 may administer medication in a health service.

The Nurses (Victorian Health Services) Award 2000 states that "… an employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training."

As medication administration is beyond an enrolled nurse's scope of practice and educational preparation under the *Drugs, Poisons and Controlled Substances Act 1981*, the Australian Nursing Federation successfully argued that the direction to administer medication was beyond the limits of the employee's skill, competence and training.

Source: ANHECA (2004).

The Hogan Review (2004) said:

> This restriction reduces the efficient management of aged care facilities, again without any noticeable benefit to residents. (p. 267)

According to the Commission (PC 2008c), the Australian Medical Association and nursing organisations have in the past expressed concerns about expanding the scope of practice and the impact this could have on safety standards and public confidence. The Commission proposed a health workforce improvement agency which would undertake an objective and transparent assessment of the potential opportunities for, and concerns relating to, expanding the scope of practice (PC 2005). In response, COAG established the National Health Workforce Taskforce (NHWT) to inform development of practical solutions on workforce innovation and reform.

More recently, COAG (2008d) announced it is establishing a new agency, the National Health Workforce Agency, to oversee reforms to the Australian health workforce. The Agency will subsume the current NHWT activities and assume responsibility for its work program encompassing workforce planning and research; education and training; and innovation and reform (NHWT 2009).

In addition to progressing the NHWT work program, COAG (2008d) has announced the following major reforms which the Agency will manage and oversee:

- improving the capacity and productivity of the health sector to provide clinical education for increased university and vocational education and training places
- funding and payment mechanisms to support new models of care and new and expanded roles
- redesigning roles and creating evidence-based alternative scopes of practice
- developing strategies for aligned incentives surrounding productivity and performance of health professionals and multi-disciplinary teams.

In the short-term it is important for aged care providers that there is greater mutual understanding and coordination between the Commonwealth accreditation agency and state/territory regulators to avoid unnecessary confusion over the existing scope of practice. However, in the longer term, extending the scope of practice is likely to improve productivity and also improve job satisfaction for nurses within the aged care industry. As the PC (2008c) said:

> Allowing workers with appropriate training to provide services in more flexible ways may make the aged care sector more attractive to current and prospective workers and thereby help to alleviate workforce shortages. (p. 150)

The National Health Workforce Agency is expected to deliver a national roll-out of workforce redesign programs (including extended scopes of practice) by September 2010 (COAG 2008d). Further delays or on-going slippage in this reform timeframe should be avoided.

Building certification regulation

Fire safety declaration

Aged care providers have called for the removal of the annual fire safety declaration (Catholic Health Australia, sub. 18, p. 2; Aged and Community Services Australia, sub. 38, p. 2) because it is now viewed as an unnecessary cost imposition with no offsetting fire safety benefits.

Assessment

The annual fire safety declaration was introduced by the Australian Government in 1999 as a means of improving the fire safety of aged care homes (box. 2.8). Approved providers of residential aged care are required to complete a fire safety declaration for each calendar year.

Since November 2003, the Department has required all residential aged care services to complete an annual fire safety declaration. The declaration seeks assurances that Australian Government funded aged care homes have complied with all applicable state, territory and local government fire safety laws. Providers with more than one residential aged-care service must complete a separate fire safety declaration form for each service.

The Department may take action if an approved provider fails to meet its responsibility to complete the fire safety declaration. The provider may be subject to compliance activity or a review of the service's certification.

If the declaration indicates a matter of concern, the Department will refer the matter to the relevant state, territory or local government fire authority which is responsible for enforcing fire safety regulations for follow-up and necessary action to remedy any deficiencies in fire safety standards. The matter may also be referred to the Aged Care Standards and Accreditation Agency, and the Department may review the service's certification.

Box 2.8 **Achieving mandatory fire safety standards**

In 1999 a 10 Year Forward Plan to improve building quality was agreed with aged care industry representative groups. The 10 year plan set targets for all aged care homes to achieve mandatory fire and safety standards (as well as privacy and space requirements).

For fire and safety, homes had until 31 December 2005 to achieve a score of at least 19/25 when measured against the safety criteria of the 1999 Certification Assessment Instrument (box 2.10).

In June 2004, $3500 per resident was paid to all aged care providers (totalling around $513 million) in recognition of the increased standards of building quality under the 10 Year Forward Plan, and particularly the higher standards relating to fire and safety. Approved providers were required to use the funds to:

- update or improve fire safety standards, including upgrading existing fire safety equipment to meet state, territory and local government regulatory requirements, to meet the standard set in the 1999 Certification Assessment Instrument, including:
  - installation of fire sprinklers
  - updating or improving fire safety equipment
  - engaging the services of professional fire safety consultants
  - improving the level of staff fire safety training.
- invest in building upgrades to meet the benchmarks of the 10 year forward plan for certification
- ensure that high care residents, including residents who are ageing in place, are accommodated in buildings of the appropriate building classification.

When fire safety requirements (including compliance with all relevant state/territory/local government safety requirements) and the certification requirements are met the funds could be used to:

- improve the quality and range of aged care services
- retire debt related to residential care.

Source: DOHA (2009e).

Subsequent to the release of the Commission's draft report, the Department said:

> The annual Fire Safety Declaration made to the Department of Health and Ageing provides evidence of compliance by residential aged care services with State, Territory and local government fire and safety regulations.
>
> The annual declaration is one method of measuring and promoting safety in Commonwealth funded residential aged care services. (sub. DR96, pp.8-9)

But given the achievement of the fire safety standards by nearly all aged care providers — 99 per cent of aged care homes had met the fire and safety

requirements at 30 June 2008 (DOHA 2008a) — this regulatory requirement is unnecessarily burdensome and duplicative. Measuring and promoting safety is the responsibility of state and local fire safety authorities.

This annual fire safety declaration should be removed for those providers that have met state, territory and local government fire safety standards. Only those homes that have not met the fire safety requirements the previous year should be compelled to submit a fire safety declaration in the following year. In effect, once an aged care facility has been declared compliant with the Australian Government fire safety certification arrangements, it would then be left to the relevant state, territory and local government authorities to enforce fire safety regulations and there would be no further Australian Government involvement.

RECOMMENDATION 2.12

The Australian Government should abolish the annual fire safety declaration for those aged care homes that have met state, territory and local government fire safety standards.

Building certification

Aged care associations and aged care providers have concerns with the Australian Government building certification standards which largely duplicate (and in some areas exceed) the requirements under the Building Code of Australia (BCA), which is administered by the states and territories (Catholic Health Australia, sub. 18, p. 2; Aged and Community Services Australia, sub. 38, p. 2).

Assessment

Building certification was introduced as part of the Australian Government's 1997 reform package to improve the physical standards of aged care facilities (box 2.9). While the Australian Government maintains that its certification standards are needed to address issues of poor building stock within the industry, there are only two criteria — privacy and space requirements — that are not covered by the Building Code of Australia (BCA).

The 10 Year Forward Plan, discussed previously, set new standards for privacy and space for residents and the ratios of toilet and bathing facilities in residential aged care homes. This requirement relates to numbers of residents per room and ratios of toilets and bathing facilities. The privacy and space requirements each home must meet depend on whether they are an existing aged care home or a new home.

Box 2.9 **1999 Certification Assessment Instrument**

Buildings are expected to meet the requirements of the 1999 Certification Assessment Instrument. This means that they must achieve an overall score of 60/100 and a mandatory score of at least 19/25 on section 1 (safety), as well as meeting the privacy and space requirements. The instrument includes seven sections, each of which assesses an aspect of building quality. Weighted scores are awarded for each section:

- safety (25 points maximum)
- hazards (12 points maximum)
- privacy (26 points maximum)
- access, mobility and occupational health and safety (13 points maximum)
- heating/cooling (6 points maximum)
- lighting/ventilation (6 points maximum)
- security (12 points maximum).

Most new buildings will meet certification requirements if they conform with the Building Code of Australia (as applied in the relevant state or territory).

The certification status of an existing service may be reviewed at any time. This can include assessment of any aspects of the service that is thought relevant to its continuing suitability for certification.

Re-certification is not mandatory after building upgrading or refurbishment, unless it is a condition of a capital grant. However, the Department will ask for copies of relevant local authority approvals as evidence of a service's continuing suitability for certification. The Department may ask a service that has undertaken building works to be reassessed to confirm that it remains suitable for certification. The Department bears the costs of the assessment.

Source: DOHA (2005; 2009f).

According to DOHA (2008a) under the privacy and space requirements, every aged care home that was constructed prior to July 1999 is required to have no more than four residents accommodated in any room, no more than six residents sharing each toilet and no more than seven residents sharing each shower or bath.

All new buildings constructed since July 1999, are required to have an average, for the whole aged care home, of no more than 1.5 residents per room. No room may accommodate more than two residents. There is also a mandatory standard of no more than three residents per toilet, including those off common areas, and no more than four residents per shower or bath.

Of the 2804 aged care services operating in Australia as at 30 June 2008, 2642 (or 94 per cent) were fully compliant with the privacy and space requirements (DOHA

2008a). Approved providers had until December 2008 to meet privacy and space requirements.

As proposed by the Regulation Taskforce (2006) these privacy and space criteria could be mandated separately, thereby reducing the costs of duplicating the BCA. Or alternatively, as proposed by Catholic Health Australia, the requirements could be incorporated into the BCA:

> Now that the upgrading of the existing stock has been achieved, the certification standards (to the extent that they are not) should be incorporated in the Building Code of Australia and thereby avoid ongoing regulatory duplication between the BCA and the building certification program. (If there is a residual of homes that have not met the certification standards, they alone could remain subject to building certification processes). (sub. 18, p. 2)

The advantage of incorporating the privacy and space requirements into the BCA is that it would remove the Australian Government certification process altogether — mandating these requirements separately would mean a certification process would still exist, albeit a much narrower one than exists at present.

However, removing the certification process altogether will mean that aged care services will only be assessed at the time of construction. At the state level, the building regulations, including the provisions of the BCA incorporated by reference, are applicable to buildings only when they are being built. At the Australian Government level, on the other hand, certification requires compliance with the certification instrument, on each occasion when the certification process is carried out (Hogan Review 2004).

This should no longer be a significant issue given that the overwhelming majority of aged care facilities now meet the certification standard. Those few homes that do not meet the standard could still be subject to the Australian Government certification requirements until they are assessed as compliant. Once all homes have met the current certification standard the BCA would then be the only requirement providers would need to conform with — the BCA would then set the nationally consistent standard in residential aged care to ensure that residents are provided with an appropriate built environment.

Moreover, incorporation of the privacy and space requirements into the BCA would appear to be a straight-forward process. The Australian Building Codes Board (ABCB) uses a Proposal for Change (PFC) process to consider proposals to change the BCA. Proponents of change (government, business or individuals) are required to provide adequate justification to support their proposal. The PFC process is consistent with COAG best practice regulatory principles to ensure appropriate rigour is used in the assessment of proposals.

The Department of Health and Ageing should submit a Proposal for Change to the Australian Building Codes Board requesting the privacy and space requirements contained in the current building certification standards be incorporated into the Building Code of Australia. Newly constructed aged care facilities would then only be required to meet the requirements of the Building Code of Australia. Once all existing residential aged care facilities have met the current building certification standards those standards should be abolished.

Unfinished business from the Regulation Taskforce

Providing choice in aged care accreditation

Aged and Community Services Australia continues to question the efficacy of having only one provider of aged care accreditation, the Aged Care Standards and Accreditation Agency (sub. 38, p. 3).

Assessment

The Aged Care Standards and Accreditation Agency (the Agency) manages the accreditation of residential aged care homes by assessing compliance with the quality standards on behalf of the Australian Government. Other accreditation bodies provide services to community care programs and retirement villages.

The Agency advises the Department of aged care providers that are not meeting their obligations under the *Aged Care Act 1997*. The Department is responsible for taking action against services that are found to be non-compliant, including suspension of funding and, in the case of the most serious breaches, revocation of approval.

As the Regulation Taskforce (2006) outlined, the agency is an independent, wholly owned Australian Government company with exclusive rights to manage the accreditation process. It is funded by Australian government grants ($21 million in 2008) and accreditation fees paid by individual aged care providers ($4.3 million in 2008).

The Regulation Taskforce recommended that:

> … the Australian Government should allow residential aged care providers to select from a range of approved quality improvement and quality management agencies. (Regulation Taskforce 2006, p. 35)

The Taskforce argued that increased competition among accreditation providers could reduce the costs of accreditation to the residential aged care industry and the government and at the same time reduce the burden of having to deal with several accreditation bodies for those aged care providers whose services straddle residential care, community care and retirement villages.

In not accepting the Regulation Taskforce (2006) recommendation to allow residential care providers choice of accreditation agencies, the Australian Government (2006) stated:

> Accreditation is part of a system to make considered decisions on access to government subsidies, action in response to non-compliance and the application of sanctions. It is a pre-requisite for receiving government subsidies.
>
> Although the *Aged Care Act 1997* allows for more than one accreditation agency to be established, the 2004 Hogan Review considered the role of the Agency as the sole accreditation body for the purposes of the Act should remain. These arrangements ensure national consistency in determining entitlements to government subsidies and in decisions to revoke accreditation and withdraw subsidies. (Regulation Taskforce 2006, p. 12)

It is not clear that the Hogan Review (2004) envisaged ACSAA remaining the sole accreditation body indefinitely, rather there should be a period of stability in accreditation arrangements until the industry matures:

> In view of the immaturity of the industry overall, the Review considers there is no good reason at this time to change the role of the Agency as the sole accreditation body for the purposes of the Aged Care Act. (p. 283)

On this issue, the current accreditation provider, the Aged Care Standards and Accreditation Agency, endorsed the conclusions of the Senate Community Affairs References Committee 2005 inquiry into quality and equity in aged care:

> The Committee does not support the suggestion proposed by several [residential aged care] providers of allowing a range of agencies to provide accreditation services. It believes that such an approach has the potential to lead to greater inconsistency in assessment outcomes by involving a greater number of organisations in providing accreditation services. The Committee also considers that it may encourage providers to 'shop around' for a 'soft' auditor and is not convinced that the JAS-ANZ arrangements would militate against this potential outcome. (SCARC 2005, p. 43)

For the same reason, National Seniors Australia was also not supportive of allowing competition between accreditation agencies:

> Given the importance of the accreditation process, one body should be responsible for its implementation. The emphasis on cost-cutting does not adequately take into account the potential for inconsistency of approaches (if not the laws) between agencies. (sub . DR95, p. 6)

Subsequent to the release of the Commission's draft report, the Department also indicated that it considered having (only) one accreditation body was important to provide consistency in assessment, but indicated the issue of choice in accreditation would be examined in the current accreditation reviews:

> Currently, Government policy is that having one accreditation body is important to provide consistency of assessment. Any change to the arrangement would need to be considered by the Government in the context of responding to the reviews underway on accreditation processes and standards. (sub. DR96, p. 9)

On the other hand, COTA National supported greater competition in the accreditation market, and saw it as a way of facilitating the separation of the Agency's accreditation (and education) function from its 'policing' roles:

> There is a strong professional argument that the processes of accreditation and indeed industry education should be separate from monitoring, complaints investigation and compliance processes, which might be characterised as 'policing'. If accreditation was independent and competitive as in the rest of the health sector, then a new agency, independent of but funded largely by federal government, could undertake monitoring, complaints handling and other quality compliance activities. COTA has long argued that these functions should be separate from the Department. (sub. DR94, p. 8)

Allowing the entry of more than one accreditation body would be unlikely to have negative consequences for accreditation standards in residential aged care. Alternative options to provide quality management and quality improvement are available now. As Aged and Community Services Australia states, the Joint Accreditation System of Australia and New Zealand (JAS-ANZ) provides a mechanism to accredit bodies providing accreditation services and facilitates a common approach to accreditation (sub. 38, p. 3).

JAS-ANZ was discussed by the Commission in its recent research report on standard setting and laboratory accreditation:

> JAS-ANZ is a government-owned, international body established in 1991 by formal agreement between the Governments of Australia and New Zealand. Its primary function is to accredit organisations which conduct certification programs for quality management systems, product conformance and personnel certification. JAS-ANZ can also accredit inspection bodies.
>
> JAS-ANZ operates on a not-for-profit, self-funding basis and is controlled by a governing board appointed by the Australian and New Zealand Governments. Neither government provides funding to JAS-ANZ. (PC 2006c, p. 190)

If a body such as the JAS-ANZ was used to assess accreditation bodies then it does not necessarily follow that:

- inconsistency in assessment outcomes would be any greater than they are now

- residential aged care providers would be in a position to 'shop around' for the easiest process to achieve accreditation
- there would be a 'race to the bottom', with significant erosion in accreditation standards.

The Regulation Taskforce considered that increased competition may achieve the government's quality assurance objectives at lower cost to industry and government. While the cost savings to industry (in the form of fees) and government (in the form of grants) may not be that large, the greatest benefit to industry could potentially be in ensuring that providers do not have to deal with multiple accreditation bodies to cover all of their aged care activities. As the Regulation Taskforce (2006) stated:

> … it would benefit those providing a broader range of services to older people, including retirement villages and community-based and other residential care programs. (p. 34)

The larger the number of aged care providers that participate in other aged care activities (beyond residential aged care) where accreditation is undertaken the larger these particular benefits will be.

But, according to the Agency, it estimates that most providers of residential aged care services do not have other business interests which involve accreditation processes:

> While there is no accurate data available, the Agency estimates that most approved providers of Australian Government subsidised residential aged care services have residential aged care as their sole business activity. (ACSAA, sub. DR65, p. 4)

Even if there were only a small number of providers who are engaged in multiple accreditation activities, the competition benefits of removing the restriction on choice of accreditation agency would still outweigh the costs, so long as assessment outcomes were appropriately monitored to ensure that the inconsistency under the proposed more competitive accreditation arrangement were no greater than under the current accreditation arrangement.

RECOMMENDATION 2.14

The Australian Government should allow residential aged care providers choice of accreditation agencies to introduce competition and to streamline processes for providers who are engaged in multiple aged care activities.

Other concerns raised

Proposed community care standards and reporting processes

Some providers of community care are critical of the draft community care standards being developed in response to the previous Government's policy document, *A New Strategy for Community Care – The Way Forward* (2004), that was aimed at streamlining reporting processes in community care. Aged and Community Care Victoria are concerned about how providers would be assessed by auditors against the proposed standards:

> … these standards have been developed as a "locked down" package with the performance criteria and the guide not simply published as standards of an aspirational or principled nature ... they are highly prescriptive and risk being incorrectly interpreted in their application by auditors who have not worked in the field with various organisation types or particular funded programs. (sub. 34, p. 12)

Aged and Community Services Australia (sub. 38) do not support the shift in focus of the standards away from fostering continuous improvement towards compliance. It is also concerned that the current reform process may not deliver on its promise to streamline quality reporting because some duplicative processes would continue because of continued jurisdictional disagreements:

> … even with the introduction of streamlined standards and reporting documentation, providers will be required to undergo the same process twice where they receive Commonwealth funding … and Commonwealth/State funding. The jurisdictions have not been able to agree to a single reporting and assessment process which will significantly undermine any potential benefit of common standards and double the costs of implementation for both governments and service providers. (sub. 38, p. 6)

Assessment

Currently, there is no single set of standards that service providers report against for community care programs. Instead, there are a number of standards and frameworks. As a result, service providers report against various standards to different bodies and there is a high degree of duplication and overlap. Some of these standards are:

- the Accountability Reporting model developed for the providers of Community Aged Care Packages, Extended Aged Care at Home and National Respite for Carers Program
- Quality Improvement Council Standards (QIC)
- the Australian Council on Health Care Standards (EQuIP)

- International Standards Organisation (ISO)
- Home and Community Care (HACC) Standards
- Disability Service Standards.

Since 2004 the Australian Government, in partnership with state and territory governments, has been attempting to improve the system by streamlining quality standards across all government funded community care programs.

To progress reform, in 2005 the Department commissioned an options paper for the development of:

- a common set of quality standards that may be applied across all government funded community care programs
- a National Quality Reporting Framework and reporting process that will reduce duplication and streamline reporting requirements for service providers (DOHA 2009c).

In February 2007, the report was submitted to the Planning and Accountability Working Group comprising representatives from the Department of Health and Ageing, the Department of Veterans' Affairs and state and territory governments. This working group was replaced by the Quality Reporting Working Party in April 2008 and is under the overarching direction of Community and Aged Care Officials (CACO).

Drawing together the findings on standards and reporting processes, DOHA said the report recommended that a National Quality Reporting Framework should:

- be based on existing HACC standards
- use consistent language with flexibility to accommodate program specifics
- incorporates a proposed Continuous Quality Improvement (CQI) approach
- have minimum performance expectations and outcomes which community care service providers must achieve (DOHA 2009d).

The CACO endorsed the draft common standards in February 2008. In 2009, in consultation with state and territory governments, the set of seven draft common standards for quality reporting and related expected outcomes, together with a self assessment reporting tool and guidelines for service providers and assessors, was released for piloting with a representative range of community care providers (known as the 'community care standards package').

According to the Department:

> … the purpose of the pilot is to evaluate how well the standards and the reporting framework meet the aim of streamlining reporting while ensuring quality services are delivered. Feedback from the pilot testing … will be used to further refine and finalise the common arrangements for quality reporting. (DOHA 2009d, p. 2)

This consolidation process has been underway since 2004 with very little to show for the efforts undertaken by Commonwealth, state and territory governments. As a consequence, the administrative burden associated with the different quality standards and processes for community care providers continues to grow, as the emphasis on community care continues to increase — its share of subsidised places under the *Aged Care Act 1997* increased from 2 to 20 per cent between 1995 and 2007.

Given the comments made on the community care standards package in the submissions to this annual review, there are ongoing industry concerns with the current direction of the national framework for community care. In the draft report the Commission urged the Department to resolve any lingering concerns and issues raised by service providers (and other governments) and implement the National Quality Reporting Framework as soon as possible.

Subsequent to the release of the Commission's draft report, the Department specified an implementation start date of March 2010 for the common standards and reporting processes:

> A final report is expected in September 2009 and it is anticipated that the Common Standards and reporting processes will be progressively implemented from about March 2010.
>
> A number of issues raised by Aged and Community Services Australia and Aged and Community Care Victoria, in their submissions to the Productivity Commission, will be evaluated in light of the pilot outcomes. (sub. DR96, p.7)

Implementation of this framework should be consistent with the methodology underpinning the Standard Business Reporting initiative (appendix B). In particular, the new framework should:

- take account of, and draw on data that will be available through the SBR financial reporting taxonomy
- look at the data that business already collects, and draw on that to meet data needs as far as possible
- use common language and definitions in data requests across all jurisdictions and agencies
- build that standard language into a taxonomy that can supplement the financial reporting taxonomy

- develop electronic reporting and lodgement tools that can be incorporated into the new secure single sign-on protocol that is being developed by the SBR project.

To facilitate this new framework the community care sector will require the support of good IT/software development to deliver standardised software across jurisdictions.

RECOMMENDATION 2.15

The Commonwealth, state and territory governments should resolve any outstanding issues with the proposed community standards and reporting processes and implement the National Quality Reporting Framework as soon as possible, consistent with the methodology and principles supporting Standard Business Reporting.

Differential treatment in the administration of payroll tax

Aged and Community Care Victoria raises the issue of differential treatment of payroll tax arrangements depending on whether the provider is not-for-profit or for-profit. And within for-profit, whether the provider is providing residential aged care or community aged care:

> Not-for-profit Commonwealth aged providers are automatically exempt from all payroll tax while the Commonwealth refunds for-profit providers of aged residential care via a payroll supplement. For-profit providers of Community Aged Care Packages (CACPs) and Extended Aged Care at Home (EACH) do not receive a payroll tax supplement. (sub. 34, p. 14)

Aged and Community Care Victoria suggests that all aged care providers should be exempt from payroll tax in all jurisdictions.

This issue will be examined in a study being undertaken by the Productivity Commission. On 17 March 2009, the Commission received terms of reference from the Government directing it to undertake a commissioned study on the contribution of the not-for-profit sector. In undertaking the study, the Commission will be examining the extent to which tax exemptions accessed by the commercial operations of not-for-profit organisations may affect the competitive neutrality of the industry (PC 2009a).

ACFI subsidy mechanism for residential care

On 20 March 2008, the ACFI replaced the Residential Classification Scale (RCS) with a three-year phase-in period. According to the PC (2008), the RCS and

accompanying regulations were seen as unduly complex with a high associated compliance burden for providers.

Although it appears that the Aged Care Funding Instrument (ACFI) has reduced the administrative burden on residential aged care providers, other aspects of the new instrument have caused concern within the industry:

> The new ACFI assessment tool in our residential aged care facility is not funded adequately to meet the needs of the care of the people within aged care low care general and (low care) dementia, high care general and high care dementia. The resident is the one who is missing out on the care levels and this funding system needs to be seriously addressed before issues start to arise within the industry. (sub. 36, p. 1)

The Australian Government developed the ACFI in consultation with industry following two reviews (DOHA 2003; Hogan Review 2004). The ACFI calculates basic care subsidies according to each client's level of need (none, low, medium or high) in three care domains:

- activities of daily living (such as nutrition, mobility, personal hygiene, toileting and continence)
- behaviour supplement (cognitive skills, wandering, verbal behaviour, physical behaviour and depression)
- complex health care supplement. (DOHA 2008a)

According to the Productivity Commission (2008c), under the RCS, basic subsidies were paid according to an eight point scale, which was based on the level of care provided by a residential facility. In contrast, the ACFI measures the resident's need for care, not care provided. Further, the new arrangements have been designed to reduce the amount of documentation aged care providers complete to claim funding. For example, the type and form of funding records that providers must maintain have been better defined to reduce over-documentation.

Reflecting concerns within the industry about the new funding instrument at the time of its establishment, a panel of advisers was set up to consult with providers on all aspects of its implementation. In addition, a review of the instrument was scheduled for 18 months after its implementation (PC 2008c). According to the Department, this review is scheduled to commence in September 2009.

Indexation of basic aged care subsidy rates

St Andrews's Village Ballina raises a longstanding concern of the aged care industry regarding the indexation of basic subsidy rates (which is not based on movements in industry-specific costs):

> For a number of years now, the government has continued to increase the [Commonwealth Own Purpose Outlays] COPO, which funds staffing and care side of aged care facilities, at a very minimal inflation rate of 2% to 2.3% at the greatest point. When inflation and costs are increasing greater than 3%, sometimes 5% — as was the case in 2008 — this funding formula by the government seriously miscalculates what funds are required to competently run an aged care facility from 2008 and beyond. (sub. 36, p. 1)

According to the Productivity Commission (2008c) subsidies are indexed using the COPO index, which is weighted 75 per cent for wage costs and 25 per cent for non-wage costs. The index only makes provision for safety net increases in wages and for economy-wide movements in non-wage costs. As a consequence, the subsidy as indexed, will be increasingly inadequate if actual aged care sector wages increases are higher than the Safety Net Adjustment (SNA).

Concerns with the current indexation approach were raised by the Aged Care Industry Council — the peak Council of Australia's aged care providers — in its 2009-10 Budget Submission:

> This is an inadequate approach which is threatening ongoing service provision and access to care. Under this method community care service hours are declining and 40 per cent of residential care providers are operating at a loss as a result of rising costs which are not matched by the indexation provided. (ACIC 2009, p. 1)

> Costs, especially wages and their on-costs are rising at a faster rate than the funding provided. Wages represent 70-80% of costs in aged and community care services. The Commonwealth uses the Safety Net Adjustment (SNA), rather than actual aged care sector wage increases which have occurred as a result of enterprise bargaining, to determine COPO. The more generous funding increases made available to the public and private hospital systems have supported higher wage outcomes in these sectors and increased the difficulty for aged care providers to compete. Nursing wages in the non aged care sectors continue to escalate and so aged care will be forced to follow or risk losing valued staff to the acute care sector. (ACIC 2009, p. 6)

While this funding issue is outside the scope of our current study, the Commission did consider COPO indexation as part of its inquiry into nursing home subsidies (PC 1999). At the time, it noted that with other sources of income for providers largely tied, inadequate increases in subsidies after allowing for efficiency improvements would compromise the delivery of quality care and recommended:

> Basic subsidy rates should be adjusted annually according to indices which clearly reflect the changes in the average cost of the standardised input mix, less a discount to reflect changes in productivity. Revised indexation arrangements should be introduced as soon as possible. (PC 1999, p. 97)

As the Commissioned noted in 2008:

This approach (i.e. indexing basic subsidy rates to indices specifically related to the aged care industry) recognises the importance of both ensuring subsidies accurately reflect the cost pressures faced by the aged care industry and providing an incentive for providers to look for ways of improving their efficiency and productivity. (PC 2008c, p. 100)

3 Child care

Key points

- The child care industry suffers from significant regulatory overlap and duplication between the Commonwealth Government and state and territory governments. COAG has agreed to establish a rigorous National Quality Agenda to remove the overlaps, gaps and inconsistencies from July 2009. It is imperative that the forthcoming final Regulation Impact Statement (RIS) on the National Quality Agenda conducts a transparent assessment of the costs and benefits of the enhanced regulatory framework, particularly the compliance cost savings (if any) to business.
- At the same time it is important that the Australian Government maintains efforts to unilaterally reduce regulatory burdens in areas where it has responsibility even though other reform processes, involving other jurisdictions, are on-going. For example, some streamlining of the accreditation arrangements should take place now, prior to the implementation of the COAG reforms, to remove unnecessary administrative burdens on child care services.
- Under current regulations there is a lack of credible sanctions for child care services that are not satisfactorily participating in Child Care Quality Assurance systems. This effectively penalises those services that are meeting the accreditation standards without improving the welfare of children attending sub-standard services. The Department of Education, Employment and Workplace Relations should amend the regulations so that it is clear that a service can have its Child Care Benefit approval removed if it is not accredited by the National Childcare Accreditation Council.
- The National Childcare Accreditation Council should also reform some of its internal processes to reduce the regulatory burden on child care services without affecting service quality. In particular, it should scrap unannounced validation visits and paper validation surveys and improve the coordination of visits of the Council and state/territory regulators to child care services.
- In recent years there have been some additional regulatory requirements foisted on the industry, such as anticipated vacancy reporting, that have imposed costs on child care services without providing an offsetting benefit to services or the community. The Department of Education, Employment and Workplace Relations should improve the way child care services report anticipated vacancy information so that industry compliance costs are constrained and the information provided to parents is more useful.

3.1 Child care industry background

The child care industry is focused on meeting the care, education and development needs of young children. Over recent decades there has been strong growth in the number of child care places, driven by growing demand from the increased participation of women in the workforce and government-subsidised service provision.

Responsibility for the operation and management of child care services in Australia is shared by the government, community and private sectors — although the private sector dominates in most states (table 3.1).

Since the mid 1980s, Australia has gradually moved from a supply-side style of funding, which provided funds directly to (not-for-profit or community) services, to demand-side funding, which provided funds primarily to parents to enable them to choose the kind of child care provision they want. With the changed funding arrangements came strong growth in market share by private for-profit services.

Table 3.1 **Proportion of state and territory licensed and/or registered children's services, by management type, 2007- 08 (per cent)[a]**

	NSW	*Vic*[b]	*Qld*	*WA*	*SA*[c]	*Tas*	*ACT*	*NT*
Child care								
Community managed[d]	27.8	34.6	37.0	20.9	35.1	50.7	81.6	71.3
Private[e]	69.5	53.5	59.9	75.2	40.6	32.4	18.4	28.8
Government managed	2.7	11.8	3.1	3.9	24.3	16.8	–	na
Total	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**

a Includes all Australian, state and territory government supported services. **b** All government managed pre-schools in Victoria are managed by local government. **c** The majority of government managed child care services in SA are small occasional care programs attached to government pre-schools. **d** Community managed services include not-for-profit services provided or managed by parents, churches or co-operatives. **e** Private for-profit services provided or managed by a company, private individual or non-government school. **na** Not available. **–** Nil or rounded to zero.

Source: SCRGSP (2009).

This recent restructuring of the industry has created tensions between not-for-profit and for-profit providers of child-care — with the former alleging the latter may attempt to maximise profits by reducing the quality of care (e.g. by employing only the minimum number of qualified staff) to the detriment of children and families. For example, Community Child Care said:

> State children's services regulations and national quality assurance systems are important mechanisms to protect young children from harm and to maximise opportunities for positive development during the crucial formative years. These mechanisms are especially crucial in the mixed economy of child care, to prevent

> unscrupulous commercial operators from maximising profits at the expense of children and families. (sub. 27, p. 2)

On the other hand, the for-profit sector suggests the community sector is creating a 'sense of crisis' about the current quality of care in the industry in an attempt to claw-back market share. For example, Child Care New South Wales said:

> Despite the attempts of certain people with ulterior motives to create a sense of crisis, the real issue for centres is not service quality — it is affordability and accessibility.
>
> It is important to think about ways to improve quality. But a challenge for Australia is not to 'beat up' on the imperfections in our Long Day Care systems. We suspect that those who focus their attention on these weaknesses really have a separate agenda. The people trying to create the impression of a crisis are concerned that the bulk of service-delivery is provided by the private sector.
>
> As we see it, the claims of many who talk about wanting to make changes to quality are really interested in making changes to market-share. (sub. 20, attachment b, p. 19)

The Australian Government's roles and responsibilities for child care include:

- paying Child Care Benefit (CCB) to families using approved child care services or registered carers ($2.0 billion in 2008-09)
  - CCB assists parents with the cost of approved and registered care. The payment of CCB varies depending on family income, the number of children in care, the hours of care, and the type of child care used
- paying Child Care Tax Rebate (CCTR) to eligible families using approved child care services ($1.1 billion in 2008-09)
  - CCTR is an additional payment to help families with their out-of-pocket costs after CCB has been received
- funding the National Childcare Accreditation Council (NCAC) to administer quality assurance systems for child care services
- funding organisations to provide information, support and training to service providers
- providing operational and capital funding to some providers.

The Australian Government supported 668 124 child care places in 2007 compared to 517 654 places in 2003 — an increase of nearly 30 per cent. The majority of Australian Government supported child care places were:

- outside school hours care places (45.4 per cent)
- centre-based long day care places (42.8 per cent)
- family day care places (11.2 per cent)

- occasional care places (0.4 per cent)
- other care places (0.2 per cent).

3.2 Overview of child care regulation

Child care regulation in Australia is shared between the Commonwealth and state and territory governments.

The Commonwealth family assistance law (*A New Tax System (Family Assistance) (Administration) Act 1999* and *A New Tax System (Family Assistance) Act 1999*) imposes conditions on child care services that must be met if they are to receive financial assistance from the Australian Government and be able to offer fee reductions to families through the provision of the Child Care Benefit (CCB).

It is a condition of initial approval and continued approval for CCB purposes that child care services and carers register and satisfactorily participate in Child Care Quality Assurance (CCQA) systems. These services include centre-based Long Day Care (LDC), Outside School Hours Care (OSHC) and Family Day Care (FDC) schemes. The quality assurance schemes are different for each care type.

The CCQA systems are administered on behalf of the Australian Government by the National Childcare Accreditation Council (NCAC).

CCQA is designed to build on and complement state and territory licensing regulations, where they exist (table 3.2), which generally provide a minimum standard of operations for services. These state and territory regulations cover a range of factors including:

- space (the size of rooms and playgrounds)
- health and safety requirements
- number of staff and their qualifications
- number and ages of children.

These licensing systems cover the requirements that must be met before a child care service can commence operations. Ongoing monitoring of compliance with these regulations by respective jurisdictions can result in a service being closed if any of these requirements are not met. However, not all states and territories have comprehensive regulations in place (table 3.2).

Table 3.2 **Licensing arrangements in each state and territory[a]**
2008

Service model	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*ACT*	*NT*
Centre-based long day care	L	L	L	L	L	L	L	L
Occasional care	L	L	L	L	G/L	L	L	L
Family day care schemes/agencies	L	L	L	X	G/L	L	L	X
Family day care carers	R	X	R	L	R	R	X	X
Outside school-hours care	R	L	L	L	R	L	L	X
Home-based care	L	X	X	X	L	L	X	X
Other care[b]	X	X	X	X	L	L	L	X
Preschool/kindergarten	L/G	L	L/G	G	G	G/R	L/G	G/R

[a] L = Services require a licence to operate, R = Services require registration or approval to operate, G = Services are provided by state/territory governments, X = Services do not require licence, registration or approval to operate, but may be required to meet regulatory standards.

[b] Other Care = nannies, playschools and in-home care

Source: SCGRSP (2009) and DEEWR (sub. DR90)

State and territory governments also regulate preschool/kindergarten. While the arrangements vary between states and territories, preschools are mostly subject to a regulatory system different from that of child care services. Unlike child care services, there is no similar national quality assurance system for preschool/kindergarten.

3.3 Concerns about regulation of child care

Duplicate regulation between the Commonwealth and state/territory governments

Inadequate quality accreditation and licensing arrangements

Some child care associations raised concerns about the duplication of requirements under the quality assurance system administered by the Australian Government and state and territory licensing regulations.` For example, Australian Community Children's Services stated:

> Some of the quality areas and underpinning principles sit on top of or duplicate existing state/territory children's services licensing requirements … Service providers are required to complete and submit (mostly) bi-annual reports to NCAC and state/territory

licensing authorities to ensure compliance with quality assurance and licensing. (sub. 7, pp. 2-3)

Others, like Child Care New South Wales, sheeted home responsibility for the duplication to inadequate regulation decision-making processes at the state level:

> The biggest problem by far is the extent of duplication between existing state childcare regulation and the Commonwealth's regulatory system for quality improvement and accreditation. That duplication can be traced back to the root cause — inadequate regulation decision-making processes. The central problem is that the people who make the rules at the state level have inadequate regard for cost or affordability impact on parents or on other governments. (sub. 20, attachment b, p. 27)

But Community Child Care said that the cost of this duplication to child care providers has been overplayed:

> CCC believes that it is a myth that the workload of fulfilling existing regulation, licensing and quality assurance requirements is overly burdensome. (sub. 27, p. 1)

Assessment

This issue of duplicate child care regulation is not new. It was most recently raised at the Australian Government level by the Regulation Taskforce (2006) and it provided the following explanation for the regulatory duplication in areas such as child care (and aged care):

> Particular difficulties arise because of the imbalance in regulatory and fiscal responsibilities between the Australian Government and state and territory governments. Specifically, while the states and territories have had formal responsibility for areas like aged care, child care and education, the Australian Government provides some funding for these services. To ensure 'value for money' from its subsidies, the Australian Government has increasingly been overlaying existing state and territory regulation with its own quality accreditation mechanisms and reporting requirements. (p. 166)

The Regulation Taskforce (2006) recommended the Australian Government should commission an independent public review of:

- the role of the Australian Government and state and territory governments in regulating the childcare sector, including possible mechanisms to reduce duplication between governments
- measures to enhance the efficiency of the childcare sector to deliver desired quality outcomes
- the merits of aligning regulatory approaches across jurisdictions towards achieving minimum effective regulation. (Recommendation 4.41, p. 49)

In August 2006, the previous Australian Government agreed in principle to this recommendation and indicated that any possible overlap between Commonwealth and state and territory regulatory requirements would be considered as part of a (previously) announced review of the three levels of the National Quality Assurance system.

The issue has also been examined by the New South Wales Government. The New South Wales Independent Pricing and Regulatory Tribunal (IPART) conducted its own investigation into the duplication of regulation within child care services as part of its *Investigation into the burden of regulation and improving regulatory efficiency* (2006).

Its desktop comparison highlighted the degree of overlap between the Commonwealth Quality Improvement and Accreditation System (QIAS) for long day care centres and the New South Wales Children's Services Regulation. Of the 33 QIAS principles of quality care, there was 'some overlap' with 20 principles and 'significant overlap' with 8 principles. Only 5 principles had 'no overlap' with the New South Wales regulations (IPART 2006, appendix 6). While this is persuasive evidence of the prevalence of overlap, it must be acknowledged that there is little quantified information on the extent of business detriment associated with this duplication, particularly compliance costs.

IPART (2006) recommended that the New South Wales Government support a COAG review of the role of the Commonwealth and state and territory governments in regulating the children's services sector to:

- identify areas of regulatory duplication that can be immediately addressed
- identify options to enhance the efficiency of regulating the children's services sector, including consideration of a single national regulatory model and a single national regulator (p. 135).

The New South Wales Government (2007) responded in August 2007:

> The NSW Government is working with other jurisdictions to develop by 2008 an intergovernmental agreement on a national approach to quality assurance and regulations for early childhood education and care. This agreement aims to address overlaps and duplication between State and Commonwealth regulations and reduce red tape for service providers. (p. 4)

The Australian Government referred this reform initiative to the COAG Productivity Agenda Working Group (PAWG) at the COAG meeting in December 2007 (COAG 2007a). At this meeting Australian governments committed to establishing a National Quality Agenda (NQA) for Early Childhood Education and Care (ECEC) that comprises four key elements:

- strong quality standards
- a quality ratings system
- streamlined regulatory (licensing and accreditation) arrangements
- an Early Years Learning Framework.

The objectives of the National Quality Agenda are to:

- enhance learning and development outcomes for children in different care settings
- build a high quality, integrated national quality system for early learning and care that takes account of setting, diversity of service delivery and the age and stage of development of the children.

This Working Group released a discussion paper for consultation in August 2008 (COAG 2008a). According to the discussion paper, feedback from this consultation process will be taken into account in developing the National Quality Agenda. The National Quality Agenda commenced in July 2009 and will be implemented progressively over the coming years.

The Early Years Learning Framework was endorsed for implementation by COAG at its July 2009 meeting (COAG 2009b). It describes the principles, practice and outcomes essential to support and enhance young children's learning from birth to five years of age, as well as the transition to school. The release of the Early Years Learning Framework is the first phase in the implementation of the Australian Government's National Quality Agenda for early childhood education and care.

A consultation Regulation Impact Statement (RIS) was released for public comment by the Early Childhood Development Steering Committee (ECDSC) in July 2009 to facilitate consultation. Prior to the release of this consultation RIS, Child Care New South Wales expressed a number of concerns about future regulation based on inadequate prior regulation impact assessment:

> Child Care New South Wales is concerned that well-meaning regulatory proposals to lift service-quality standards might end up hurting the very children and families that all parties are trying to help, as well as damaging jobs, parent workforce-participation, Australian productivity, and centres themselves.
>
> The risk is that the cost of (already good-quality childcare centre services) will become unaffordable for ordinary families … costs will (needlessly) rise to a point where many ordinary families will not be able to afford the higher standards, and thus be forced to make use of lower quality but lower cost backyard alternatives.
>
> At the very least, the government which is going to be expected to pay for increased parent subsidies in order to overcome the affordability issues needs to be properly engaged in understanding what those costs are likely to be, and whether increased costs

> are likely to be matched by commensurate increases in quality (benefits). (sub.20, p. 12)

Child Care New South Wales went on to highlight the importance of having good quality regulatory impact analysis:

> The success of this whole childcare regulation reform exercise hinges on the quality of that Regulation Impact Statement (sub. 20, p. 9)

The analysis in the consultation RIS focuses on three of the elements of the NQA outlined above (i.e. a National Quality Standard, enhanced regulatory arrangements, and a quality rating system).

The cost–benefit analysis on the proposed ECEC National Quality Agenda undertaken by Access Economics (2009), on behalf of the ECDSC, and whose results were incorporated in the consultation RIS, says:

> The greatest impacts lie in the effects of the new National Quality Standard, where improved staff to child ratios and staff qualifications generate enhanced outcomes for children in ECEC, but at significantly increased labour costs. (Access Economics 2009, p. i)

While all children are expected to benefit from implementing the National Quality Standard, most of the benefits are expected to be acquired by disadvantaged children. According to the COAG consultation RIS:

> … the literature suggests that improvements in quality resulting from improving staff-to-child ratios and staff qualifications is likely to increase the long-term, positive impacts on children, primarily disadvantaged children, provided they participate in learning and care. (ECDSC 2009, p. 40)

A qualitative summary of the main costs and benefits potentially arising from the NQA is presented in table 3.3.

The cost–benefit analysis could only quantify the costs of the proposed National Quality Standard. For example, the additional costs (relative to the baseline option) in the long day care sector range from $1.18 billion to $2.16 billion over the ten years to 2020, depending on assumptions about the levels of staff to child ratios and the timing of their implementation. The benefits were not able to be quantified due to data limitations and a lack of comprehensive research. According to Access Economics:

> While the new standards will unequivocally confer benefits on children in ECEC — and these impacts will be higher where the increase in the level of quality is greater — there is an insufficient evidence base on which to reliably quantify these benefits or compare them between scenarios. (Access Economics 2009, p. v)

Table 3.3 **Potential impacts of the proposed National Quality Agenda for Early Childhood Education and Care**

	Costs	*Benefits*
National Quality Standard	• Additional staff required to meet new staff to child ratios • Higher staff wages resulting from qualified staff requirements • Costs of increasing the qualified ECEC workforce	• Benefits resulting from children receiving incrementally higher quality care
Enhanced regulatory arrangements	• Costs of transitioning to the new framework • Costs of sharing information where the regulatory effort was previously duplicated	• More efficient administration of industry regulation • Reduced regulatory burden on industry
Quality rating system	• Administration costs, including collection and collation of data and the dissemination of service rating information	• Better informed decision making by parents • Potential augmentation of quality improvements over time

Source: Access Economics (2009).

In addition, quantification of costs and benefits was also not possible for the 'quality rating system' since the impacts on decision making and resulting improvement in quality levels could not be accurately isolated. However, the costs were expected to be negligible as the functions required to deliver the system have been accounted for in the development of a single integrated national quality standard and ratings framework. The benefits were expected to be more significant as the system is likely to increase the sensitivity of parents to the quality of care, leading to more informed decision making by parents and generating greater incentives for service providers to increase quality (Access Economics 2009).

Finally, the impacts of the third core element of the NQA, the enhanced regulatory framework, could also not be quantified with any certainty. This was not because of any technical difficulty with obtaining data or measuring these impacts in dollars, but because the details of the new regulatory system are yet to be finalised (ECDSC 2009).

From a regulatory burdens perspective, the consultation RIS would have been a more useful consultation document if it had included quantified estimates of the impacts of the enhanced regulatory framework on service providers. It is difficult for providers to meaningfully comment on the enhanced regulatory framework when they are not provided with any estimates of the magnitude of the impacts on individual providers.

COAG notes that the depth of analysis required for consultation is lower than that at the decision-making stage:

> It is expected that the level of analysis in a draft [consultation] RIS would be lower than the level of analysis in the final RIS. This is because the impacts of options are sometimes unclear. The community consultation process is designed to allow interested parties and stakeholders to help identify such impacts. In such cases the OBPR may focus its assessment primarily on the first three parts of the draft RIS, the problem, objectives and options section of the RIS.
>
> As a general rule, the level of analysis included in the final RIS provided to the decision maker should be higher than that included in the draft RIS which is prepared for the purpose of consultation. (COAG 2007b, p. 8)

The Commission recognises that for some consultation RISs, there will often be considerable uncertainty surrounding the likely design and final implementation details of options being considered, making the collection of data and estimation of likely impacts problematic. It is therefore not reasonable to expect as complete an analysis as is required for the final RIS for the decision maker.

However, it is at this early stage of the process that well informed feedback from stakeholders has the greatest potential to improve the efficiency and effectiveness of the final proposal. In this particular case, useful information could have been sourced from service providers to finetune estimates of compliance cost savings if preliminary estimates had been provided for the enhanced regulatory arrangements in the consultation RIS — which was the only alternative (other than 'no policy change') being assessed.

According to Access Economics (2009), the new regulatory framework will be a genuinely national framework with reforms based upon the following key features:

- a single national standard to replace current licensing and quality assurance processes, and which apply to all relevant services regardless of location
- joint governance of the national quality system, to allow the perspectives of all jurisdictions to be taken into account in the setting of and changes to the standard and assessment processes
- no duplication of regulation across levels of government, or sectors
- individual services dealing with only one organisation for regulation and assessment
- parents and service providers receiving information from only one source
- a national body with joint governance arrangements to oversight the administration of the National Quality Standards and Ratings Framework, and assure national consistency against the framework.

The consultation RIS says the enhanced regulatory arrangements will create a more efficient and less burdensome regulatory environment for child care and pre-school providers:

> The new system will be designed with best contemporary practice in mind, and thus is expected to be cost effective and reduce the regulatory burden on industry.
>
> There are expected cost savings for service providers flowing from the reduced administrative burden as the result of a fully integrated approach to licensing, regulation and quality assurance. It is anticipated that savings generated within services would be re-invested into improved services for children and their families using that service. (ECDSC 2009, p. 40)

Consistent with COAG's *Best Practice Regulation Guide* (2007b), it is imperative that the forthcoming final RIS on the National Quality Agenda contains a transparent assessment of the costs and benefits of the enhanced regulatory framework, particularly the magnitude of the purported compliance cost savings to service providers (and also to regulators). As the consultation RIS makes explicit:

> … some of the key benefits [of the enhanced regulatory framework] can be estimated with a satisfactory degree of confidence … (ECDSC 2009, p. 31)

According to the Department, the final RIS will quantify some of the impacts arising from the enhanced regulatory framework:

> Based on feedback from stakeholders, COAG will undertake further cost–benefit modelling to inform development of the new regulatory arrangements, including quantifying savings and costs to, and the impacts on, services, parents and governments, in moving from the existing regulatory arrangements to a new set of arrangements. (DEEWR, sub. DR90, p. 1)

However, without another round of consultation, it is not clear how this final RIS will demonstrate that COAG's RIS Guidelines have been followed, given the consultation requirements in the Guidelines say:

> Consultation should occur as widely as possible but, at the least, should include those most likely to be affected by regulatory action (for example, consumer and business organisations) which might provide valuable feedback on the cost and benefits of regulation and on the impact assessment analysis generally. (COAG 2007b, p. 13)

Child care services have not been provided with any estimates of the costs and benefits of the enhanced regulatory framework via the consultation RIS. Without further consultation, before the final RIS is provided to decision-makers, it is difficult to see how this final RIS will meet the requirements outlined in COAG's RIS Guidelines (COAG 2007b). The Department should engage in further consultation with child care services before the final RIS is provided to decision-makers.

Burdensome or redundant regulation

Lack of credible sanctions

The current Child Care Benefit (CCB) framework requires long day care centres, outside school hours care services and family day care schemes to satisfactorily participate in Child Care Quality Assurance (CCQA) in order to pass on CCB (in the form of fee reductions) to families.

The Office of Early Childhood Education and Child Care (OECECC) within the Department of Education, Employment and Workplace Relations (the Department) has legislative responsibility for managing the compliance of child care services with the CCQA.

A number of child care associations raised the issue that meaningful sanctions are not being applied when child care services are found 'non-compliant' with CCQA systems.

> CCC is especially concerned that even though a number of services are continually marked 'non-compliant' in the Quality Assurance system, the ultimate sanction of removal of approval for Child Care Benefit (CCB) fee subsidy for non-compliance has never been applied. (Community Child Care, sub. 27, p. 3)

> DEEWR is notified by the NCAC of any children's services that has an unsatisfactory result. The ultimate penalties that DEEWR can impose are the removal of Child Care Benefit … What political will is there to really take action? (Australian Community Children's Services, sub. 7, p. 3)

Assessment

Depending on the seriousness of the issue identified at the child care service, the consequences of non-compliance can range from targeted education campaigns for minor issues through to prosecution for criminal offences. Services that are not complying with the requirements of the CCQA systems may be sanctioned by the Australian Government. Sanctions could include requiring services to meet additional conditions, or suspensions or cancellation of a service's CCB approval. Services that have their approval suspended or cancelled can no longer receive advances or make fee reductions.

However, according to the Department no service has had their approval for CCB removed, due to non-compliance with CCQA, since inception in May 2007 (table 3.4). The NCAC reported providers as non-compliant to the Department, but all services rectified the non-compliance before the date of effect for the sanction to commence, and in each case the sanction was revoked.

Table 3.4 **Consequences of non-compliant behaviour**

Notice of sanction issued from May 2007 to February 2009[a]

Type of sanction	*Number of notices issued*
Additional conditions	5 (115)
Suspension of CCB approval	6[b] (517)
Cancellation of CCB approval	1[b] (21)
Total	12 (653)

[a] Notice of intention to sanction is in parentheses. [b] While these sanctions were imposed, all services rectified the non-compliance before the date of effect for the sanction to commence and in each case the sanction was revoked.

Source: DEEWR, pers. comm., 9 April 2009.

Even if the services did not rectify the non-compliance before the date of effect it appears that the regulation is so loosely worded that it would be difficult for the Minister to remove CCB approval for a service that fails accreditation a number of times. For example, section 23 of the Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000 states that an approved centre-based long day care service must:

- participate in the Quality and Improvement Accreditation System (QIAS) in accordance with any quality improvement and accreditation requirements published by the National Childcare and Accreditation Council (NCAC)
- maintain quality child care or make satisfactory progress to improve the quality of child care in accordance with the QIAS as assessed by the NCAC.

As a consequence, being accredited is strictly not a requirement of CCB conditions of approval or continued approval. If a child care service appealed the cancellation of its CCB approval to a tribunal hearing, the Minister would have to prove that the service was not maintaining quality or was not improving quality. This burden of proof would be difficult to meet, particularly if the service fails accreditation in different quality areas each time.

For the same reasons, it would also be problematic for the Minister to pursue civil penalties or infringements for services that fail accreditation. Indeed, the Commission is not aware that such penalties have ever been used for breaches of CCB legislation concerning quality accreditation. However, if they were imposed, the one advantage such penalties would have over sanctions is that they are less likely to affect families — assuming services do not pass on the cost of fines by raising fees.

The NCAC (2009a) has suggested that the government has been unwilling to cancel a providers CCB approval because of the disruptive financial consequences on families (that arise from the tying of provider funding with participation in CCQA):

> In the past, the Government has been reluctant to withdraw Child Care Benefit funding, as this adversely affects families, leaving limited options available to sanction services. (p. 4)

It is important that the sanctions outlined in the regulations are credible. If sanctions are not utilised in an appropriate manner poor performers have less incentive to improve the quality of their services and at the same time the authority and credibility of NCAC accreditation decisions are undermined. It also imposes costs on complying providers without meeting the policy objectives of the regulation.

It is also vital for good performers that departmental sanctions are credible. If a service's approval for CCB purposes is unlikely ever to be cancelled, poor performers are likely to maintain a presence in the industry longer than they otherwise would, and good performers' growth prospects are artificially constrained by the lack of compliance action. In effect, failing to utilise sanctions in the appropriate circumstances can be seen as a restriction on competition within the child care sector, which discriminates against child care services that are meeting the accreditation standards — it is not a level playing field.

Most importantly, a failure to trigger sanctions in appropriate circumstances will be to the detriment of the welfare and development of the children attending that sub-standard service. Ongoing government funding of chronic poor performers in the child care industry is also inconsistent with the objective of child care quality assurance 'to ensure that children in care have stimulating, positive experiences and interactions that will foster all aspects of their development' (DEEWR 2008a, p. 76).

Moreover, recent changes to the administration of CCB further strengthens the need for credible sanctions. Up until recently, under the family assistance law, the Department was able to write directly to families who were using a child care service about the non-compliance of their provider and to inform them of the effect on their CCB entitlement if the approval is suspended or cancelled. However, with the recent replacement of the Centrelink Child Care Operator System (COS) with the Child Care Management System (CCMS) this apparently will no longer be possible. Thus, parents may not be aware of the non-compliant status of their provider and are unable to apply pressure for the provider to comply or risk the departure of children to an alternative provider.

Following the release of the Commission's draft report, it appears that the Department is mindful that greater clarity is required in the legislation, but that the Minister should retain discretion not to remove CBB approval in every case where a child care service is non-compliant with the accreditation process:

> Legislation should make it clear that a possible consequence of failing to become accredited may lead to the removal of CCB approval. However, the Australian Government would not want to remove CCB approval in every case. (DEEWR, sub. DR90, p. 1)

It is also important, given the magnitude of the impact of this sanction on child care services, that any clarification of the wording of the regulation should ensure that the conditions that would lead to the removal of CCB approval are clearly defined so that services are aware of the full consequences of non-compliance (Family Day Care Australia, sub. DR72).

RECOMMENDATION 3.1

The Australian Government should amend the Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000 so that it is clear that a service can have its Child Care Benefit approval removed if it is not accredited by the National Childcare Accreditation Council.

It would also be worthwhile for the government to explore other non-regulatory options to encourage child care operators to provide quality services. The NCAC (2009a) suggested removing the link between accreditation and child care funding to address the shortcomings of the current system:

> … it is recommended that the Government replaces fee subsidies with greater operational and capital assistance to child care providers. It is envisaged that the objective of containing child care fees for families would be achieved by lowering operational costs for services. This would also improve the ease of applying sanctions to non-compliant services, as families would not be affected … Tying additional funding to quality improvements would offer services an incentive to enhance the quality of care they provide, in contrast to the current system of merely applying ineffective sanctions for non compliance (NCAC 2009a, p. 4)

This proposal would lead to a funding model similar to that of the aged care industry (funding 'places' rather than 'users of the service'). Such an approach would need to be supported by a national planning framework to ensure that new services were developed in areas where shortages were most pronounced. And, as discussed in chapter 2, this type of funding model is likely to have serious shortcomings since it can:

- impose constraints on the supply of child care by making it difficult for new providers to enter the market even where the number of existing providers are deficient or not meeting the needs of families in the types of service they offer
- stifle innovation in service design and delivery
- restrict enterprise mix and investment in the sector.

Nonetheless, assuming the link between participation in CCQA systems and CCB funding is maintained, other options could be considered to create the right incentives to ensure the provision of quality care beyond the triggering of sanctions. For example, the Department could improve both the quality of the information it provides to parents and the way it is delivered to parents, to support more informed consumer choice.

Currently, parents can find out if a particular child care centre is accredited by searching on the NCAC website (which also provides an accreditation history). But if parents want to check its 'quality rating' they must physically go to the individual child care centre and request to view the service's 'Quality Profile Certificate' which provides a rating of the service's achievement against each of the Child Care Quality Assurance Quality Areas.

In addition to the above information provided by the NCAC and individual child care services, the Australian Government's 'mychild.gov.au' website provides a listing of CCB approved child care services (that have voluntarily registered with the website). However, a full listing of CCB approved child care services is currently only available on the Child Care Access Hotline (1800 670 305) funded by the Department.

Finally, the Department itself has the discretion to publicise information relating to the sanctioning or suspension of a service for non-compliance with the conditions for continued approval. Details of the sanction or suspension, and the service they apply to, may be published on the Department's website.

Parents require transparent, easily understood information about child care providers. It would appear that parents would benefit from having better quality information provided in a more consolidated format by:

- making it mandatory for the NCAC to publish on its website information on the accreditation status (and the reasons for any 'not accredited' decision – box 3.1) and the Quality Profile Certificate (or quality rating) of specific child care services
- making it mandatory for the Department to publish on its website information on those service providers that are non-compliant with CCQA, including the

reasons for their non-compliance, and the consequences/outcomes that resulted from their non-compliance

- providing direct links to the relevant information on the NCAC and Department websites on the mychild.gov.au website.

Box 3.1 Key to accreditation status

The NCAC provides the following brief descriptions of the various categories of accreditation status for child care services participating in the Child Care Quality Assurance (CCQA) systems.

- 'New registration' – is the status applied to a child care service registered to participate in CCQA and is working towards accreditation for the first time.
- 'Accredited' – is the status applied to a child care service with a Quality Profile that meets the standard required for accreditation under the relevant CCQA system.
- 'Not accredited' – is the status applied to a child care service with a Quality Profile that does not meet the standard required for accreditation under the relevant CCQA system. If a child care service is given the status of 'not accredited' it is required to improve practice and submit a self-study report to NCAC within 3-6 months after the most recent accreditation decision.
- 'Non-compliant' – is the status applied to a 'not accredited' child care service that has been reported to the Department for failure to make satisfactory progress in the relevant CCQA system because it:
  - did not meet the standard required for accreditation on two or more consecutive occasions and/or
  - the service has not met the standards required for the majority of quality areas.
- 'Compliant' – is the status applied to a child care service now meeting the requirements of the relevant CCQA system following a period of non-compliance or having had accreditation withdrawn.
- 'Accreditation withdrawn' — is the status applied to a child care service whose accreditation status has been rescinded by the NCAC because:
  - the service has serious licensing and/or child protection matters confirmed by relevant authorities
  - the NCAC has received a written complaint about the service and the service has not adequately responded within the required timeframe
  - the accreditation decision has been delayed due to licensing, child protection or complaint issues, which resulted in a delay in the accreditation decision for more than six months after the date of the service's validation visit.

Source: NCAC (2009b).

The NCAC, in responding to the Commission's draft report, says that it has the ability to publish a service's Quality Profile on its website, but requires the Department's approval:

> NCAC has investigated the legalities and technical (IT) requirements to action the recommendation to publish a service's 'Quality Profile' on the NCAC website. As the Quality Profile is indicative of quality in a child care service at a point in time only, the legal advice is to provide additional information to help parents understand and interpret the Profile, and a disclaimer regarding its use.
>
> NCAC needs DEEWR approval before actioning this and has made DEEWR aware of the result of its investigations. Should DEEWR agree to NCAC publishing quality profiles, it may take several months to build this facility into the NCAC website. (NCAC, sub. DR69, p. 5)

Improving direct communication with parents in relation to the level of quality provided by specific services and assisting consumers to more readily compare services will provide stronger incentives for child care providers to become more competitive in providing quality services.

However, Family Day Care Australia, whilst agreeing with the need for parents to have access to clear and consistent information, cautioned against a 'name and shame' approach in isolation, suggesting that 'part of the information provided to parents should be informing them about what 'quality' is and what it means for their child in a care setting' (sub. DR72, p. 3):

> Simply providing a rating level on a website does not adequately inform parents of what role the quality assurance system plays, how it impacts on their child care and how it may impact cost. A comprehensive consumer education program provided by Government on the whole National Quality Agenda would provide a better understanding of the context to parents. (Family Day Care Australia, sub. DR72, p. 3)

Family Day Care Australia also suggested 'that any decision to publish quality ratings should only be done after appropriate opportunities to address issues have occurred and any appeals processes have been completed'. It suggested that another category of accreditation status, 'decision pending', was required:

> One suggestion is that until services have been given the opportunity to rectify any unsatisfactory areas, there should be another category of accreditation status such as 'decision pending' for services participating in the Child Care Quality Assurance systems. Otherwise it can be very destructive when services are labelled as 'not accredited' on the website and the accreditation process has not yet been finalised. (Family Day Care Australia, sub. DR72, p. 3)

Another category of accreditation status does not appear to be warranted. So long as parents are provided with sufficient information explaining why a service is in the existing 'not accredited' category, and they are aware that the service must improve

practice over the following three to six months to meet the standards required for accreditation, they can make an informed decision as to whether their children should enrol or remain enrolled at the service.

RECOMMENDATION 3.2

The Department of Education, Employment and Workplace Relations should improve both the quality of child care service information provided to parents, and the way it is delivered by:

- ***making it mandatory for the National Childcare Accreditation Council to publish on its website information on child care services' accreditation status (and the reasons for any 'not accredited' decision) and the Quality Profile Certificate (or quality rating) of specific child care services***
- ***publishing on its website information on those child care services that are non-compliant with Child Care Quality Assurance, including the reasons for their non-compliance, and the consequences/outcomes that have resulted from their non-compliance***
- ***providing direct links to this information on the mychild.gov.au website.***

Reporting of vacancies

Since June 2006 child care providers have been required, under section 21 of the Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000, to report anticipated vacancy information to the Department.

Currently services are required to provide vacancy information on a weekly basis, before 8pm each Friday, for the following week. The information provided must be based on the number of vacant CCB-approved places identified each day in line with the service's business practices. Services are required to report for each week that they operate, regardless of whether they have any vacancies or not.

If services do not report vacancy and usage data, or do not report vacancy and usage data on time, a sanction or penalty may be imposed. Sanctions include suspension and cancellation of approval. In addition to sanctions, this vacancy and usage requirement is also subject to an infringement notice scheme involving financial penalties. A service that does not report on time may receive an infringement notice and has the option of paying the lesser penalty set out in the notice or having the liability determined in court.

According to the Department, some child care providers have questioned the regulatory requirement to report vacancies of child care places:

> Some child care services have complained about the burden that reporting vacancy information places upon them — often this is linked to a concern that the information provided is of limited value to parents and to the service itself (in terms of attracting clientele). (sub. 42, p. 7)

Family Day Care Australia says the current system offers little value to parents and is excessively burdensome to services:

> This requirement is very problematic for the family day care sector as vacancies can be for a few hours in a day, not necessarily a whole day, or consecutive day vacancies may not necessarily be with one carer. Therefore the information is not very useful for parents. Also given the high demand for family day care services, as soon as the data is submitted, it becomes out of date as the vacancies get filled immediately from waiting lists.
>
> The administrative burden of collecting and reporting the data is time consuming and expensive for services … Some carers have noted that no requests for care have come from this process. For parents wishing to access family day care services, contacting their local coordination unit is the best way to ascertain the most up to date vacancy information. (sub. DR72, p. 4)

Moreover, some child care organisations suggested that certain child care providers would report vacancies even when they were at capacity so that parents seeking vacancies would be directed to those providers in the first instance — ensuring they always had pent-up demand for their service.

Assessment

When vacancy reporting was initially introduced in mid-2006, providers had a number of channels to lodge this information:

- electronically (directly into the Child Care Availability System which collected vacancy information, by e-mail, or via the services of a third party software provider)
- telephone (to the Child Care Access Hotline, which had a dedicated number for services).

With the transition of all Child Care Benefit approved services onto the Child Care Management System (CCMS), this is now the only mechanism for services to submit their vacancy information (box 3.2).

According to the Department, the objectives of reporting vacancy information are to:

- improve the ability of parents to find suitable child care by:
  - being able to find out information about all the services in their area

  - obtaining information on whether or not a service has a vacancy
  - finding out about the age groups the service caters for
  - obtaining information on whether the service has a vacancy in the specific age group that parents are seeking.
- help services fill any vacancies and reduce the number of enquiries to services during times when they have no vacancies or if they do not offer care to a specific age group
- provide information to Centrelink and employment service providers to allow them to help job seekers who are parents with participation requirements under the 'Welfare to Work' reforms.

Box 3.2 **Child Care Management System**

Under family assistance legislation, all Child Care Benefit approved services were required to operate under the Child Care Management System (CCMS) by 1 July 2009.

The CCMS introduces a new process for transferring information between child care services and the government over the internet. This information will include details of the children enrolled in the service and information about their attendance at the service. The CCMS brings all approved child care providers online to standardise and simplify Child Care Benefit administration, including the capability to lodge CCB electronically.

According to the former Parliamentary Secretary for Early Childhood Education and Child Care:

> The CCMS provides an opportunity for child care service providers to review and streamline their business processes, giving them more time to concentrate on offering quality early childhood education and care programs to children and their families.
>
> The new system will reduce the amount of paperwork for child care professionals, allowing them to provide all the required data at once, in a streamlined electronic format. (2009, p.1)

Source: McKew (2009).

According to the Department, no Regulation Impact Statement (RIS) was developed prior to vacancy reporting being implemented in 2006. Advice provided by the Office of Regulation Review (now the Office of Best Practice Regulation) indicated that a RIS was not necessary as the proposed amendments were minor or machinery in nature and did not substantially alter existing arrangements.

Now that vacancy reporting has migrated to the CCMS, it is likely that the regulatory burden on services has reduced or at least stayed the same. This has been corroborated by feedback provided to the Department which indicates that:

- services that reviewed their fee charging practices to align with their obligations introduced by the CCMS have significantly streamlined their administration
- some services that have continued to use business practices that were in place prior to the introduction of the CCMS have similar administration overheads as in the previous system
- one of the key factors in streamlining administration is the third party software used by services and the level of support provided by their software provider:
  - in some instances services report significant administrative improvements due to the CCMS software changes
  - others report only marginal improvement over the previous software product.
- if a service utilises the CCMS for a period of 4–6 weeks the administrative overhead is reduced and significant streamlining can be achieved. (DEEWR, pers. comm., 30 April 2009)

Despite these recent reductions in compliance costs it is questionable whether the benefits of vacancy reporting to parents or providers outweigh the costs. The level of usage by parents is low. In terms of calls received by the Child Care Access Hotline, the call volume for the last three financial years is:

- 2005-06 – 35 800
- 2006-07 – 41 128
- 2007-08 – 36 004

According to the current provider of the Hotline, around 60 per cent of callers request information on reported vacancies (21 600 calls in 2007-08). Given the Australian Government supported 668 124 child care places per day in 2007-08, the (vacancy) calls made per year relative to the number of child care places per year is very small.[1]

It is not possible to determine the number of parents using the service as many of the callers may have engaged the service on more than one occasion if initial inquiries did not result in a successful placement. But what is clear is that the number of parents using the service will be less than the number of calls.

It would appear that either CCB recipients are not aware of the service or they do not find it very useful as it does not appear to play a significant role in informing parents regarding their choice of child care service.

[1] 36 004 x 60% = 21 602 calls per year.

It is also not possible to determine the extent to which parents are using the service for short-term or long-term placements. Parents seeking additional, alternative, or new child care arrangements are likely to be seeking stable longer term options for their children. The information they require would be for longer term placement availability rather than information on vacancies for the following week, although this weekly information could perhaps be of some use as a predictor of longer term vacancies.

On the other hand, if some parents were seeking a short term or casual vacancy it would appear that more accurate information could be gleaned from contacting a child care service directly, rather than via the Hotline which has information that could be up to a week out of date. Moreover, even if the Hotline information was accurate parents would still have to contact the child care service directly to book the place. So the vacancy reporting arrangements are only reducing the search costs to the extent that it deters parents contacting services with no vacancies — which might be less than expected if services are declaring vacancies when they do not exist, as has been claimed.

The Department, in its response to the Commission's draft report, recognised vacancy reporting could be improved and highlighted some very recent changes to the standard definition of a vacancy:

> The Government is aware that there are shortcomings with the current vacancy reporting system … On 6 August 2009, the Government announced the introduction of a new standard definition of a vacancy and instructed child care services to begin reporting against this definition on a weekly basis from 14 August 2009. Vacancy availability information using this definition is expected to be made available on the mychild.gov.au website in the coming months. (DEEWR, sub. DR90, p. 4)

Under the recently announced changes all child care services will be required to report the number of vacant places for each day of the week, based on a new standard definition (Ellis 2009).

The mychild website is likely to be much more useful to parents with the adoption of recommendation 3.2 above, so putting better-defined vacancy reporting information on this website is likely to increase usage by parents and therefore foster benefits to child care services as well.

From the evidence provided, the costs of vacancy reporting to child care providers are small, but it also appears likely that the benefits to child care providers and the community are even smaller. The Department should continue to improve the way child care services report anticipated vacancy information so that industry compliance costs are constrained and the information provided to parents is more useful.

The Department of Education, Employment and Workplace Relations should continue to improve the way child care services report anticipated vacancy information so that industry compliance costs are constrained and the information provided to parents is more useful.

Unannounced validation visits and spot checks by the NCAC

Unannounced validation visits by the National Childcare Accreditation Council (NCAC) were raised in consultations as being unnecessary and duplicative given the existence of 'spot checks' by the same organisation. It was suggested by some child care services that spot checks are sufficient to ensure validators can observe genuine typical practice and the quality of child care services are maintained throughout the year.

On the other hand, Community Child Care (CCC) hold the view that both unannounced validation visits and spot checks are necessary:

> CCC believes it is essential that both unannounced validation visits and unannounced spot checks are an ongoing requirement of the NCAC to minimise the risk of unscrupulous operators bringing in a 'quality kit' for the pre-determined day of validation to mask poor practice in order to gain accreditation. (sub. DR80, pp. 1-2)

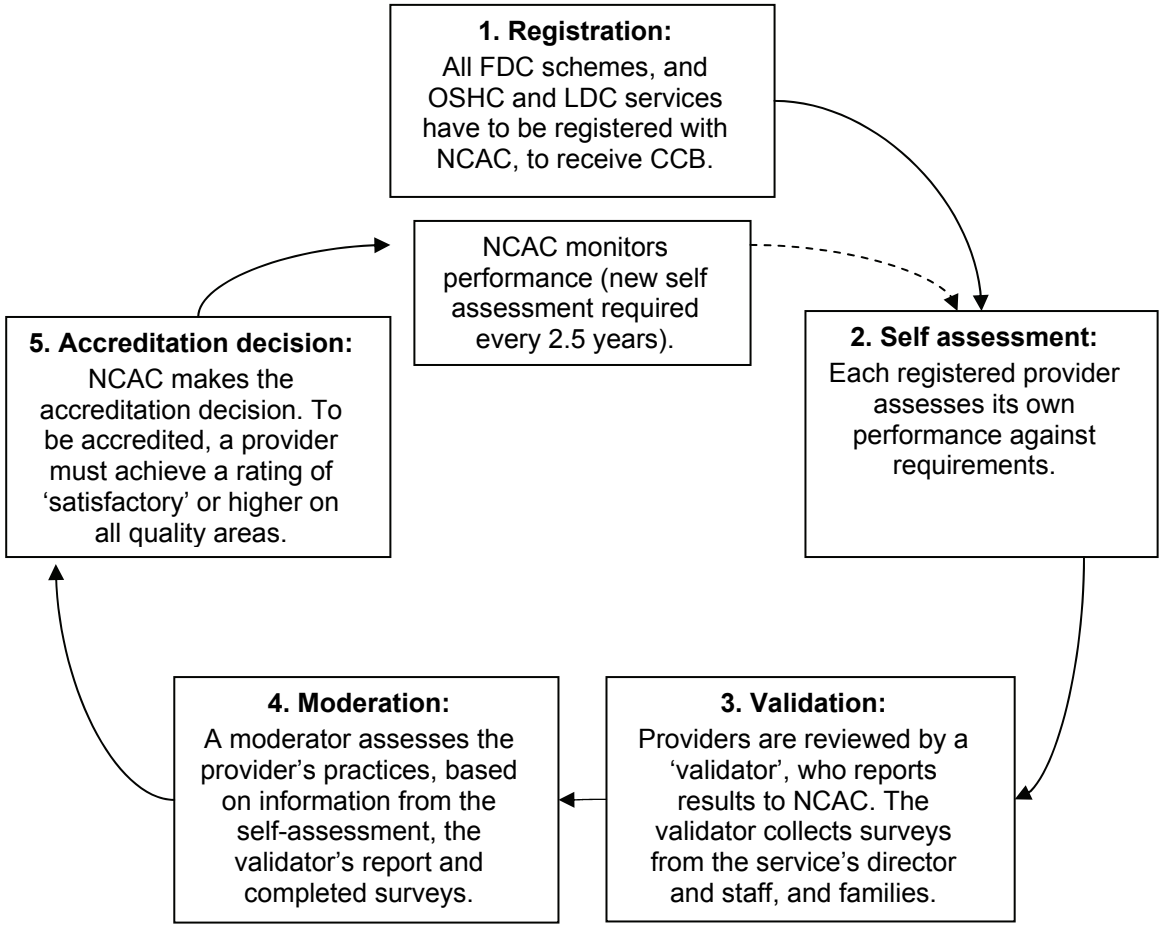
As part of the accreditation process under the NCAC quality assurance systems (figure 3.1), after a child care provider's self-assessment report has been received, NCAC selects a validator to conduct the validation visit of the service. A letter is sent to the provider advising a timeframe of six weeks within which the visit will occur. The validator does not provide the service with a specific date that they will attend the service. (NCAC 2007)

In addition, providers that have been through the CCQA process and are accredited are randomly selected to receive a spot check. The NCAC may also schedule a spot check as part of an investigation of a written complaint about a child care service.

During a spot check, a NCAC validator attends a child care facility without notice to observe:

- progress made by the service to self-assess and improve on a continuing basis
- any practices not meeting the standard required for accreditation and immediate action taken by the provider to address these
- provider practice in relation to issues raised in a written complaint (where applicable). (NCAC 2007)

Figure 3.1 **Accreditation process under National Childcare Accreditation Council quality assurance systems** [a, b, c, d]



[a] FDC refers to Family Day Care schemes. [b] OSHC refers to Outside School Hours Care. [c] LDC refers to Long Day Care services. [d] CCB refers to Child Care Benefit payments.

Source: SCRGSP (2009).

Assessment

When child care providers are going through the accreditation process for the first time, or subsequent to a period of being 'not accredited', or after having their accreditation withdrawn, the NCAC should be focused on fostering continuous improvement as part of its support function. It is difficult reconciling unannounced validation visits with the NCAC's objective, 'to assist child care professionals to deliver quality child care by providing advice, support and resources' (NCAC 2007, p. 4). A pre-appointed validation visit may also yield better outcomes for the validator as the service director and staff can structure their days to better accommodate the validator for the duration of the visit.

While validation visits should be about supporting child care services, spot checks are an important part of the NCAC's inspectorial function. Spot checks are a valuable mechanism for creating the right incentives for services to provide consistent quality care every day once they are accredited or seeking re-accreditation.

The Department should ensure a clear separation of the NCAC's support and inspection functions by removing unannounced validation visits and reintroducing pre-appointed validation visits for those providers seeking accreditation. Spot checks should be retained for those providers already accredited or seeking re-accreditation.

The Department, subsequent to the release of the Commission's draft report, indicated that the former Parliamentary Secretary for the Office of Early Childhood, Education and Child Care, requested a review of the current policy for unannounced validation visits prior to her changing portfolio responsibilities. The review proposed that, 'services will receive notification in writing of the date of the scheduled validation visit. Spot checks will continue to be unannounced.' (DEEWR, sub. DR90, p. 5)

The NCAC suggested the recommendation to provide services with the date of their validation visit could be implemented easily and that spot checks are sufficient to identify any services that 'put on a show' for their validation visit:

> This change could be implemented immediately and would allow services to ensure that staff are prepared for the validator and would significantly reduce stress on the services. While services could potentially 'put on a show' for the validator, NCAC could spot check the service if a complaint was received about this. (NCAC, sub. DR69, p. 6)

RECOMMENDATION 3.4

The Department of Education, Employment and Workplace Relations should remove the requirement on the National Childcare Accreditation Council to conduct 'unannounced' validation visits of child care services, but continue with (unannounced) spot checks.

NCAC validation surveys

As part of the accreditation process under NCAC, quality assurance systems (figure 3.1) providers are reviewed by a 'validator' who reports results to the NCAC. At the time of the validation visit the validator collects (paper) validation surveys that have been sent to the provider prior to the visit for completion by the service director, staff and families. There is a separate set of surveys for each child

care quality assurance system, each set is varied to relate to the relevant quality areas and principles.

Child care providers are required to send validation surveys to the parents of children attending their respective services and then collect them for the validator prior to the validation visit. The onus is on individual providers to meet the NCAC's minimum benchmark return rate of forty per cent of children attending the service. During consultations, child care providers questioned the need for their involvement in administering NCAC validation surveys.

According to Family Day Care Australia (sub. DR72), the format of the surveys is not meaningful to parents and can be easily misinterpreted. It also suggests the time and resources devoted to chasing up surveys could be utilised more effectively in delivering services.

Assessment

The surveys can be time consuming for services to administer given that they may be copying, distributing and collecting, on average, approximately 100 surveys and accompanying cover letters. However, it could also be anywhere between 15 – 600 surveys, depending on the size of the service (NCAC, pers. comm., 1 May 2009).

Child care providers could be spared the administrative cost of this process if the NCAC conducted telephone surveys of a sample of parents from each individual child care centre. There is no justification for the NCAC shifting some of the current administrative burden of validation surveys onto providers.

According to the NCAC, a number of options are available that could assess families' satisfaction with the quality of care provided (at less cost to child care services):

- an annual telephone survey could be conducted to gain qualitative feedback from families. The survey could be conducted externally and formulated to gain information about specific issues
- a website poll for families using an online survey that could be completed at any time, rather than when services reach Validation in the CCQA process
- build on current strategies used by the NCAC to communicate with families to increase an awareness of opportunities to be involved with services and encourage participation. (sub. DR69, p. 8)

The Department, subsequent to the release of the Commission's draft report, indicated that validation surveys will be replaced by a Family Satisfaction Survey with the design and mechanics of the delivery to be developed by the NCAC in

consultation with DEEWR as part of the transition to the National Quality Agenda (DEEWR, sub. DR90)

RECOMMENDATION 3.5

The National Childcare Accreditation Council should replace paper validation surveys given to parents with an alternative delivery mechanism, such as a telephone validation survey, so that child care services are no longer required to act as a survey dispensing/collection service.

Consolidation of child care accreditation systems

During public consultations some providers questioned the on-going need for three different Australian Government child care quality assurance systems for Family Day Care schemes, Outside School Hours Care services and Long Day Care centres. Views were expressed that complying with more than one set of standards is a burden on those individual services which provide more than one type of service.

Assessment

In 2006, the NCAC commenced working towards the development of an integrated child care quality assurance system to be known as the Child Care Accreditation System (CCAS) which was going to apply to the three types of service currently accredited by the NCAC. Draft CCAS standards were developed in 2006-07 and released for public consultation from January to April 2007 together with a draft framework for the CCAS.

The CCAS identified common, core elements of quality care in family day care, long day care and outside school hours care environments. At the same time, it recognised those elements of difference and retained those components of quality care specific to each service type. The CCAS was aimed at streamlining the existing CCQA systems to reduce the burden on individual services and enable other child care service types to participate in CCQA (NCAC 2007).

The work undertaken on the CCAS appears to have been subsumed by COAG's National Quality Agenda for Early Childhood Education and Care. According to the Department this work will feed into the COAG reform process:

> Preliminary work was undertaken in relation to streamlining of the Child Care Quality Assurance systems for Long Day Care, Family Day Care and Outside School Hours Care and many people across the child care sector contributed to that process. While the agenda for reform now is much broader, the contribution that was provided during

> the previous process was extremely valuable and will feed into the work now underway. (DEEWR 2009d)

It is not clear why such work could not have continued in parallel with the broader COAG process and have been implemented, given both processes have the same objectives — to streamline regulatory (licensing and accreditation) arrangements.

It is important that the Australian Government maintains efforts to unilaterally reduce regulatory burdens in areas where it has responsibility even though other reform processes, involving other jurisdictions, are on-going. In this case, rather than delay an existing Commonwealth process until the outcomes of a wider process become clear, it would have been more fruitful to undertake both simultaneously and then merge the outcomes of both processes when they are finalised.

RECOMMENDATION. 3.6

The Department of Education, Employment and Workplace Relations should complete the integration of the three existing Child Care Quality Assurance systems as soon as possible.

Other concerns raised

Coordination of visits of NCAC and state regulators

In consultations, providers raised the issue of the lack of coordination of visits between the National Childcare Accreditation Council (NCAC) and state/territory regulators. This lack of coordination can result in services receiving visits from both tiers of government at the same time or within a very short space of time.

Assessment

Both the NCAC and state/territory regulators conduct visits to child care services as part of the accreditation and licensing processes. Due to the independent nature of both processes, child care providers can receive multiple visits in a short space of time.

It would relieve the burden on child care providers having to deal with the administrative burden of both tiers of government in a short space of time if the visits from Commonwealth and state agencies were more evenly spaced throughout the year. In this way child care providers' compliance workload would be more uniform and there would be less risk of providers being taken away from core

business activities for lengthy periods (to address compliance issues) within a specific timeframe during the year.

Obviously coordination of visits by Commonwealth and state/territory officials would not be possible in all circumstances (e.g. spot checks, inspections triggered by complaints). However some coordination should be feasible in relation to the respective accreditation/licence renewal cycles.

Subsequent to the release of the Commission's draft report, the Department indicated that this issue will be addressed through the implementation of the National Quality Agenda:

> Specifically, COAG has agreed to a jointly governed unified national system to replace current licensing and quality assurance processes under which:
>
> - individual services will need to deal with one organisation for quality assessment. (DEEWR, sub. DR90 p. 6)

Until the National Quality Agenda is fully implemented the NCAC should work with respective state governments to ensure visits from the NCAC and state regulators occur in a coordinated manner to minimise the inconvenience to child care services responding to both tiers of government within a short space of time. As Family Day Care Australia suggests:

> Until there is a single, integrated national system for regulation, a better coordinated approach that includes a forward timetable with clearly scheduled visits can alleviate some of the stress experienced by services. (sub. DR72, p. 60)

Moreover, if recommendation 3.4 (i.e. replacing unannounced validation visits with announced validation visits), is implemented, state/territory licensing departments could be advised of the date of the NCAC's validation visit, 'ensuring that, where possible services' licensing and validation visits do not occur within the same timeframe' (NCAC, sub. DR69, p. 6)

RECOMMENDATION 3.7

The National Childcare Accreditation Council and state/territory regulators should coordinate their visits to child care services as far as possible, to reduce the risk of compliance activity spiking within a specific timeframe during the year.

CCB compliance reporting

Child care services must keep an assortment of records to maintain their CCB approval (box 3.3). Records must be kept for 36 months from the end of the calendar year in which the care or event recorded occurred.

Box 3.3 **Records to be kept by approved child care services**

All approved child care services must keep the following records:

- if applicable, the licence to operate a child care service issued by the state or territory where the service operates
- records of attendance for every child provided with care, including records of absences which, in the opinion of the service, took place in permitted circumstances ('approved absences') or on a permitted absence day ('allowable absences')
- records of any instances in which the service certified something under the family assistance law (for example, for eligible hours or a CCB rate for a child at risk or an individual in hardship, or for the need for a period of 24-hour care)
- copies of reports given by the child care service to the Secretary of the Department concerning details of child care usage and Child Care Benefit payment summary
- copies of notices of any determinations (CCB percentage, eligible hours limits, and so on) given to the service by the Secretary under the family assistance law for CCB purposes
- copies of receipts issued to people who have paid child care fees
- enrolment forms
- statements or documents for the purposes of documenting an approved absence
- insurance policies and any other documentation relating to insurance
- accounting records, including cash books and journals
- copies of any in-home care agreements

And in the case of family day care only:

- current records of the full name, residential address and contact number of each carer employed or contracted by the service
- if care is provided at a place other than the carer's residence, the address and telephone number of those other premises.

Source: DEEWR (2008a)

Some child care providers, like Monash University Family And Child Care, raise concerns about the length of time records must be stored to be compliant with CCB record-keeping requirements:

> Meeting reporting requirements for CCB can be difficult, as information is required to be stored for various amounts of time, which can again be different from the state based regulations. This provides storage issues for centres. (sub. 28, p. 1)

Assessment

According to the Department, the objective of the compliance framework is to preserve the integrity of child care payments made by the Australian Government in the child care sector:

> Compliance monitoring is considered necessary to underpin more than $1.9b outlays in payments for Child Care Benefit purposes, $860m in Child Care Tax Rebate plus substantial funding programs. The obligation to keep records and to produce them for inspection are fundamental to compliance. (sub. 42, p. 5)

The key child care compliance activities undertaken by the Department include:

- educating services about their obligations under family assistance law
- conducting unannounced visits to approved child care services to monitor compliance with their obligations
- investigating possible child care benefit fraud.

According to DEEWR (2009a), the most common non-compliance issues identified in reviews of child care services include:

- services claiming CCB for absences before a child commenced care or after the child has ceased care
- problems with attendance records, such as failing to note the times in and out of children in care and parents not signing/verifying children's attendance where appropriate
- allowable and approved absences not being clearly recorded on attendance sheets and services failing to report allowable absences to the Family Assistance Office
- receipts not meeting the legal requirements, for example, not including information such as the names of the children covered by the receipt, the period to which the fee payment relates and the amount of CCB fee reductions for the period covered by the receipt.

The CCB compliance framework does not cover compliance with the quality assurance programs administered by the NCAC or state and territory licensing requirements for child care services.

The graduated responses to non-compliant activity are listed in the Department's *Child Care Payment Compliance Framework* and include:

- targeted education campaigns
- warnings
- sanctions, including meeting additional conditions, or suspension or cancellation of a service's CCB approval
- civil penalties and infringement notices
- prosecution where criminal offences are involved
- recovery of fraudulently received payments through legal proceedings. (2009b)

In most cases, according to DEEWR (2009a), services will simply require further education and guidance because most services work hard to provide quality child care and follow the rules to ensure that families receive their correct entitlement to CCB. However, there are a small number of services who engage in unfair and/or illegal practices which can result in the wrong entitlements being paid. When these non-compliant services are identified further investigation and follow up action is undertaken.

Since 2006, the Department has conducted over 3000 compliance visits and some of the services have had follow up visits. The annual target for compliance visits is around 10 per cent of all services. In recent times the Department has secured successful prosecutions for CCB fraud amounts of between $70 000 and $150 000. The court judgements resulted in the monies being repaid to the Australian Government.

There is obviously a strong public policy rationale for having procedures in place to minimise the risk of incorrect payment and fraud, to ensure the integrity of child care payments made to families and services. These compliance processes, where possible, should be weighted towards those services that have a history of participating in inappropriate practices using a risk management approach. This will help to minimise the regulatory burden on the majority of services that 'follow the rules'. An example of where this could occur is in conducting unannounced visits to approved child care services to monitor compliance with their obligations.

According to the Department, virtually all compliance visits are unannounced and the targeting of services for compliance visits is predominantly based on a service's 'risk profile'. The risk profile is built up from a series of edit checks applied to child care data. Some services are also subject to compliance visits based on complaints and tip-offs received via the Child Care Compliance Tip-off Line (1800 664 231).

From the information provided by the Department to the Commission it appears that such a risk management approach is currently undertaken.

Inconsistent application of child care quality assurance systems and regulations

Some child care associations and service providers raised the issue of different interpretations of national standards by individual validators and also state regulations by state compliance officers:

> … regulation and QA (Quality Assurance) are blunt instruments which inevitably rely on human interpretation and implementation. CCC is aware of persistent problems with inconsistent interpretation and enforcement. For example state Children's Services Advisors issuing formal breaches for practices previously identified as points for discussion such as a minor tear in a mattress. At the national level QA validators sometimes require specific wording in policy documents while others accept local wording that captures the intent of the national standards. (Community Child Care, sub. 27, p. 2)

Monash University Family and Child Care had similar concerns with individual interpretations of Victorian regulations pertaining to sleep supervision:

> … supervision in sleep rooms is an ongoing battle between DEECD (Department of Education and Early Childhood Development) and children's services. (State) regulations require adequate supervision of children sleeping. Some DEECD representatives interpret this as requiring a staff member to sit with sleeping children at all times. This is not necessarily how children are supervised in the home environment and creates impractical (staff-child) ratios for centres to maintain, as that staff member is effectively "off the floor." (sub. 28, p. 1)

Assessment

It is important that individual state regulators aim to achieve a high level of consistency in their enforcement of state regulations, but it is beyond the scope of this report to discuss the extent of inconsistency in enforcement within any individual state or territory.

National quality assessors should also focus on achieving a high standard of consistency in their assessments of individual child care centres against the national Child Care Quality Assurance systems.

In respect of Commonwealth quality assurance, the NCAC administers the following three Child Care Quality Assurance (CCQA) systems:

- Quality Improvement and Accreditation System (QIAS) for long day care centres

- Outside School Hours Care Quality Assurance (OSHCQA) for outside school hours care services
- Family Day Care Quality Assurance (FDCQA) for family day care schemes.

The number of child care providers using each quality assurance system is outlined in table 3.5.

Table 3.5 **Services registered to participate in CCQA systems**
As at 30 June 2008

Service	*Number*
Long day care centres using QIAS	5 597
Outside school hours care using OSHCQA	3 324
Family day care schemes using FDCQA	316
Total	9 237

Source: NCAC (2008).

According to the NCAC (2008) all three Commonwealth quality assurance systems follow the same five-step accreditation process with a focus on quality improvement (figure 3.1).

Recent efforts have been made by the NCAC to ensure greater national consistency of accreditation decisions:

> From 1 July 2006 NCAC began directly employing Validators … to undertake all Validation Visits … As employees of NCAC, Staff Validators are able to conduct a greater number of Validation Visits and Spot Checks. They receive extensive training and a higher level of feedback and support from NCAC … NCAC records have shown increased satisfaction with Validator consistency since the introduction of Staff Validators. (2007, p. 12)
>
> From 1 September 2007, significant changes to the Moderation staffing model were introduced. Consolidating the number of Moderators employed by the NCAC has already generated significant improvements to timeframes between Validation Visits and Accreditation Decisions, and will ensure greater national consistency of Accreditation Decisions. (2008, p. 5)

It seems that most service providers are satisfied with the validation visits conducted by the NCAC. In its most recent annual analysis of validation evaluation forms, over 90 per cent of services were satisfied with their validation visit (NCAC 2008).

More importantly, it would appear that most service providers are content with the accreditation decisions made by the NCAC because the number of requests for

review received by the Accreditation Decisions Review Committee (ADRC) from services were not large relative to the total number of registered services.

A service may apply to the ADRC for a review of its accreditation decision. This includes services that have been accredited but want to appeal their ratings. The ADRC is comprised of members appointed by the Australian Government Minister responsible for children's services and is independent of the NCAC. Reviews undertaken by the ADRC result in recommendations for consideration and determination by the NCAC. However, the ADRC cannot overturn an NCAC accreditation decision, it can only provide advice.

According to the NCAC, in 2007-08 the ADRC provided the NCAC with 84 recommendations in response to requests for review received from services. The ADRC recommended changes in 47 instances, while no changes were recommended in 37 instances. As a result of changes recommended by the ADRC, NCAC changed 13 decisions from Not Accredited to Accredited. It should be noted that a change to a single CCQA Principle may not alter an overall accreditation decision.

Given the low level of requests for review by the ADRC of accreditation decisions (made by the NCAC) it would appear that in general service providers are reasonably satisfied with the application of the child care quality assurance systems by the NCAC.

Inconsistent licensing arrangements across jurisdictions

Community Child Care (sub. 27, p. 2) raised concerns, prior to the release of the draft report, about the lack of licensing in Victoria for outside school hours care and family day care. Since the release of the Commission's draft report, new children's services legislation has commenced in Victoria, which includes regulating outside school hours care and family day care.

Notwithstanding these recent changes in Victoria, some states do not license some child care types that are licensed in other states. State and territory governments maintain responsibility for the licensing and regulation of child care services. However, some child care sectors are not licensed in some jurisdictions and preschools are generally subject to different regulations and standards than child care services within jurisdictions (table 3.2).

In general, state and territory regulations are focused on structural quality factors regarding factors like safety standards, staff qualifications, staff-child ratios, child development and health and safety requirements. There are differences across

jurisdictions in some of these areas. For example, there are differences in minimum staff-child ratios for centre-based long day care across jurisdictions (table 3.6). Only the Northern Territory and the Australian Capital Territory have the same standards as those endorsed in the national standard that were agreed by the Council of Social Welfare Ministers in 1993.

Any lack of uniformity in licensing and regulatory standards between states will be addressed as part of COAG's National Quality Agenda for Early Childhood Education and Care. According to the Department's website:

> The National Quality Agenda aims to reduce the administrative red tape on services, reduce the overlap and duplication, and work towards better child care services for all Australian children. (DEEWR 2009c)

The outcome of this COAG initiative will not be known until an exposure draft of the national quality standards is publicly released later this year.

Table 3.6 **Minimum staff to child ratios in centre-based long day care**
States and Territories

	0-2 years	*2-3 years*	*3-5 years*
National standards	**1:5**	**1:5**	**1:11**
New South Wales	1:5	1:8	1:10
Victoria	1:4	1:4	1:15
Queensland	1:4	1:6	1:12
South Australia	1:5	1:10	1:10
Western Australia	1:4	1:5	1:10
Tasmania	1:5	1:5	1:10
Northern Territory	1:5	1:5	1:11
Australian Capital Territory	1:5	1:5	1:11

Source: ECDSC (2009).

4 Information media and telecommunications

Key Points

- The main concerns raised by the information and telecommunications industry about the processes for creating regulation and its administration are that:
  - there is a propensity to approach every issue by creating new regulations, often leading to uncoordinated, overlapping or duplicative regulation
  - the Australian Communications and Media Authority's (ACMA) approach to regulation is overly prescriptive with a focus on legalistic interpretation.
- The Commission's major recommendations are outlined below.

Telecommunications

- In April 2009, the Australian Government released a discussion paper on possible reforms to telecommunications regulations. In light of this, the Commission has decided to focus on regulations which are not addressed by the discussion paper.
- Customer information requirements for the telecommunications sector should be reviewed with the aim of streamlining the requirements and improving the comprehensibility and clarity of the information provided to customers.
- Prepaid mobile phone identity checks should be reviewed with the objective of revising the regime to allow law enforcement agencies to better identify owners at a lower cost to business.

Information media

- ACMA should be given greater discretion to target its investigation activity.
- The regulatory burden from the anti-siphoning regime could be reduced by substantially reducing the anti-siphoning list.
- Radio local content rules should be revised to make them more flexible and to reduce the reporting requirements.
- The radio local presence and content rules triggered by changes in ownership should be abolished.
- The disclosure standard for radio current affairs should be made less prescriptive.

4.1 Industry structure

The information media and telecommunications industry contributes some 2.1 per cent of total employment and 2.3 per cent of gross value added in Australia. Further, a strong information technology industry makes an essential contribution to the efficient operation of other industries. Indeed, the telecommunications industry has been a major driver of productivity growth in the economy both directly and as a facilitator of productivity growth in other industries. Telecommunications is the largest sector within the information media and telecommunications industry, with broadcasting making a smaller contribution (table 4.1).

Table 4.1 **Broadcasting and telecommunications revenues**
2006-07

Industry sector	*Revenue*
	($ billion)
Commercial television	4.0
Subscription television[a]	2.9
Commercial radio	1.0
Telecommunications carriers	25.2

[a]estimated revenue for 2008

Source: ACMA (2008a); IBIS World (2009).

For convenience, the industry has often been divided into the broadcasting and telecommunications sectors. However, the distinction between these two areas is not always clear and the internet has characteristics of both sectors. Convergence within the industry is making this distinction less clear, as content which was traditionally available only through broadcasting is becoming available over the internet and through mobile phone services.

Broadcasting and media

A key feature of changes in the media over recent years has been the emergence of growing competition from new media. The share of advertising revenue being received by both newspapers and television has declined while internet advertising revenues have grown (ACMA 2008a). This places pressure on the business models of the traditional media:

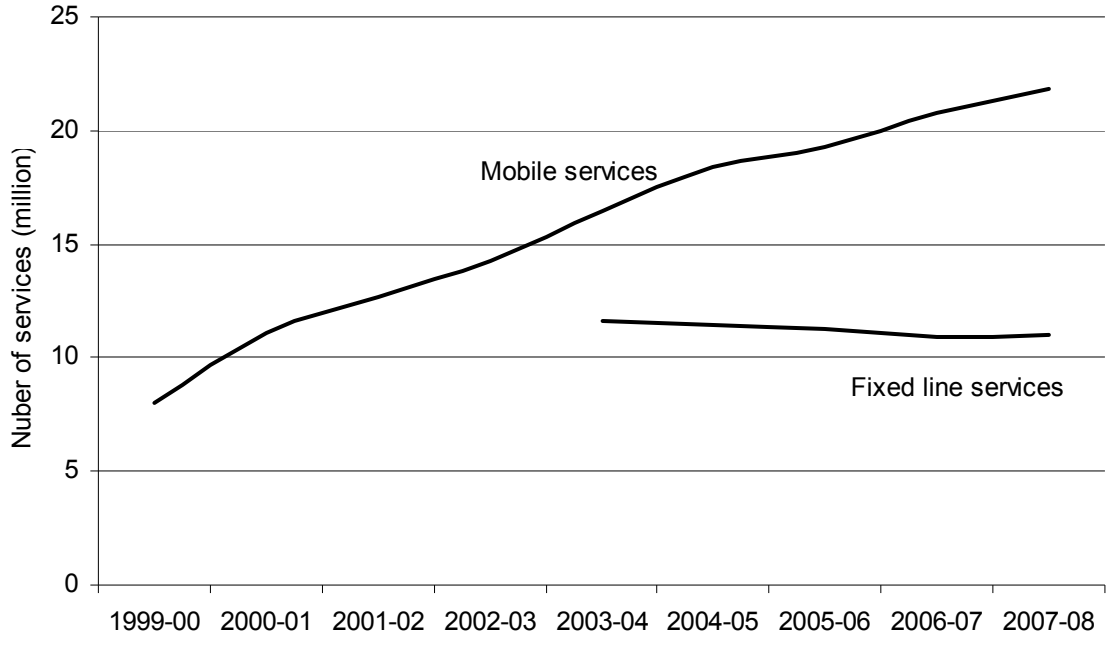
> Fragmentation is one of the most significant trends in media. Audience or readership fragmentation erodes the scale and scope of advantages that content producers and distributors have been used to. The migration of advertising expenditures to online mediums has exacerbated the decline in revenues per channel. (ACMA 2008a, p. 41)

The growth of subscription television services in Australia has also affected the market share of free-to-air broadcasters. Multichannel subscription services commenced in 1995. Since then the number of subscribers has increased to 2.2 million households by early 2009, or an estimated 6.7 million potential viewers (ASTRA 2009a). In the ratings week commencing 29 March 2009, for example, subscription television accounted for 23.5 per cent of all viewing in metropolitan areas (ASTRA 2009a).

Telecommunications

Telecommunications has been subject to dramatic changes due to developments in technology and changes in consumer tastes. The number of fixed-line telephone connections has remained relatively stable, experiencing a small decline in recent years since they peaked in 2004. As at June 2008, there were an estimated 11 million fixed-line services. Telstra, through both retail and wholesale services, accounted for 85 per cent of all fixed-lines provided (ACMA 2008a).

Figure 4.1 **Australian phone services**



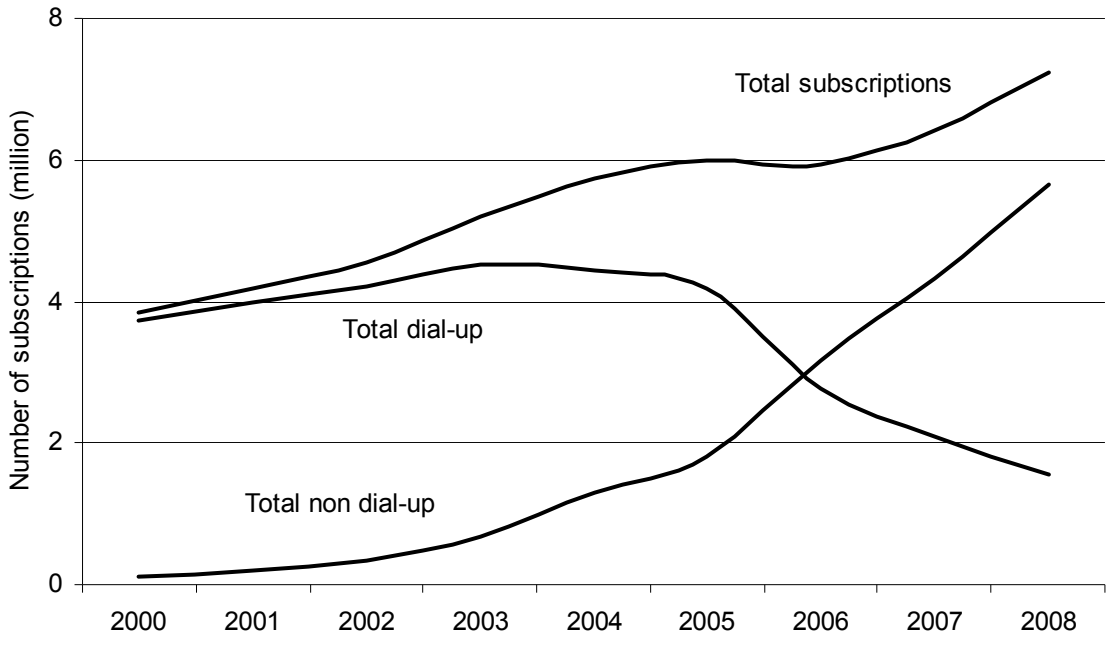
Data source: ACMA (2005, 2008a).

By contrast, there has been substantial growth in the use of mobile phone services over the past decade (figure 4.1). The number of mobile phone services now exceeds the population. A significant number of younger consumers are now choosing to rely solely on mobile phones for voice telephony (ACMA 2009b).

Mobile phone revenue continues to grow while fixed-line revenues decline. In 2007-08 mobile phone revenue for voice services was $9.4 billion while revenue from fixed–line services was $7.6 billion (ACMA 2008a). Importantly, while the infrastructure and market for fixed-line services is still dominated by one company, Telstra, the growing mobile phone market is characterised by competition between Telstra, Optus and Vodafone/Hutchinson.

There has also been a substantial change in internet use by Australians in recent years (figure 4.2). In 2000, the majority of internet subscriptions were for dial-up services, with relatively few non dial-up (broadband) subscribers. Since then, the total number of internet subscriptions has almost doubled. This has been accompanied by a dramatic rise in broadband connections coupled with a large decline in dial-up services, to the point where dial-up users now account for just 22 per cent of internet subscriptions.

Figure 4.2 **Australian internet subscriptions[a]**



a Based on quarterly data: March (2005, 2007); June (2001, 2006, 2008); September (2000, 2002, 2003, 2004).

Data source: ABS *Cat No. 8153.0.*

One aspect of the growth in internet use, and an example of technological convergence, has been growth in internet-based communication services such as voice over internet protocol (VoIP) telephone services. In June 2008, a survey indicated that about 17 per cent of internet users had a VoIP service, with a similar proportion planning to take up the service within 12 months. VoIP is more

commonly used for longer distance calls. In the survey, 67 per cent of users indicated they used the service for international calls, while only 38 per cent used it for local calls (ACMA 2008a). Presently, VoIP is not displacing fixed line services, as fixed telephone lines are still the primary method for broadband internet connections. Increased uptake of broadband connections that do not require fixed telephone lines, such as wireless or naked DSL, could result in increasing substitution of VoIP (and mobile) services for fixed-line telephone services (ACMA 2008a).

4.2 Overview of regulation

The information media and telecommunications industries are characterised by rapid technological change. This is resulting in a convergence of industries, as the boundaries between services become increasingly blurred. As a result, the industry structure in place when the current regime was designed has changed significantly.

The regulatory regime has also, in part, been designed to promote competition where natural monopolies have existed. The telecommunications access regime has led to a rise in competition for fixed line services, and those services are now competing with wireless and mobile telephony services.

The Australian Government has the power to regulate telecommunications and broadcasting. It is the primary regulator of this sector although some aspects of the industry are affected by state regulation, such as fair trading and consumer protection laws. The main regulatory instruments are the:

- *Telecommunications Act 1997*
- *Broadcasting Services Act 1992* (BSA)
- *Radiocommunications Act 1992*
- *Telecommunications (Consumer Protection and Service Standards) Act 1999*
- *Trade Practices Act 1974* (TPA), which regulates competition and the telecommunications access regime.

The Australian Communications and Media Authority (ACMA) was established on 1 July 2005 as the primary regulator of telecommunications and broadcasting. It was formed by the merger of the Australian Broadcasting Authority and the Australian Communications Authority. It has powers, duties and obligations under 29 statutes and more than 523 legislative instruments (ACMA 2008a).

Government regulation is supplemented by an extensive network of co-regulatory arrangements involving industry organisations (figure 4.3). Both the BSA and the

Telecommunications Act provide for the development of industry codes by industry organisations. In 2008, a total of 38 codes were registered with ACMA (ACMA 2008a). These codes cover issues such as:

- technical standards
- consumer protection
- consumer complaints
- advertising
- program content
- transfer of customers between businesses.

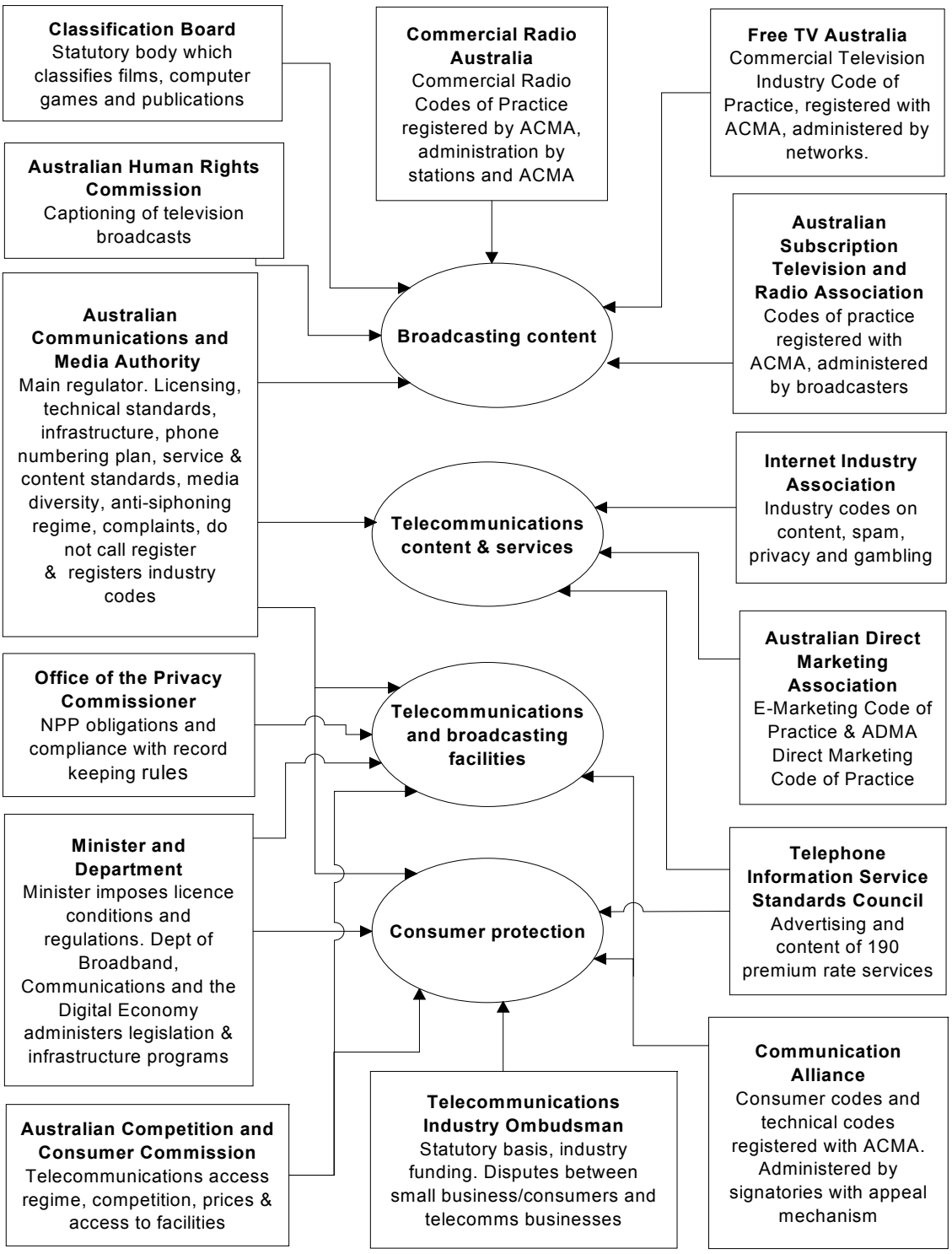
Codes are generally developed in consultation with ACMA and are registered with ACMA. The codes are usually administered by the industry organisations or industry participants. However, where a complaint is not resolved at that level, ACMA can accept a complaint and conduct its own investigation. ACMA may accept an enforceable undertaking where a code has been breached or, following a lengthy procedure, impose an additional licence condition on a broadcaster. ACMA can also promulgate an industry standard if it considers that the codes do not adequately address an issue. Complaints about a licence condition matter or a standard may be made directly to ACMA.

A number of regulatory requirements, such as retail price controls and the universal service obligation, apply only to the incumbent telecommunications carrier, Telstra.

Convergence and regulation

Global developments in communications and the media have led to a complex and dynamic industry and regulatory environment. In 1990, there were essentially only two types of communications services. One was the plain old telephone service which was based on a mature network of copper wire pairs carrying voice communications. The other was the broadcasting of free-to-air television and radio through high powered terrestrial wireless transmitters.

Figure 4.3 **Selected key regulatory bodies**



The communications environment today is characterised by a growing number of technologies (copper wire pairs, mobile telephony, optical fibre and cable networks, satellite, television and radio broadcasting, and wireless technologies) each capable of delivering a growing range of competing services. This process is generally referred to as convergence.

The strains that these developments are placing on the regulatory framework have been recognised by ACMA. It has used the term 'broken concepts' to encompass the notion of legacy legislation — that is, rules for the communications sector that used to work 20 years ago, but which don't entirely fit current circumstances (Chapman 2008).

Recent reviews of regulation

Regulation, or potential regulation, of this sector has been the subject of numerous reviews and inquiries. These have dealt with a range of issues including privacy, sexualisation of children in the media, regional telecommunications and the effectiveness of codes. Outcomes of some of these reviews do not appear to have been made public and the processes followed after those reviews are not always transparent.

4.3 NBN regulation reforms

In 2008, the Australian Government made a request for proposals to roll-out and operate a new National Broadband Network (NBN). The objectives of the NBN are to provide high speed broadband services to all Australians and promote competition in telecommunications services. After the closing date for submissions to this review by the Productivity Commission, the Prime Minister and the Minister for Broadband, Communications and the Digital Economy announced the outcome of the NBN Request for Proposal. In announcing its decision, the Government also released a discussion paper *National Broadband Network: Regulatory Reforms for 21st Century Broadband* (Australian Government 2009a).

The discussion paper outlines proposed regulatory changes that the Government will progress to facilitate the roll-out of the NBN. It also canvasses options for broader reforms to make the existing regulatory regime more effective in the transition period. Those reforms affect the telecommunications competition framework and the consumer safeguard framework. The discussion paper specifically noted Telstra's submission to the Commission's review and sought comments on the issues raised in that submission to the Commission.

The scope of the consultation process being undertaken by the Department of Broadband, Communications and the Digital Economy (the Department) is quite broad. It deals directly with many of the areas of regulation that are raised in submissions to the Commission. The overlap between this review and the issues canvassed through the discussion paper include:

- regulations to facilitate the physical roll-out of fibre optic infrastructure
- the operation of the telecommunications access regime in Part XIC of the TPA
- the operation of the telecommunications specific competition regime in Part XIB of the TPA
- tariff filing and record keeping rules
- the scope and funding of the universal service obligation
- the Customer Service Guarantee arrangements and associated reporting requirements
- the Network Reliability Framework and associated reporting requirements
- Telstra's industry development plan
- distribution of hard copy telephone directories
- local number portability requirements
- reporting on payphone services
- retail price controls on Telstra.

The possibility that the Commission's annual review may overlap with other reviews dealing with the same issues was envisaged in its terms of reference. The terms of reference for this review state that in proposing a focused annual agenda, and providing options and recommendations, the Commission is to have regard to any other current or recent reviews commissioned by Australian governments affecting the regulatory burden faced by businesses.

In light of the more specific consultation process on significant areas of telecommunications regulation being conducted by the Department, the Commission has decided to focus its efforts on those areas of regulation which lie outside of the scope of the Department's process. Consequently, this report will not examine those areas of regulation covered by the Department's consultation process.

The Commission has forwarded all of the relevant submissions to the Department and the Department has stated that it will consider those submissions in the context of the discussion paper.

4.4 Regulatory environment

Industry raise a range of concerns about the general regulatory environment. These relate to the volume of regulation, how regulations are developed, and the role of the regulator, ACMA, in developing and enforcing regulation. These general concerns, and the impact on industry, are described in the following terms by Commercial Radio Australia:

> Broadcasters accept that they will be subject to some level of regulation, designed to maximise the use of the available spectrum and the benefit of the community. However, the level of regulation has become unmanageable in recent years, particularly for the smaller players in the market.
>
> The commercial radio industry is spending an increasing amount of time complying with regulatory requirements, rather than conducting its core business of broadcasting radio. This increasing concentration of resources on compliance – rather than programming – is likely to have a negative effect on radio broadcasting, to the detriment of the listening public. (sub. 6, p. 16)

These concerns, which are echoed in other submissions, relate to the development of regulation, regulator discretion and regulatory reporting.

Development of regulation

Industry raise numerous concerns about the processes for developing regulation, including industry codes. Those concerns relate to the increasing burden of regulation, the overlap between regulations and the cost and speed of developing industry codes.

The Australian Mobile Telecommunications Association (AMTA) (sub. 5) states that the rise in the volume and complexity of regulation has led to duplication and high industry compliance costs. AMTA has used the process through which the regulations governing mobile content have been developed as an example to outline its concerns. It considers that the public policy outcomes could have been achieved in this case with less regulatory effort and complexity, and with a greater reliance on principled outcomes.

The cost of developing industry codes can be significant. In 2005, the Australian Communications Industry Forum (now the Communications Alliance) estimated that it expended more than half a million dollars developing the Consumer Contracts Code, and that the total cost of developing an industry code could be two million dollars (ACIF 2005).

AMTA is further concerned that new regulations in this area are now being considered before the most recent changes have even come into force and been given the opportunity to work. More generally it is concerned that there is a predisposition to create new regulations in response to a situation even though the issue may be resolvable by applying existing regulation. AMTA (sub. 5) feels that the regulator and policy department must properly consult each other to ensure that they understand the status quo before making any decision to make amendments or regulate afresh.

These concerns have also been raised by other industry bodies. Free TV Australia (sub. 41) cites the review of the Commercial Television Industry Code of Practice as an example of the problems with the development of codes under the co-regulatory approach. It contends that ACMA has sought to extend its involvement in the development of codes beyond what was envisaged in the Broadcasting Services Act (BSA). It also cites delays in the development of the Multi-Channel Appendix as a result of ACMA's intervention and its interpretations of it powers under the BSA:

> Broadcasters are concerned at an apparent shift away from the co regulatory principles underlying the BSA. Broadcasters have seen in recent times a re-emergence of a more interventionist approach, particularly in the area of the review of the Commercial Television Industry Codes of Practice (Code) and to investigations under the code. (sub. 41, p. 3)

Telstra (sub. 16) has expressed the view that the whole regulatory framework exhibits a bias in favour of regulation and that reviews of whether existing regulation remains necessary are infrequent.

Free TV Australia (sub. 41) is also concerned that for some public consultations, the outcomes do not appear to acknowledge or address details contained in the submissions. There is a concern that the consultation process appears to have predetermined outcomes which are published in complete disregard of the submissions made by stakeholders.

Related issues have been raised by other industry participants. Both Optus (sub. 30) and the Communications Alliance (sub. 29) highlight the excessive and uncoordinated requirements to provide information to consumers. This issue is discussed later in this chapter.

Vodafone advocates the desirability of regulatory intervention only occurring where it is directed at a demonstrated durable market failure:

> Regulatory processes that lack robustness result in disproportionate regulation where the costs to business outweigh the benefits. (sub. 47, p. 5)

Assessment

Both the BSA and the Telecommunications Act give general guidance to ACMA about regulatory policy. The BSA provides that the Parliament intends broadcasting services be regulated in a manner that, in the opinion of ACMA, enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services (BSA, s. 4). Similarly, the Telecommunications Act (s. 4) states that Parliament intends that the industry be regulated in a manner that promotes the greatest practicable use of industry self-regulation and does not impose undue financial and administrative burdens on industry participants.

Both the BSA and the Telecommunications Act provide that industry bodies or associations should develop codes (BSA, s. 130J; Telecommunications Act, s. 112) or that industry groups develop codes in consultation with ACMA (BSA, s. 123). Under the BSA ACMA is unable to register a code unless it is satisfied that the code meets certain conditions such as providing appropriate community safeguards (s. 123(4)(b)(i)).

In response to the comments by Free TV Australia on the consultation process the Department of Broadband, Communications and the Digital Economy states that the government is committed to appropriate consultation with industry and considers all the views expressed through such processes. It goes on to say 'however, the government reserves the right to determine the most appropriate way to acknowledge and respond to individual views and stakeholders' (sub. DR54, p. 26). The Government's best practice consultation guidelines state that 'to provide credibility to the consultation process, policy agencies should also show stakeholders how they have taken consultation responses into consideration' (Australian Government 2007a).

In relation to the process for reviewing codes, ACMA says that:

> In the code review process the ACMA follows best practice. It identifies early in the process the matters that are of concern and meets with broadcasters to discuss these matters and other regulatory issues. The ACMA rejects outright claims by Free TV Australia that the ACMA has sought to extend its involvement in the code development process beyond what was envisaged by the BSA. The ACMA undertakes its responsibilities in assessing and registering codes in accordance with its obligations under the relevant legislation. The ACMA's power to register a code is not enlivened unless it is satisfied that the statutory pre-conditions to registration are satisfied. (sub. DR73, p. 6)

It is not the role of this review to adjudicate on the specific examples which have been given. However, the concerns being expressed by industry suggest that the

process for developing regulations may not always follow best practice and may need to be revised. The current arrangements which give ACMA broad discretion to make or approve regulations, and then to enforce those same regulations, are unlikely to represent best practice.

However, Free TV Australia also notes that:

> … our relationship with the ACMA is generally constructive. The recent work on the development of the EPG [electronic program guide] principles and guidelines is an example where the ACMA and industry worked together to develop a satisfactory solution. (sub. DR97, p. 11)

The Australian Communications Consumer Action Network (ACCAN) has another perspective:

> We have found industry is often unwilling or unable to genuinely negotiate on Code provisions where there is a perceived commercial cost involved. (sub. DR92, p. 4)

It is difficult to reconcile the different views of how the process for developing new regulations has operated. Perceptions about the overall effectiveness of the process may be influenced by particular cases. But, on balance, the Commission considers that the benefits of the co-regulatory approach to developing codes are not always being realised. The speed and efficiency with which new regulations are developed under the co-regulatory model might be enhanced if regulators were to take a more light-handed approach to the development of industry codes and provide industry with more clarity about the outcome of its consultation processes.

Regulator discretion

Industry is concerned about the extent of ACMA's discretion in relation to its regulatory powers under the BSA and how that discretion is exercised. Free TV Australia describes ACMA's approach to enforcement as being 'hardline' and 'interventionist'. Free TV Australia claims that ACMA has generally not followed its own guidelines when assessing the seriousness of a breach and has used its powers to impose maximum penalties in circumstances not warranted by the relevant breach:

> Broadcasters are seeing an increasingly legalistic approach to investigations under the BSA. Often the approach is one which places greater weight on legalistic interpretations which have no resultant public benefit. Broadcasters would like to see an increased emphasis on practical solutions. (sub. 41, p. 9)

Free TV Australia (sub. 41) cites a recent example where it considers that ACMA has applied an overly legalistic interpretation to the code when finding breaches. In its view, ACMA's interpretation of what steps broadcasters must take to meet the

requirements of the code have led to changes in procedures by broadcasters which are unnecessarily burdensome. Free TV Australia is also concerned that its role in administering codes is being diminished by ACMA's approach.

Free TV Australia (sub. 41) notes that in 2006 ACMA developed Draft Guidelines to expand on the provisions of the BSA with the apparent objective of providing certainty and clarity about the way ACMA was to apply some of its powers. Free TV Australia argues that the Draft Guidelines are unsatisfactory as they largely reiterate the enforcement provisions of the BSA.

Free TV Australia is of the view that legislative amendment is required to ensure that there are adequate parameters around the exercise of ACMA's powers in relation to enforcement.

The Australian Direct Marketing Association (ADMA) (sub. DR93) is also concerned about ACMA's approach to regulation. It describes ACMA's approach as being overly prescriptive and focused on legalistic interpretation. ADMA expresses support for the steps taken by ACMA in pursuit of organisations that wilfully and continually flout the law. But it is concerned about the cost to members of formal investigations, the failure of ACMA to share with industry complaints data which might assist them to identify trends in complaints, and the prescriptive nature of ACMA's application of the Compliance Guide. ADMA concludes by saying that:

> ADMA remains concerned that Australian business is being forced into excessive compliance measures to meet a zero complaint tolerance level and this is a disproportionate response to social ill which the Do Not Call Register was designed to prevent. (sub. DR93, p. 12)

Assessment

The BSA gives some general guidance to ACMA about the enforcement of regulation. The BSA provides that the Parliament intends that ACMA use its powers, or a combination of its powers, in a manner that, in the opinion of ACMA, is commensurate with the seriousness of the breach concerned (BSA, s. 5).

The concerns of industry are not shared by the Australian Communications Consumer Action Network (ACCAN), who call for more rigorous enforcement:

> ACCAN would be extremely pleased for the Commission to recommend a much more rigorous approach to enforcement of existing regulation, as opposed to creating new regulation, which has effectively allowed telcos to shift responsibility for their poor regulatory compliance. We have long believed that enforcement is the missing link in the telecommunications regulation. (sub. DR92, p. 9)

ACMA strongly rejects the criticisms of industry regarding the use of its enforcement powers and the application of the guidelines. It asserts that:

> … ACMA considers the matters which are set out in those Guidelines in each of the matters in which it has exercised its powers and has actively considered whether or not the exercise of its enforcement powers would foster stable and predictable regulatory arrangements and deal effectively with breaches. (sub. DR73, p. 8)

In relation to its enforcement of the Do Not Call Register Act, ACMA states that:

> The ACMA's general approach to DNCR Act compliance is a facilitative one – seeking to resolve a matter, where appropriate, without resorting to formal procedures. The ACMA's main focus is to act to prevent unwanted calls from continuing or recurring by encouraging telemarketers to take appropriate action to avoid breaching the legislative scheme. However, if facilitation in unsuccessful or inappropriate, the ACMA will take appropriate investigatory and enforcement action. (sub. DR99, p. 1)

In the same submission, ACMA outlines its three stage approach to responding to complaints. This involves the use of advisory letters (to inform businesses that complaints have been received and reminding them of their legal obligations), warning letters (containing specific complaint details and encouraging the business to take action to improve compliance), and formal investigation. Throughout the advisory and warning stages of the ACMA process, ACMA states that it provides complaint information to businesses and engages with businesses to identify potential solutions. ADMA's claim that ACMA takes a zero complaint tolerance approach does not appear to be supported by the data provided by ACMA.

Table 4.2 **Do Not Call Register complaints and ACMA enforcement**
31 May 2007 to 30 June 2009

	(number)
Complaints received that raised potential contraventions	34 720
Advisory letters sent	969
Warning letters sent	301
Formal investigations commenced	33

Source: ACMA (sub. DR99, p. 2).

ACMA (sub. DR73) also draws to the Commission's attention its lack of discretion not to investigate some code complaints. As an example, it refers to some cases when it was required to investigate matters where a complaint had come to it many years after a broadcast, even though the material on which to base an investigation was no longer available.

It is not the role of this review to examine individual examples of ACMA's exercise of its powers. But the concerns expressed by industry through their submissions appear to be broadly based. Moreover, at the least, these concerns suggest that there

is uncertainty about the approach being taken by ACMA. These concerns might best be addressed through a closer dialogue between ACMA and industry on this issue or, if that approach is not effective, consideration could be given to providing more guidance in the legislation on how ACMA should exercise its discretion.

One way in which the regulatory burden on both industry and ACMA might be reduced is by providing ACMA with greater discretion not to investigate some code complaints. The BSA currently provides that ACMA need not investigate a complaint if it is satisfied that the complaint is frivolous, or vexatious, or was not made in good faith (s. 149). In contrast, the *Ombudsman Act 1976* provides the Commonwealth Ombudsman with additional grounds to not investigate a complaint, or to not investigate a matter further. For example, the Commonwealth Ombudsman may not have to investigate, or to investigate further if:

- the Ombudsman is satisfied that the complainant became aware of the action more than 12 months before the complaint was made
- the complainant does not have a sufficient interest in the subject matter of the complaint
- an investigation, or further investigation, of the action is not warranted having regard to all the circumstances
- where redress has been granted the Ombudsman is only required to investigate the matter if the redress was not reasonably adequate
- where a complainant has the right to have the matter reviewed by a court or tribunal (Ombudsman Act, s. 6).

The limited grounds on which ACMA can use its discretion and decline to investigate a complaint restricts ACMA's ability to target its enforcement activity on those complaints which are of greatest concern. In doing so, the current complaints mechanism imposes unnecessary costs on the industry, who must respond to ACMA's investigations. ACMA should be provided with a broader discretion, similar to that of the Commonwealth Ombudsman, to only investigate code complaints where investigation is justified. If broader discretion to decline to investigate claims was provided to ACMA, it should take a greater risk management approach to the investigation of code issues.

RECOMMENDATION 4.1

The Australian Communications and Media Authority should be provided with a broader discretion, similar to that provided to the Commonwealth Ombudsman, to not investigate some code complaints.

Regulator reporting

Another concern relates to the number of reports the industry is required to submit to government agencies and the overlap in the information requested by different agencies. Vodafone identified ten separate requirements to provide reports to ACMA, the Australian Competition and Consumer Commission (ACCC) and the Australian Bureau of Statistics (ABS). It drew the Commission's attention in particular to the increasing depth of information being sought, the growing number of surveys being issued by the ABS and the degree of overlap with ACMA's Annual Industry Information Request for its Research and Reporting Program.

Vodafone (sub. 47) contends that these requirements impose a significant financial and human resource commitment and are onerous.

Assessment

Over recent years the significant burden imposed on business through multiple requirements to report to regulators, often involving duplicative requirements, has been widely recognised. As outlined in appendix B, COAG has responded to this general business-wide issue by giving its support to the development of Standard Business Reporting (SBR). Although SBR is focussed on financial reporting requirements, the same principles and process can be applied to other areas of reporting.

Some progress on this issue appears to have been made in recent years. Vodafone noted that ACMA and the ACCC have recently made some progress in reducing the overlap between their requirements. In response to the concerns raised by industry ACMA (sub. DR73) outlined some recent developments which have reduced the reporting burden:

- last year information requested from industry pursuant to section 105 of the Telecommunications Act was cut by 30-40 per cent
- this year ACMA has consolidated some reporting requirements further
- ACMA has participated in legislative initiatives to enhance its ability to share information with other agencies including the Department of Broadband, Communications and the Digital Economy and the ACCC.

The Commission also notes that in some areas the information sought by ACMA flows from specific requirements in regulations which give it little flexibility. One example of this, as discussed later in this chapter, is in relation to reporting of High Definition broadcast hours by free-to-air television broadcasters.

The Commission urges the Government and its agencies, which are imposing reporting requirements on industry, to continue to pursue the harmonisation and streamlining of reporting requirements, drawing as much as possible on the SBR experience (see appendix B).

4.5 Interaction with telecommunications consumers

Customer information

There are concerns about the extent of customer information requirements imposed on the industry, and that new regulations are continually placing additional information provision requirements on the industry. The Communications Alliance submits:

> … that the information provision requirements contained in the many regulatory instruments that the communications industry is subject to, should be reviewed to establish:
>
> - What requirements are unnecessary or redundant;
> - What alternative mechanisms are available to the provision of information such as ”on request” and “online”; and
> - Whether a sunset clause should be inserted into the relevant regulations. (sub. 29, p. 5)

Industry highlighted the costs of meeting the customer information requirements and the burden they imposed on business. Optus (sub. 30) outlines the list of material it is required to provide to new residential customers and identifies 21 different regulations under which there are significant consumer information obligations. Optus also indicates that the absence of sunset clauses in the legislation leads to industry being required to send out information which is no longer of interest to consumers.

The concerns by industry about the burden of these requirements also relate to the perceived failure of the current requirements to satisfy the needs of customers. Optus refers to research and anecdotal evidence showing that the large quantity of information provided to customers is confusing and overwhelming. As a result, customers remain unaware of their rights and the consumer safeguards which exist. It has been argued that the requirements are not only burdensome for industry, but are failing to meet their objective of effectively informing consumers.

The concerns of industry are exacerbated, in Optus’s view, because new information requirements are being introduced without an assessment of the costs

and benefits of the new requirements. Nor is the issue of how the new requirements relate to the existing requirements, under both general and telecommunications specific regulations, being considered:

> Even though research shows that the provision of this information in its current format is not effective, new regulations in the telecommunications sector continue to be brought into force containing additional customer information requirements, adding to the pool of material provided to customers and adding to the impost on business – without any assessment of the effectiveness or cost-benefit of providing such information to customers in such a format. (sub. 30, p. 42)

Assessment

The effective and efficient provision of information to customers about their rights and obligations ensures that the protections provided for them are effective. To be effective, the information provided to consumers needs to be clear, easily located, and comprehensible. Providing too much information to consumers may be confusing. Important information may be 'lost' among the mass of information provided. In its Report on Australia's Consumer Policy Framework the Commission recommended that:

> Where a need for mandatory information disclosure requirements has been established, the regulator concerned should require that:
>
> - information is comprehensible, with the broad content, clarity and form of disclosure consumer tested prior to and/or after implementation, and amended as required, so that it facilitates good consumer decision-making; and
> - complex information is layered, with businesses required to initially provide only agreed key information necessary for consumers to plan or make a purchase, with other more detailed information available (including by electronic means) by right on request or otherwise referenced.
>
> Also, the respective roles and responsibilities of regulators and businesses in regard to such matters as consumer testing, content and amendment should be understood and agreed at the outset. (PC 2008b, p. 75)

It appears that the development of information requirements has occurred on a piecemeal basis. While each individual requirement may be reasonable by itself, the cumulative effect has been to create a web of uncoordinated requirements which is duplicative, burdensome to industry, and does not meet its objective of informing customers.

In response to the Commission's draft report both the DBCDE (sub. DR54) and ACMA (sub. DR73) note that the NBN discussion paper sought views on red tape issues and suggest that it would be pre-emptive to conduct a review until the outcomes of that process are in place. While the discussion paper sought general

views on red tape issues and the consumer safeguard framework, customer information requirements are not specifically mentioned and may not be fully considered through that process. A comprehensive review of these regulations is required, although that review might be timed to co-ordinate with the NBN process.

A review of the overall requirements is needed to develop a more streamlined, integrated, customer information requirement which is less burdensome to business and more effective for customers. Future changes to the requirements need to be considered in the light of the existing requirements and the need to provide customers with a coherent package of information.

RECOMMENDATION 4.2

The Australian Communications and Media Authority and the Department of Broadband, Communications and the Digital Economy should conduct a comprehensive joint review of all of the customer information requirements imposed on telecommunications businesses, and the processes used in developing new requirements. Specifically they should:

- ***review all of the current customer information requirements in consultation with industry and consumer organisations, with the aim of streamlining the requirements to remove duplication, reduce the burden on business, and improve the comprehensibility and clarity of information provided to customers, consistent with the principles set out in the Productivity Commission's Report on its Review of Australia's Consumer Policy Framework***
- ***review the processes for developing new customer information requirements to ensure that such processes take account of the existing requirements and that the new requirements form part of a comprehensive and comprehensible package of customer information.***

Consumer contracts

The *Telecommunications Act 1997* and the Telecommunications (Standard Form of Agreement Information) Determination 2003 give telecommunications providers the right to contract with customers through standard forms of agreement. They also set out the rules with which those agreements must comply. Those contracts are also subject to the Trade Practices Act, the Telecommunications Consumer Protections Code, and the various state and territory fair trading laws.

For national operators, the requirement for businesses to comply with each individual state and territory requirement is considered to be burdensome. As Optus states:

> As we operate in each Australian State and Territory, we must ensure that our customer contracts meet the requirements imposed in no less than nine different pieces of legislation and regulation. This is a ridiculous situation and untenable without huge costs to the organisation for legal advice to ensure all contracts comply. (sub. 30, p. 45)

This issue was also raised by the Communications Alliance in its submission to the Commission's study on *Performance Benchmarking of Australian Business Regulation* (Communications Alliance 2006).

Assessment

As Optus notes, COAG has already agreed to a new consumer policy framework, including a provision to regulate unfair contract terms. An information and consultation paper released by the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs in February 2009, described one of the key elements as being:

> … the development of a consumer law to be applied both nationally and in each State and Territory, which is based on the existing consumer protection provisions of the *Trade Practices Act 1974*, and which includes a new national provision regulating unfair contract terms, new enforcement powers and, where agreed, changes based on best practice in state and territory laws. (Treasury 2009, p. iii)

The formal process of implementing a new national consumer law began on 24 June 2009 when the Trade Practices Amendment (Australian Consumer Law) Bill 2009 was introduced in the House of Representatives.

The development of a single national consumer law should address many of the concerns of industry about the duplication of laws in different jurisdictions.

Prepaid mobile phone identity checks

Carriage service providers offering prepaid mobile phone services are required to conduct identity checks on purchasers under the Telecommunications (Service Provider Identity Checks for Prepaid Mobile Telecommunications Services) Determination 2000.

Industry has identified concerns with the operation of this regulation. AMTA (sub. 5, pp. 7-11) contends that the regulation is costly to prepaid service providers, but has limited effectiveness. Concerns raised in the AMTA submission are:

- difficulties in ensuring compliance, given identity checks need to be completed by approximately 30 000 retailers
- difficulty for some customers to satisfy identity check, for instance minors

- inability of point of sale checks to defeat those determined to obtain anonymous services through, for example, identity fraud or theft of phones.

Optus (sub. 30) reports that in 2006 ACMA proposed changes to the Prepaid Determination to improve the overall level of compliance. However, Optus is concerned that the objectives of the change were not clearly identified, there was no cost-benefit analysis conducted, and no benchmark measurement of compliance against which to measure any change.

Assessment

The purpose of the regulation is to avoid the registration of anonymous pre-paid mobile services, allowing law enforcement agencies to identify the owners of mobile phones which are used in conjunction with illegal activities. The importance of this information is emphasised by law enforcement agencies. The Attorney-General's Department states that:

> The information gathered under the Determination has been vital to investigations of terrorists, murderers, drug traffickers, kidnappers and those who have committed crimes of violence.
>
> Without accurate purchaser information, investigations by law enforcement and national security agencies could be significantly hindered. It is common practice for individuals seeking to avoid scrutiny from security or law enforcement agencies to try to avoid using properly subscribed pre-paid mobile telecommunications services. The abolition of this policy would allow all persons of interest to purchase mobile devices anonymously, thereby avoiding lawful interception of their communications. (sub. DR86, pp. 1-2)

The Attorney-General's Department also draws the attention of the Commission to the comments of the Parliamentary Joint Committee on the Australian Crime Commission. It said that 'the current requirements for recording SIM card user details are deficient and therefore represent a significant difficulty to authorities needing to accurately track suspect mobile phone users. This is a critical area needing urgent attention' (PJC 2007, p. x). The Committee also commented on the economic costs to Australian society of serious and organised crime:

> Along with the tangible cost to law enforcement agencies and government departments, there is the huge yet unquantifiable cost to society of the undermining of confidence in public institutions, the financial sector and the economy. There is also the human cost to individuals, families and communities that are affected by the activities of organised and serious crime, as is the case with drug addition and people trafficking. (PJC 2007, p. 89)

One of the key issues raised by industry is the difficulty in ensuring compliance with current arrangements. While identity checks are conduced by phone retailers at

the point of sale, liability for non-compliance rests with the carriage service providers, with no scope for enforcement action against retailers.

It has also been argued that identity checks can be relatively easily circumvented through identity fraud due to the difficulties in validating identity documents by retail sales staff. AMTA states:

> … the regime is fundamentally flawed in that while most customers have no motivation to provide false information, the shop assistants are not and could not be expected to validate the identification documents presented by customers at point-of-sale. Thus the whole process is subject to the simplest forms of identity fraud. (sub. 5, p. 8)

There are also other difficulties in identifying the eventual users of the phone. Purchasers of prepaid phones may lend or give them away and an estimated 200 000 mobile phones are lost or stolen each year (AMTA 2009). Prepaid owners may be unlikely to report the loss because the prepaid nature of the service limits the owner's loss. AMTA (sub. 5) also suggests that the whole regime can be avoided by importing prepaid services from overseas.

The evidence given to the Parliamentary Joint Committee on the Australian Crime Commission about the evasion of the regime points at other weaknesses of the regime. Senior Western Australian police gave evidence that criminals used multiple SIM cards to make it more difficult to intercept conversations and also suggested that there was evidence that criminals were buying mobile service retailers so they had a ready supply of untraceable SIM cards (ACCAN, sub. DR92).

Overall, there appears to be considerable difficulty in preventing access to anonymous prepaid services for those determined to do so. The Department of Broadband, Communications and the Digital Economy says that 'Industry, and law enforcement and national security agencies have had long standing concerns regarding the effectiveness of the pre-paid mobile identity checking arrangements' (sub. DR54, p. 8). Concern has also been expressed by consumer groups about the ability of the regime to deliver national interest outcomes (ACCAN, sub. DR92).

While it is not clear that there are substantial benefits from the identity check regime, the process imposes significant costs on both the industry and consumers. AMTA (sub. 5) estimates the cost to industry of the regime to be around $10 million per year. It also states that the regime could cause higher charges to consumers of prepaid services and raises the issue that onerous identity requirements could make it difficult for some customers, in particular minors, to satisfy the identity check requirements.

AMTA (sub. 5) is also concerned that, in its view, previous proposals for improving the process have not:

- identified empirical evidence to demonstrate the extent of the problem
- clearly identified the objectives of the changes
- considered the likely effectiveness of the changes
- included a cost benefit analysis
- included benchmark measurement of compliance against which improvements might be measured.

The latest changes to the regime were made in 2004. Those changes provided industry with the option of developing alternative compliance plans to meet their obligations. The Regulatory Impact Statements which accompanied those changes discuss many of the weaknesses which have been raised during this review, incorporated some data on costs to industry and indicated that the Australian Communications Authority would continue to work with industry to find an adequate data source against which to verify customer identity details. But they do not contain any specific information on how effective the regime was at the time, or the extent to which the changes might improve the reliability of the information available to law enforcement agencies (ACA 2003, 2004).

Few countries have implemented similar mobile phone registration policies. A survey conducted for the Office of the Privacy Commissioner of Canada found that only 9 of the 24 countries which responded had regulations that required mobile operators to collect customer information for prepaid services. Six countries considered and rejected a policy following a consultation process (Office of the Privacy Commissioner of Canada 2006).

There appears to be general support for a review of the regulations. The Parliamentary Joint Committee on the Australian Crime Commission recommended in September 2007 that, 'the Commonwealth Government examine the cost of provision of telecommunications data by telecommunications companies, with particular reference to methods by which that cost can be met or controlled' (PJC 2007, p. ix). The Department of Broadband, Communications and the Digital Economy has also said that it can see merit in a review (sub. DR54).

In its draft report, the Commission suggested that the current regime should be reviewed with the objective of either abolishing the requirement or substantially revising the regime. In light of the representations from the Attorney-General's Department and ACMA about the importance of the information to law enforcement agencies, the Commission has removed the reference to possible abolition of the regime from its recommendation. However, the Commission

remains concerned that there appears to be little evidence that current identity check requirements are resulting in significantly better data than that which would be available through normal sales records.

The submissions received by the Commission indicate that this is not a simple issue, consideration of which is not helped by the lack of objective information. The information being sought by law enforcement agencies is clearly of some value to them. But there are significant questions about whether it is reasonably attainable, and whether the cost of current arrangements are justified by the benefits being delivered. At present there is little evidence on which to make a judgement about the costs and benefits of the regime. Imposing the costs of collecting the data on industry without passing those costs onto the law enforcement agencies means that there is no automatic mechanism to balance the costs and benefits.

The Commission considers that a review of these regulations should commence as soon as possible. The review should be based on evidence, incorporate best practice processes for developing regulation, involve consultations with industry, consumer groups, the Privacy Commissioner and law enforcement and security agencies. The review should examine all the relevant issues, including:

- the impact of any regime on the availability of mobile phones to potential users, such as children, who may have difficulty satisfying proof of identity requirements
- the practical limits on the ability of retailers and network operators to verify the identity of purchasers and users
- evidence of the extent to which the identity check regime, or any proposed regime, improves the reliability of data available to law enforcement agencies
- evidence of the extent to which the data contributes to law enforcement and security activities
- whether the cost of verifying identity and collecting data should be borne by law enforcement agencies or the government, as the data is being collected for public benefit.

RECOMMENDATION 4.3

The Australian Government should review the costs and benefits of identity checks for prepaid mobile phone services in consultation with law enforcement and security agencies. The review should have the objective of substantially revising the regime to better achieve its objectives while eliminating unnecessary costs to business.

Privacy

Both the *Privacy Act 1998* and a number of telecommunications regulations contain provisions relating to privacy. The Taskforce on Reducing Regulatory Burdens on Business noted business concerns about the consistency between Australian Government privacy requirements and those under the Telecommunications Act (Regulation Taskforce 2006).

In 2008, the Australian Law Reform Commission (ALRC) published a detailed report on privacy regulation in Australia (ALRC 2008). The ALRC examined in detail the current generic and industry specific regulations relating to privacy. The ALRC's main recommendation was that Part 13 of the Telecommunications Act be redrafted to achieve greater logical consistency, simplicity and clarity (ALRC 2008).

AMTA indicates in its submission to this Review that this was a positive development and that the ALRC recommendations should provide much needed clarification. The costs and benefits of any proposed amendments to the legislation arising from these recommendations will need to be considered in more detail through a Regulation Impact Statement.

4.6 Sports anti-siphoning regulations

The sports anti-siphoning list aims to prevent major sporting events from being 'siphoned off' by subscription television to the detriment of free-to-air viewers. Anti-siphoning regulation is contained within the Broadcasting Services Act.

The current regime gives free-to-air television broadcasters preferential access to negotiate the rights to broadcast sporting events on the anti-siphoning list. The Minister for Broadband, Communications and the Digital Economy has discretion to add or remove sporting events from the list. Events are automatically delisted 12 weeks prior to the event, allowing subscription television broadcasters to negotiate with the sporting bodies for broadcast rights, unless exclusive rights have already been acquired by the free-to-air broadcasters.

Free-to-air networks that acquire rights are not obliged to televise the event. However, there are a number of restrictions on free-to-air networks that acquire rights to events on the anti-siphoning list. Networks are required to first broadcast those events on their core channel. There are also anti-hoarding provisions that can be used to require free-to-air broadcasters to offer the rights to events they are not going to broadcast to the ABC or SBS for a nominal fee. Subscription stations can also negotiate to purchase broadcast rights from free-to-air networks.

The Australian Subscription Television and Radio Association (ASTRA) raises concerns that the anti-siphoning list imposes a significant burden on subscription broadcasters as a result of their having to negotiate with their competitors. These negotiations are more complex, drawn out and burdensome than if subscription broadcasters could negotiate directly with the underlying rights holder. ASTRA (sub. 37) cites, as an example, the negotiations for AFL rights between Foxtel and Network Seven and Ten for the 2007-2011 period. Discussions with free-to-air broadcasters commenced in March 2005 and were not finalised until February 2007.

ASTRA submits that the anti-siphoning list contains too many events. It noted that when soccer was last on the anti-siphoning list the network which bought the rights showed only one game out of the 32 domestic games that it could broadcast. ASTRA claims that 77 per cent of the events on the list are not broadcast by free-to-air broadcasters. They contend that the anti-siphoning regime:

- reduces total consumer access to sport
- appoints the FTA [free-to-air] networks as brokers for sports rights
- reduces the value of sports rights to sporting codes
- imposes a competitive disadvantage on STV [subscription television]. (sub. 37, p. 5)

Free TV Australia oppose any amendment of the anti-siphoning list, arguing that the list is operating as intended, allowing Australians to watch major sporting events on television for free. Free TV also argue that digital take-up would be enhanced if free-to-air broadcasters were permitted to show listed events on their additional digital channels (sub. DR97).

Under s. 115A of the BSA, the anti-siphoning regime is subject to a statutory review, to be completed by the end of 2009. In commencing this process, the Department of Broadband, Communications and the Digital Economy released a discussion paper on 20 August 2009 and called for submissions by 16 October 2009 (DBCDE 2009b).

Assessment

The anti-siphoning list was introduced with the objective of ensuring broad access to television coverage of major sporting events. However, it appears to be a blunt, burdensome instrument that is unnecessary to meet the objective of ensuring wide community access to sporting broadcasts.

There has been a history of changes to the anti-siphoning regime since it was first established in 1994. There have been a number of changes implemented which may

have addressed the perverse outcome of listed events not being broadcast at all. Anti-hoarding provisions were introduced in 1999 and stipulate that in the case of designated events, broadcasters must offer unused rights to the ABC or SBS for a nominal charge. However, the provisions have not been widely used. In 2007, the then Australian Government introduced 'use it or lose it' guidelines. The guidelines were not in place for long under the previous Government, and the current Australian Government has not announced its approach to these guidelines. There have also been number of changes to the listed events. Several tennis, basketball, golf and motor racing events have been removed from the list, although both the summer and winter Olympic Games have been added.

Reviews of the anti-siphoning regime have been undertaken previously, including by the Commission (PC 2000). The issues raised in this review are largely the same, and so aspects of that analysis remain pertinent. However, there has also been a significant growth in the reach of the subscription television sector that reduces the case for maintaining the current anti-siphoning regime.

Anti-siphoning list is overly burdensome

The inclusion in the list of events which can not be, or are not, broadcast by free-to-air television broadcasters imposes a protracted negotiation process on subscription television broadcasters. This imposes an unnecessary regulatory burden on those businesses. The protracted negotiation process might be shortened through strengthening the anti-hoarding regime or by introducing a formal 'use it or lose it process'. However, shortening the existing list would be a more effective approach to this problem, while being consistent with the overall policy objective.

The main concern put forward by ASTRA in their submission is that the anti-siphoning list is too long and that the majority of listed events are not shown by the free-to-air networks. While the list contains a relatively large number of individual events, these are spread across a small number of sports. For instance, the list includes all games in the primary National Rugby League (NRL) and Australian Football League (AFL) competitions, all events in the Commonwealth and Olympic Games and all matches in the Australian Open and Wimbledon tennis competitions. This is relatively long by international standards (box 4.1).

Clearly, given the number of events on the list, it is not feasible for a free-to-air broadcaster to televise all of these events on a single channel. Free-to-air networks regularly on-sell to subscription television that portion of the broadcast rights they are unable to broadcast. These negotiations can happen at any time and in some instances, subscription networks are involved in negotiations from the outset and make joint bids with free-to-air stations to sporting rights holders.

Box 4.1 **Sports broadcasting overseas**

The Australian anti-siphoning list is relatively long compared with those used overseas, such as in a number of European countries — Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Germany and the United Kingdom. In these countries, listed event schemes are conducted in accordance with the Council of European Communities Television Without Frontiers Directive and events must meet certain criteria to comply. The schemes are broadly similar across these countries and generally contain sporting events which involve participation of a national team, finals of domestic competitions or world tournaments, such as the Olympic Games.

Some countries also vary restrictions across listed events. In the United Kingdom, for example, there is a two tiered approach. Events in group A are fully protected to be shown on free-to-air stations, while for those in group B, highlights coverage must be available to free-to-air television. The group A list consists of ten events and, aside from the Olympic Games, it is only the finals of each event that are included in the group A list. The group B list comprises ten events as well. Mostly these are different events to those in group A, although some are non-finals events where the finals are listed in group A, for instance, non-finals coverage of Wimbledon. However, for most events, protected coverage is limited to finals matches. The UK regime is currently being reviewed.

Further, there are no such restrictions in many countries including New Zealand and the United States.

Source: DBCDE (2009b); DCMS (2008).

Anti-siphoning regime is anti-competitive

The anti-siphoning list is inherently anti-competitive. The anti-siphoning provisions directly limit competition between subscription and free-to-air networks. While subscription television providers regularly gain access to listed events, the regime shifts the balance of negotiating power in favour of free-to-air networks, as subscription television broadcasters are unable to compete for exclusive broadcast rights for listed events. The additional constraints on negotiations placed on subscription broadcasters create a significant additional burden in terms of the additional costs of trying to get events delisted or having to deal with free-to-air networks. As ASTRA submits:

> … negotiations are more complex, drawn out and burdensome than if STV could negotiate directly with the underlying rights holder … (sub. 37, p. 7)

As the Commission identified in the broadcasting inquiry, *Broadcasting* (PC 2000), in 2000, access to exclusive rights for sporting events is a significant draw card for attracting subscribers to subscription television. The anti-siphoning regime prevents subscription networks from using exclusive coverage to attract subscribers.

The anti-siphoning regime also has a negative impact on sporting bodies, as a result of the substantial reduction in competition during negotiations with broadcasters for the rights. The Commission, in the broadcasting inquiry, found that the provisions reinforced the market power of the small number of free-to-air broadcasters, reducing the potential benefits to the sporting bodies. The Commission also concluded that the anti-siphoning regime is likely to distort the relative prices of broadcast rights of listed events relative to non-listed events, potentially reducing the price received by sporting organisations for listed events (PC 2000).

The impact of anti-siphoning restrictions on sporting organisations has been raised in submissions to the current review by the Independent Sport Panel and the recently completed Senate Standing Committee review into the reporting of sports news and the emergence of digital media (box 4.2).

The anti-siphoning measures can also have negative impacts on the broader community. The Australian Association of National Advertisers (AANA) generally supports the reduction of the anti-siphoning list, noting:

> AANA has long considered the anti-siphoning regulations to be anti-competitive and not necessarily in the best interests of the community. AANA acknowledges there will be circumstances where broadcasting regulation can be justified to ensure community access to sporting event coverage. However, AANA considers these should preferably be managed as the exception rather than the rule. (sub. DR57, p. 1)

Overall, the anti-siphoning regime imposes considerable anti-competitive distortions and imposes considerable additional burdens on subscription broadcasters in acquiring those rights.

Anti-siphoning regime has limited effectiveness

There are a number of reasons why it could be expected that broad coverage of sporting events would be maintained in the absence of anti-siphoning regulation and that the current regime may not be necessary to ensure broad access to sports broadcasts.

There has been considerable growth in the penetration of subscription television into households. It has been estimated that approximately a third of Australian households now access subscription television. Ratings figures indicate that subscription television accounts for over 20 per cent of all television viewing. Moreover, sport is typically the most popular viewing option of those with subscription television, suggesting that it is those viewers particularly interested in watching sport that are most likely to subscribe. For example, telecasts of sporting events (soccer, NRL and AFL) accounted for the top ten most popular broadcasts on subscription television in the week commencing 29 March 2009 (ASTRA 2009b).

Box 4.2 **Impact of anti-siphoning restrictions on sport**

Sporting organisations have commented on the impact of anti-siphoning regulations on the returns to sporting organisations from broadcast rights.

For example, the Australian Rugby Union says that:

> For sports operating in the mass entertainment business, it is vital that they be able to make their own decisions which balance the twin objectives of optimisation of exposure (say, through free to air television) and maximisation of revenue (perhaps via pay/subscription television and other forms of distribution platforms). Anti-siphoning is a form of regulation which can substantially reduce the competitive tension required for price maximisation and thus lessen the amount of funds available to invest in pathways and grass-roots sport. (Australian Rugby Union 2008, pp. 12-13)

In the view of the Australian Rugby League and National Rugby League:

> … the current anti-siphoning regime has held back competition in media rights negotiations which have potentially deprived Rugby League of funding for the game's grassroots level.
>
> The continued operation of the Anti-Siphoning scheme, in its current form, will continue to restrict sports from realising the full value of their media rights and driving for national coverage as part of their broadcasting model.
>
> Whilst, it would be inconceivable for Rugby League to totally move away [from] free to air broadcasting. The growth of media rights sales underpins Rugby League's investment in junior league and the thousands of kids born today who will play Rugby League into the future. (Australian Rugby League and National Rugby League 2008, p. 13)

The National Rugby League also states:

> The point that the Anti-Siphoning Legislation fails to take into account is that sports are already in the business of achieving the widest possible coverage within the media landscape. In doing so they are subject to market forces.
>
> … The sports that do achieve free to air network interest need to be able to freely negotiate the extent of coverage and the mix of free to air versus subscription telecasts in order to balance revenue versus public exposure. (National Rugby League 2009, p. 4)

While Cricket Australia states that:

> … changes to the anti-siphoning policy in particular need to ensure that new settings do not create market distortions that deny sports their ability to derive a fair market value for the rights that are central to the administration of sport. (Cricket Australia 2008, p. 21)

Despite the expanding audience of subscription television, free-to-air networks still have a considerably higher audience base and hence, can potentially generate large advertising earnings from broadcasting high rating sporting events. As Free TV Australia note in their submission:

> Sports programs are consistently among the top rating of all programs on Australian television. … 3.4 million Australians saw the 1st match of the state of origin on free to air television. The AFL Grand Final is consistently one of the top-rating programs on television in any year. (sub. DR97, p. 5)

Clearly, sporting programs are an important source of broadcast material for free-to-air television. So, for broadcasts that are likely to attract large audiences, free-to-air operators would nevertheless be in a strong position to acquire these rights even without the protection of the anti-siphoning regime. Accordingly, many of the sports on the list would be likely to remain on free-to-air networks in the absence of the anti-siphoning list (box 4.3).

While many events could be expected to remain on free-to-air television if the anti-siphoning list was removed, some events might be taken up by subscription networks. Examining experiences overseas, the Commission noted in the broadcasting inquiry that there had not appeared to be any significant migration in the United States, but there were some high profile cases of migration in the United Kingdom, including that of their Premier League soccer competition (PC 2000). At that time, the Commission noted that migration was most likely in the case of sports that could be used to boost the subscription base, and concluded that it was likely that in the absence of the anti-siphoning regime there could be some migration of sporting events to subscription television in Australia (PC 2000).

The anti-siphoning list is also arbitrary in its content, with the criteria for events to be listed unclear. One proposal to reduce the seemingly arbitrary list of events that are not televised on free-to-air programs is the implementation of a 'use it or lose it' policy, whereby events would be removed from the list if they are not taken up, and broadcast, by free-to-air networks. This approach is advocated by the subscription television industry (ASTRA, sub. 37) and guidelines for a 'use it or lose it' approach were developed under the former Australian Government (ACMA 2008b).

The 'use it or lose it' guidelines provided that a broadcaster had to televise an event live, or near live, unless delay was to facilitate greater audience access, to at least 50 per cent of the population nationally and televise at least half of the event. In the case of multi-round competitions where entire coverage is not feasible it must have facilitated complimentary coverage by making rights available to another free-to-air or subscription broadcaster on a reasonable basis. However, as they were only introduced in 2007, they did not have sufficient time to operate. Further, the current Australian Government has not adopted such a policy. Further, it has directed that ACMA no longer prepare its *Anti-Siphoning Monitoring Investigation* reports (ACMA, sub. DR73).

The effect of anti-siphoning regulations on multichannel broadcasting by free-to-air broadcasters raises another potential issue. The broadcast of events on the anti-siphoning list by free-to-air multi-channels is restricted. Currently, free-to-air broadcasters must first broadcast events on the anti-siphoning list on their main channel, although they can broadcast repeat screenings on their additional channels.

Box 4.3 **Free-to-air networks pay more for sport**

As a rule, the most popular broadcasts on subscription television each week are the broadcasts of live National Rugby League (NRL) and Australian Football League (AFL) matches. Both of these sports are on the anti-siphoning list, but because of the nature of these events it is not feasible for a free-to-air station to broadcast all matches. Both free-to-air and subscription networks have rights to broadcast live matches. It is difficult to accurately determine how much broadcasters pay for the rights to these sports, but press reports indicate that free-to-air broadcasters tend to pay more than subscription television.

For NRL, it was reported that the latest broadcast deal with Network Nine and Foxtel amounted to $500 million over six years. Of this, the reported price to Foxtel was $43 million per year for six years, amounting to just over half of the total contract. The split up for content involves three matches broadcast on the Nine network and five on Foxtel each round. The finals are retained on free-to-air. Notwithstanding that the free-to-air network retains rights to the higher rating final games, overall, the average price paid by Foxtel per broadcast match is significantly lower. Foxtel broadcasts around 50 per cent more games than the free-to-air Nine network, for a similar outlay.

Similarly for AFL, the most recent deal involved a consortium of Networks Ten and Seven paying $780 million over five years. They then sold some of these rights to Foxtel for a reported figure of $315.5 million. The split up involves four games per round, as well as exclusive coverage of the finals series on the free-to-air stations, while four games per round are allocated to subscription network, Foxtel. These figures indicate that free-to-air networks are paying an estimated 47 per cent more than Foxtel for their share of the AFL broadcasts. While the free-to-air share includes the finals series, it nevertheless appears that they are prepared to pay more for broadcast rights than their subscription television competitor.

These examples suggest that free-to-air broadcasters are able to pay substantial premiums for selected sporting events and generally pay more for matches they broadcast than subscription broadcasters. In the absence of an anti-siphoning regime it appears likely that many very popular events would remain on free-to-air television because free-to-air networks are in a position to pay a premium for broadcast rights to high rating events, given their larger viewing base.

Sources: Masters (2007); Sydney Morning Herald (2007).

If the restrictions on multi-channel broadcasting were removed, while the anti-siphoning restrictions on subscription television networks remain, the impact on subscription networks could be significant. Currently, some competitions (AFL and NRL) are broadcast on both free-to-air and subscription networks. In part, this is because it is not feasible for free-to-air networks to broadcast all matches. But if free-to-air networks were permitted to broadcast anti-siphoning events exclusively on their secondary channels, this could impose another competitive disadvantage on subscription broadcasters.

Another issue is that technological change could have implications for the operation of the anti-siphoning list over time. The increasing speed of broadband internet connections may lead to an increase in services providing live streaming of sporting broadcasts over the internet. The development of subscription internet protocol television (IPTV) services was raised as a potential threat to the effectiveness of the anti-siphoning regime broadcasters by Free TV Australia (2009) in their submission to the National Broadband Network regulatory review. In that submission, Free TV Australia stated that the anti-siphoning regime should be extended to cover subscription IPTV services to prevent migration of major sporting events to internet broadcasting. However, this may be difficult to do, given that subscription IPTV services could be supplied from overseas. Such technological change is likely to decrease the effectiveness of the scheme. Attempts to increase the reach of anti-siphoning regulations could exacerbate the anti-competitiveness of the scheme and may prove difficult to achieve in any case.

As already noted, previous reviews have found the anti-siphoning list to be ineffective and anti-competitive. The Commission's inquiry into broadcasting in 2000 also found that the anti-siphoning regime did not ensure that events were broadcast and could have the perverse impact of reducing sport broadcasting (PC 2000). At that time, the Commission made a number of recommendations with respect to the broadcasting of sport. It recommended that:

- broadcasters in one form of broadcasting should not be allowed to acquire broadcast rights to sporting events of national significance to the exclusion of those in other forms of broadcasting
- criteria for a new and shorter list should include demonstrated national significance, consistent broadcast by free-to-air television stations, and high viewing levels
- responsibility for administration of the anti-siphoning provisions should be transferred from the Minister to the ABA (now ACMA) (PC 2000).

The Commission stopped short of recommending the abolition of the list because there was some risk of migration of events to subscription television. Since the Commission's Inquiry in 2000, there has been no substantive changes to the anti-siphoning regime.

The list was revised in 2004 under the Broadcasting Services (Events) Notice (No. 1) 2004. As part of this process, a Regulation Impact Statement (RIS) was prepared. The RIS canvassed three reform options:

- retain the existing provisions with a revised list of events
- implement a dual rights scheme — like that proposed by the Commission in the 2000 broadcasting inquiry
- a two tiered approach, where the top tier would operate under the existing arrangements, while the second tier would be somewhat less restricted.

Ultimately, the RIS concluded that the first option of retaining the existing regime and revising the list was the most appropriate approach. This option was endorsed above the other two on the basis that it was most in keeping with the original intent of the anti-siphoning scheme and that the other options would not provide a sufficient degree of certainty in ensuring free-to-air coverage of significant events. However, the RIS did not canvass the option of completely removing the list, nor did it assess the costs to business.

The anti-siphoning list appears to be unnecessary to meet the objectives of wide consumer access to sports broadcasts (it may actually reduce consumer access to sports broadcasts). Further, it imposes substantial regulatory burdens and competitive disadvantages on subscription television networks. The option to abolish the anti-siphoning regime should be explored.

As an interim measure, the burden imposed by the regime should be alleviated by substantially shortening the list and simplifying the process for enabling access by subscription broadcasters to events not broadcast by free-to-air networks. An objective and transparent approach should be used for determining which events should be included in a reduced anti-siphoning list. Evidence of a history of broadcast on free-to-air networks and a popularity (ratings based) threshold could be used as key criteria in an objective assessment as to whether an event should be listed or not. Additionally, a formal 'use it or lose it' mechanism should be considered to ensure that the list retains only those events that are actually shown on free-to-air networks.

As part of this mechanism, consideration would need to be given to the treatment of simultaneous multi-round type events. Whatever the approach adopted for reducing the anti-siphoning list, it is likely to involve the partial delisting of particular sporting competitions. That is, not every match in a particular competition would be included on the list. Instead the list might be restricted to key matches within a competition, such as finals.

RECOMMENDATION 4.4

The anti-siphoning regime imposes regulatory burdens because of the protracted commercial negotiations required in respect of listed events. To address this issue the Australian Government should substantially reduce the anti-siphoning list.

Subsequent to the release of the Commission's draft report, the Department of Broadband, Communications and the Digital Economy called for submissions to its review of the anti-siphoning scheme. In undertaking its review, the Department should have regard to the Commission's recommendation to reduce the anti-siphoning list and consider the submissions that the Commission has received on this issue.

4.7 Broadcasting — local content and facilities

Local content rules for radio

New local content rules that require regional commercial radio licensees to broadcast minimum quantities of material of local significance each business day commenced on 1 January 2008. They were introduced under the *Broadcasting Services Amendment (Media Ownership) Act 2006*. The daily minimum requirements vary with the class of licence: 5 minutes for racing and remote area stations; 30 minutes for small stations; and 3 hours for other stations. Commercial radio licensees are required to broadcast their prescribed quantity of local content on all business days between 5.00 am and 8.00 pm. They are then required to undertake a number of reporting obligations to demonstrate compliance with the local content obligation, including: an annual report to ACMA; making an audio record of broadcast local content; and compilation of a local content statement for each business day.

Commercial Radio Australia (sub. 6) raises a number of concerns with respect to these provisions including:

- reporting requirements — including: annual reporting requirements; daily local content statements; and maintaining records of local content — are too onerous
- the requirement for racing and remote area stations to provide local content is an unreasonable burden because these services are often networked from other areas
- local content broadcast on weekends should be permitted to count towards content requirements
- complying with local content provisions every week of the year can be difficult for small radio stations.

Assessment

The objective of the regulation is to ensure that there is a minimum amount of material of local significance broadcast on regional commercial radio stations. The industry concerns revolve around the rigid nature of the requirements for achieving this level of local content.

A more flexible regime would allow for radio stations to better tailor local content to local listener demands, recognising that local broadcasters are in the best position to judge how their listeners would prefer to have local content scheduled. For instance, coverage of local sporting events could be concentrated on weekends, while coverage of local events or issues may occur on a more *ad hoc* basis. The requirements for uniform daily content levels does not accommodate this flexibility. The objective could be met through a more flexible system, with more aggregated quotas. Licensees should be given a longer period than the current daily requirement to meet their minimum local content requirements. This period could be one week (seven days), to allow licensees to include local content broadcast on weekends. Further flexibility might also be included to allow for exemptions for certain periods, recognising the difficulty facing small regional broadcasters when regular on-air staff are on leave.

The issue of local content obligations for racing and remote area stations is another concern raised by participants. Commercial Radio Australia (sub. 6) says that these services are often networked from outside the broadcast area. Clearly, in many cases access to local content is not the primary reason that listeners tune in to radio broadcasts. In the case of some radio broadcasting, such as racing, local content may not be relevant, or local events not available to be broadcast. This is tacitly acknowledged through the minimal levels of local content required on racing and remote area stations. However, even minimal content requirements impose compliance and administrative burdens on commercial radio broadcasters. Consideration should be given to exempting certain classes of licensee from local content provisions.

A more flexible approach to local content requirements should be accompanied by a less onerous reporting framework. Reporting requirements can impose a significant regulatory burden on broadcasters, without contributing to the production of local content. The administrative burden of the reporting requirements may have the effect of reducing the resources which broadcasters can invest in producing local content. Commercial Radio Australia (sub. 6) submits that one network has estimated external legal costs to be around $25 000 per annum per radio station.

Reporting requirements are likely to be most cost effective when they are targeted at industry participants who the regulator has grounds to believe may not be

complying with regulatory requirements. This seems particularly pertinent, given that there does not appear to be a significant problem with regards to local content compliance. In 2007-08, ACMA did not receive any complaints from the public about local content obligations (ACMA 2008d).

Round Table discussions and further submissions subsequent to the release of the draft report indicate that ACMA has attempted to minimise the impact of reporting requirements. Nevertheless, a review should be conducted to determine what reporting requirements are necessary for the regulations to meet their objectives.

RECOMMENDATION 4.5

The policy objective of the local content rules for radio could be met through more flexible rules. The Australian Government should introduce amendments to make provision for regional broadcasters to meet their local content obligations over the course of a longer time period, rather than through rigid daily content obligations. For certain categories of licence, such as racing and remote area licences, consideration should be given to whether there is a need for local content requirements.

More flexible local content obligations should be accompanied by streamlined reporting requirements which target compliance activity on broadcasters who have been identified as having a high risk of non-compliance.

Effects of trigger events for radio broadcasters

The transfer of radio licences trigger special local content and presence requirements. These are designed to maintain local broadcasting when a regional radio broadcast licence has changed hands. The provisions were introduced in the context of changes to cross-media ownership regulations, but their effect is broader. Trigger events occur whenever there is a change of ownership or control of a regional commercial radio broadcast licence, or there is the formation of a new registrable media group as a result of restructuring. A trigger event imposes additional conditions upon the licensee, including:

- local presence requirements in relation to staffing and facilities
- additional local content requirements with respect to local news, weather and community service announcements
- reporting and record keeping requirements with respect to the local content and compliance with local presence requirements.

Commercial Radio Australia (sub. 6) is concerned that these provisions lead to excessive compliance costs, constrain the ability of the industry to operate in an efficient and profitable way, and devalue existing regional commercial radio businesses.

Assessment

The policy objective of the trigger event is to maintain levels of local content and facilities in the light of changes in media ownership. As with the local content provisions, the trigger event provisions were introduced under the *Broadcasting Services Amendment (Media Ownership) Act 2006*. A number of concerns with the trigger event provisions were raised at the time of their introduction with respect to both the breadth of the provisions and the burden imposed when a trigger event occurs.

Commercial Radio Australia (sub. 6) contends that the definition of a trigger event is excessively broad. While the provisions were introduced in the context of cross-media mergers, or an amalgamation of radio stations, the trigger event provisions apply to all licence changes. Any change in ownership or the formation of a new registrable media group is classed as a trigger event. Given the broad scope of the definition of a trigger event, it is likely that the trigger event provisions will eventually be applied quite widely across the commercial radio industry as stations are sold.

Once a trigger event occurs there are a range of additional conditions to which commercial radio licensees must adhere. One of the more restrictive of these is the local presence condition, which requires the licensee to maintain in perpetuity the staffing levels and use of infrastructure within the licence area, as at the date of the trigger event. This can seriously affect the operation of regional radio stations, preventing them from responding to changes in technology, local labour markets, and product market conditions. Stations subject to this trigger event provision are likely to be at increased risk of business failure because of the constraints on their ability to respond to changing circumstances. Such a condition is likely to reduce the value of local licences, affecting the viability of local broadcasters, and potentially undermining the objective of the provisions.

Although local presence and cross media ownership restrictions are aimed at maintaining media diversity, they have the potential to undermine the ability to deliver media efficiently. As the Commission noted when examining cross media ownership rules in its broadcasting inquiry:

> By preventing mergers across the boundaries of radio, television and newspapers, the rules potentially have an efficiency cost. (PC 2000, p. 343)

As convergence continues, uptake of new technologies is likely to foster greater media diversity while increasing the pressures on traditional media. Restrictions that prevent traditional media from utilising economies of size and scope — such as allowing a regional radio station, to combine and share resources with either another radio station, or a local newspaper or television station — could threaten the viability of regional media providers. By limiting the ability of traditional media to adapt to changes in the industry the trigger event provisions, and cross media ownership laws more generally, may have the perverse effect of reducing both diversity and the ability of broadcasters to deliver local content.

As noted above, following a trigger event a radio broadcaster is also required to meet more prescriptive and onerous local content conditions than those contained in the general local content provisions. In addition to the local content requirements imposed on all radio broadcasters, licensees are required to broadcast a minimum number of local news and weather bulletins and community service announcements (BSA, ss. 61CD-61CE). There does not appear to be a valid rationale for this difference in requirements. Local content obligations should be the same for all licensees in the same class.

The change in licensee also triggers substantial reporting requirements, covering local content and compliance with local presence requirements. This imposes additional administrative costs in terms of the time to complete reporting requirements. These can be a substantial burden for a small regional station. Commercial Radio Australia (sub. 6) has stated that the provisions also result in substantial external legal costs for affected stations, which are estimated by one station to be around $50,000 per annum.

The scope of these provisions is broad and, in combination with their indefinite nature, means that over time they could apply widely across the industry. The requirements imposed by the provision appear to be excessively burdensome, particularly the local presence requirements. On the other hand, the benefits appear to be limited. The standard local content rules should be sufficient to ensure that local content objectives are satisfied. The trigger event provisions should be abolished.

RECOMMENDATION 4.6

The Australian Government should introduce amendments to abolish the trigger event provisions for radio broadcasters. Instead, local content provisions should be relied on to ensure broadcast of locally significant material.

4.8 Broadcasting content

Regulation across broadcasting platforms

Currently different types of broadcasting are subject to different regulations. Free-to-air television, subscription television and radio broadcasting are each subject to different regulatory regimes. This difference has been the focus of concerns about the lack of even handedness in the regulatory environment.

Free TV Australia (sub. 41) is concerned that commercial free-to-air television is among the most intensively regulated of all Australian industries, and its regulation is more stringent than that of other media. Free TV Australia argues that much of the existing regulation came into place at a time when there were far fewer screen time activities available to the Australian public, but that this is no longer the case:

> New platforms are not subject to the same heavy handed regulation as commercial free to air broadcasters. Going forward attention should be paid to moving toward even handed regulation across all platforms. (sub. 41, p. 3)

Similar concerns about differences in the regulation of the two television platforms have been raised by ASTRA, although from a rather different perspective:

> The regulatory system for television broadcasting provides protection for the free to air (FTA) networks, discriminates against new players such as STV [subscription television] and creates significant economic inefficiencies. (sub. 37, p. 2)

While ASTRA notes that subscription and free-to-air broadcasters have the same or similar requirements in relation to many obligations, ASTRA and Free TV Australia highlight some areas of significant difference. The main differences are that:

- Commercial television licensees are required to pay annual licence fees of up to 9 per cent of gross earnings. In 2006-07 this amounted to over $270 million (Free TV Australia, sub. 41). Subscription broadcasters are subject to different requirements.
- Existing free-to-air broadcasters are protected from competition through restrictions on new entry into the free-to-air television market.
- Much of the regulation of advertising on commercial free-to-air television, such as restrictions on advertising to children and advertising of alcohol, is unique to free-to-air. There are some restrictions relating to children's advertising and placement in the subscription television codes of practice.
- Commercial free-to-air television licensees are subject to the Australian Content Standard 2005 which requires them to broadcast an annual minimum quota of

55 per cent Australian programming between 6.00 am and midnight. In contrast, subscription television operators are subject to a licence condition that requires that at least 10 per cent of program expenditure for drama be spent on new Australian drama. In 2006-07, commercial free-to-air television broadcasters spent $96 million on Australian drama while subscription television spent just over $26 million.

- Regional commercial television licensees in the eastern states are subject to licence conditions requiring minimum levels of local news and information. These quotas do not apply to subscription television, although Sky News and the Weather Channel provide local content.
- The Commercial Television Industry Code of Practice contains stringent classification and scheduling restrictions, many of which do not apply to subscription television.
- Free-to-air broadcasters are subject to the Children's Television Standard which imposes minimum programming and scheduling requirements. Subscription broadcasters are not subject to these requirements.
- The anti-siphoning regime and the radio disclosure standard, both of which are considered in more detail elsewhere, are also areas of significant difference in the way different broadcasters are regulated.

Assessment

Some of the differences highlighted by the industry can be attributed to differences in the way in which the two television platforms operate. Free-to-air broadcasts use radiofrequency spectrum which is a scarce public resource. The licensing fees they pay, and some of the other regulations to which they are subject, reflect the benefit they derive from having preferential access to that public resource.

The nature of the broadcasts is also a source of difference. Free-to-air broadcasts are available to anyone with access to a receiver, while subscription services are only available to those who choose to subscribe to the service. Subscribers also have the choice of using parental controls to restrict access to subscription services which are unsuitable for children. Some of the differences might also have originated in the need for regulations which accommodated the early development of subscription broadcasting.

The BSA recognises that there are differences between the different broadcasting platforms and that different regulations may be appropriate. The Act states that the Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, datacasting services, and internet services according

to the degree of influence that different types of services are able to exert in shaping community views (BSA, s. 4).

The differences also appear to flow from the operation of the co-regulatory system. Section 123 of the BSA identifies a number of specific industry groups and provides for the development of codes of practice that are applicable to each of those sections of the industry.

In commenting on these matters ACMA says that:

> The ACMA has observed significant change in the communications policy environment in recent years, including across broadcasting platforms. These changes have generated considerable pressure on communications regulation. The ACMA response to date has largely been facilitated by utilising regulatory flexibility within the existing legislative framework (with minor legislative amendment where possible, including for online services under the BSA).
>
> The ACMA considers that the communications regulatory framework as a whole requires review as there is an increasingly fragmented approach taken for new policy and communications developments and the regulatory flexibility the ACMA has available is near exhaustion. The ACMA's current approach to managing the increasing pressure on the communications regulatory environment has a limited capacity to maintain the efficiency, effectiveness and appropriateness of communications regulation. (sub. DR73, p. 15)

Both free-to-air and subscription broadcasters provided the Commission with extensive material identifying differences in the regulatory regime which they felt disadvantaged them in comparison with their competitors. While those submissions raise some interesting issues, it is not the role of this Review to re-examine the whole structure of broadcasting regulation in Australia. However, those variations should be examined by the broader review being foreshadowed by Government to ensure that the differences in regulation are not inconsistent with the overall aims of the regulatory system. With increasing convergence of the broadcasting and telecommunications sectors, the need to reconsider the appropriateness of differences in regulations across media platforms will become more important.

Radio disclosure standard

The Disclosure Standard for radio broadcasts is raised as an issue by Commercial Radio Australia (sub. 6). The Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 has been in force since 15 January 2001. It requires on-air disclosure during current affairs programs of commercial agreements with sponsors where the sponsor or their product is mentioned, or an issue is promoted that is favourable to the sponsor. The disclosure must be made immediately and as part of the broadcast. The phrasing of the disclosure must also

conform to that contained in the standard. In addition, a register of commercial agreements must be maintained.

Commercial Radio Australia (sub. 6) claims that the regulatory requirements for meeting the disclosure standard are too broad in scope and impose an excessive compliance burden. More specifically:

- the requirement for disclosures to be made immediately is considered overly onerous
- prescriptive measures (such as timing and phrasing) are difficult to comply with, particularly in the context of unscripted programming
- the disclosure standard is deemed excessively broad, requiring disclosure where the link is incidental and not contextually relevant
- the register of commercial agreements requires overly detailed publication of commercially sensitive information, in particular information on the value of the commercial agreement.

Commercial radio stations are required to maintain a register of commercial agreements that is made publicly available. The value of the commercial agreement must be listed as being within specified bands. Further, radio stations are required to obtain copies of agreements between presenters and sponsors within seven days. Commercial Radio Australia (sub. 6) submits that these requirements are too detailed and that it disadvantages radio stations in attracting presenters compared with other media, such as television, because of a reluctance to divulge remuneration with other sponsors. They also submit that it can be difficult to obtain copies of agreements within seven days because of confidentiality conditions.

Assessment

The objective of the disclosure standard is to promote fair and accurate coverage of issues by requiring disclosure of commercial agreements that have the potential to affect, or could be seen as affecting, the content of current affairs reporting. It would appear that this objective could be met through more flexible disclosure requirements.

The Disclosure Standard was introduced by the then Australian Broadcasting Authority (now ACMA) in 2000 after an inquiry into the 'cash for comment' scandal determined there was systemic failure to comply with the industry's codes of practice (ACMA 2009a). However, that investigation appears to have been sparked by failure to comply with the existing code by a relatively small number of broadcasters. That a breach by a relatively small proportion of broadcasters has led

to a prescriptive requirement on all commercial broadcasters is not in keeping with an appropriate risk management approach to regulation. That is, the regulatory remedy captured all radio broadcasters, not just those found to have breached the code. In December 2008, ACMA announced it would undertake a review of the commercial radio standards, including the disclosure standard. The review is expected to conclude in the first half of 2010 (ACMA 2008c).

The current arrangements are very strict. For instance, Commercial Radio Australia cites the following example in its submission:

> The ACMA's approach causes significant difficulties for licensees in ensuring compliance with the Disclosure Standard. For example, a presenter who made the on-air announcement within 90 seconds of the relevant material was found by the ACMA to have "breached" the Disclosure Standard. (sub. 6, p. 12)

In addition, Commercial Radio Australia contend that ACMA's insistence on prescriptive detail is unreasonable and unworkable, citing the following example:

> … one commercial station was found to have breached the Disclosure Standard when the presenter referred to his sponsor as "sponsors of ours" or "sponsors" rather than "sponsors of mine". The ACMA's view was that only "sponsors of mine" was acceptable. (sub. 6, p. 13)

The prescriptive approach taken by ACMA reflects the requirements of the Disclosure Standard. For example, Part 3 of the Disclosure Standard states that an on air disclosure must contain one of a number of specific phrases:

> A disclosure announcement must include at least one of the following phrases:
>
> (a) [name of sponsor] is a sponsor of mine;
>
> (b) I have a commercial agreement with [name of sponsor];
>
> (c) [name of sponsor] is a sponsor of my company, [name of company];
>
> (d) [name of sponsor] has a commercial agreement with my company, [name of company];
>
> (e) [name of sponsor] is a sponsor of a company of which I am a director, [name of company];
>
> (f) [name of sponsor] has a commercial agreement with a company of which I am a director, [name of company].

Changes in the approach taken by ACMA would require amendment of the Disclosure Standard.

Another indicator that the disclosure standard for commercial radio may impose an unnecessary regulatory burden on commercial radio broadcasters is the lack of a similar prescriptive arrangement for television broadcasters. The issues with respect to television appear to be generally similar to those for radio broadcasting, yet

disclosure requirements in the case of commercial television broadcasting are far less prescriptive and are dealt with through an industry code of practice. However, ACMA submits that there is less evidence of a problem with respect to television:

> The ACMA has had no evidence of similar practices being used in current affairs programming on commercial television. It has therefore not needed to take any additional action in this area. (sub. DR73, p. 18)

Further, ACMA does not agree with the suggestion of industry to move the disclosure requirements into the industry code of practice, as occurs with commercial television, because of the more extensive enforcement options available to it under the standard. For instance, under the standard ACMA can commence civil penalty proceedings or give remedial directions, whereas in the case of code breaches it can only accept enforceable undertakings, impose additional licence conditions or suspend or cancel a licence.

Overall, it appears that the requirement for disclosure of commercial arrangements for commercial radio presenters is overly prescriptive and poses an excessive burden on the commercial radio industry.

A more flexible approach, such as allowing licensees to broadcast regular disclosure announcements, rather than having to do so almost at the exact moment of a potential conflict of interest, would achieve the same outcome while reducing compliance burdens. There should also be further examination of the extent to which commercially sensitive information needs to be divulged to achieve the objectives of the provisions — disclosure of the existence of an agreement may be sufficient of itself.

RECOMMENDATION 4.7

A greater risk management approach should be taken to the radio Disclosure Standard. The Australian Communications and Media Authority should revise the Disclosure Standard to make it less prescriptive.

Captioning

Both the Broadcasting Services Act (BSA) and the *Disability Discrimination Act 1992* (DDA) impose requirements on free-to-air broadcasters to provide closed captioning for selected parts of their programming. The BSA requires each commercial television broadcasting licensee and each national broadcaster to provide a captioning service for television programs transmitted during prime time viewing hours, and for news or current affairs programs. The Commercial

Television Industry Code, registered under the BSA, contains provisions about how the hearing impaired should be made aware of captioning.

These specific requirements under broadcasting regulation operate in parallel with those in the DDA, administered by the Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission (HREOC)). The DDA does not contain any specific provisions relating to captioning, but contains general provisions which make it unlawful to discriminate against people with disabilities.

The parallel operation of these two regulatory regimes has created uncertainty for free-to-air broadcasters. Free TV Australia states that:

> … due to a lack of regulatory certainty, broadcasters have engaged in dual processes of captioning under the BSA and the Disability Discrimination Act 1992 administered by the Human Rights and Equal Opportunity Commission (HREOC).
>
> Given the financial and operational implications of captioning requirements, this uncertainty has been a significant concern for broadcasters. Free TV considers there should be a single set of regulatory arrangements that provides certainty. (sub. 41, p. 8)

A similar issue in relation to overlaps between the DDA and air safety regulations is discussed in chapter 6.

Assessment

This issue is not new. In 1998 HREOC initiated a review of closed captioning and called for submissions based on an issues paper. While that review was underway the then Department of Communications, Information Technology and the Arts was also receiving submissions as part of a review of captioning standards under the BSA. In a submission to the Department's review, the Acting Disability Discrimination Commissioner suggested that:

> Broadcasters can best have a single or consistent set of obligations if the present review by the Department leads to issues which would otherwise arise for determination under the DDA being addressed in one of these ways:
>
> - by the Parliament appropriately specifying that the DDA no longer applies to these issues or
> - by the Commissioner being satisfied that he should decline complaints under DDA section 71(2)(e) on the basis that the subject matter had already been adequately dealt with or
> - by the Commissioner giving more definite legal recognition by granting an application for temporary exemption under section 55 of the DDA on the basis of compliance with captioning standards under the Broadcasting Services Act. (Sidoti 1999, p. 2)

Those two review processes do not appear to have lead to a resolution of this issue.

Subsequently free-to-air broadcasters have applied for, and received, exemptions for limited periods from the DDA on the basis of agreements they have made to significantly increase captioning. These agreements with the Australian Human Rights Commission require broadcasters to meet higher targets than those required under the BSA.

The issue is one of the subjects of a discussion paper issued in April 2008 by the Department of Broadband, Communications and the Digital Economy (the Department). The discussion paper canvassed a number of issues relating to access to the media including:

- the appropriate roles for the Human Rights and Equal Opportunity Commission and the Australian Communications and Media Authority in relation to access requirement under the DDA and the BSA
- how changes to the regulatory requirements for access to electronic media should be implemented
- the extent to which standards for digital television transmission and domestic digital television receivers should provide for captioning and audio description (DBCDE 2008).

The Department's discussion paper called for submissions by 13 June 2008. At the time of writing there does not appear to have been an outcome from this process.

There seems to be general support for governing captioning through the BSA. In responding to the Department's recent discussion paper, Free TV Australia advocates excluding the operation of the DDA and implementing any future targets through the BSA (Free TV Australia 2008). The Deafness Forum of Australia, while commending the role to date of HREOC, similarly recommends that ACMA have the responsibility for setting standards and enforcing timeframes and that the BSA should be amended if necessary to achieve this (Deafness Forum of Australia 2008).

In its submission to the Commission, the Australian Communications Consumer Action Network (ACCAN) (sub. DR92) agrees with the position of Free TV Australia and suggests that amendments to the BSA should also cover captioning on subscription TV.

ASTRA (sub. DR82) notes that captioning on subscription television is governed solely by agreements reached under the DDA and that this arrangement has successfully delivered the current roll-out of captioning across subscription television channels.

The Commission has not formed a view about which regulatory regime should govern captioning of free-to-air and subscription television. However, it is clearly time that the uncertainty created by these duplicative regulatory arrangements was resolved.

RECOMMENDATION 4.8

The Department of Broadband, Communications and the Digital Economy and the Attorney-General's Department, in consultation with stakeholders, should seek agreement on whether requirements for captioning of broadcasts are most appropriately dealt with through broadcasting regulations or the Disability Discrimination Act. The legislation should then be amended accordingly so that broadcasters are only required to comply with a single set of regulations.

Reporting on high definition broadcast hours

Free-to-air broadcasters are required to show 1040 hours of native high definition (HD) content per year and to report on their compliance to ACMA on an annual basis. Free TV Australia (sub. 41) argues that the requirement to report compliance with the HD quota is an unnecessary regulatory burden which provides no benefit to viewers.

Free TV Australia (sub. 41) also states that more and more programs are being broadcast in HD and that all broadcasters have consistently met or exceeded the HD quota. All of the networks recently reported that they have exceeded the quota threefold.

The regulatory burden is said to be significant. Free TV Australia (sub. 41) described the reporting requirements as being highly time consuming and resource intensive.

Assessment

The issue of High Definition quotas has been considered before. In May 2005 the then Department of Communications, Information Technology and the Arts released an issues paper *A Review into High Definition Television Quota Arrangements* inviting submissions from interested parties (DCITA 2005). In response to the issues paper the ACCC said that it, 'contends that the HDTV quota is not necessary to achieve the Government's digital broadcasting policy objectives and may, in fact, be inconsistent with some of those objectives. Thus, in the ACCC's view, the government should remove the HDTV quota.' (ACCC 2005, p. 5).

A joint submission to that inquiry from the Nine Network and Network Ten stated that 'all of the metropolitan networks are meeting or exceeding their HD quota' (Nine Network and Network Ten 2005, p. 6). Although, it noted that the quota may be important in ensuring that viewers who buy HD equipment have high amounts of HD programming available to them.

There does not appear to have been any outcome from that review.

The regulatory burden on industry flows mainly from the reporting requirements. The reporting and record keeping requirements for HD broadcasts are specified in detail in the Broadcasting Services (Digital Television Standards) Regulations 2000. These regulations do not give ACMA the flexibility to target the reporting requirements, or to relieve industry of the requirements when reporting is no longer considered necessary.

ACMA (sub. DR73) advises that, with the exception of one broadcaster in 2005, all affected broadcasters to date have met, and frequently exceeded, the HDTV quotas — although some regional broadcasters were not able to broadcast for a number of months in the first half of 2009 because of technical difficulties related to implementation of new infrastructure requirements.

The Department notes that the high definition quota for commercial and national broadcasters is legislated to end after the switchover to digital television in the relevant licence area (sub. DR54). However, that is not scheduled to be completed until late 2013 (DBCDE 2009a). In light of the progress that has been made with the introduction of high definition broadcasting, the requirement to broadcast a minimum number of hours of high definition television already appears to be unnecessary. Although the requirement itself does not impose a large burden on industry, it is redundant and should be removed.

More importantly there is no justification for the ongoing reporting requirements. Compliance with the requirement to broadcast a minimum number of hours of high definition television appears to be well established. The completion of these reports by broadcasters does not appear to contribute in any way to ensuring that the specified number of HD hours is broadcast. The reporting and record keeping requirements should be repealed immediately.

RECOMMENDATION 4.9

The Australian Government should introduce amendments to abolish the requirement for a minimum number of hours of high definition television to be broadcast by free-to-air television broadcasters. Whether abolished or not, the requirement on free-to-air television broadcasters to report on compliance with the high definition quota is redundant and should be removed.

4.9 Other concerns

Producer Offsets

The Producer Offset is a refundable tax offset (rebate) for producers of Australian feature films, television and other projects. Eligibility for the offset is administered by Screen Australia, which will issue a final certificate to a production company after a project is completed. The final certificate is submitted as part of the applicant company's tax return for the income year in which the film is completed. The offset is paid as a rebate against the company's Australian tax liabilities for the income year in which the production was completed, with the remainder refunded to the applicant company.

The South Australian Government (sub. 49) has expressed concern that these arrangements are hindering the industry. Producers have to wait until their tax return is lodged before being able to receive the benefit of the offset. This may delay the start of their next project or prevent more than one big project being undertaken in the one period.

Assessment

In designing assistance for the industry the Australian Government elected to provide support through the tax system, rather than administering payments through a separate grant. The payment of a tax refund to the producer, which can be used to help finance a subsequent project, is dependent not only on the level of production expenditure, but also on the income generated by the project and from other sources. How quickly any tax refund is received will depend to some extent on the point during a producer's tax year when a project is completed. It is an inherent part of the design of the assistance that the benefit to producers from the scheme is received through the tax system. While producers might receive assistance more rapidly through a grant, the current arrangements are an inherent part of the assistance provided and do not appear to impose an excessive administrative burden.

Classification under the Children's Television Standard

Free TV Australia (sub. 41) is concerned that the pre-assessment process for the classification of television programs under the Children's Television Standard (CTS) imposes a higher regulatory burden than is necessary to ensure adequate programming for children.

In response, ACMA (sub. DR73) observes that there was minimal support from stakeholders for any of the alternative models explored in the issues paper it published in 2007. ACMA now intends to establish bi-annual forums involving industry to explore models for children's and preschool program classification.

The CTS is currently under review. A revised draft standard has been released and a final standard is due to be released in the near future.

Internet filtering

The South Australian Government (sub. 49) has concerns about the potential regulatory burdens associated with the proposal to filter and block internet sites at a global level. The South Australian Government notes that this issue will be discussed by the Australian ICT in Education Committee. It is more appropriate for these concerns to be addressed in that forum, and through the ongoing process of developing regulatory proposals, rather than through this review.

Classification of low volume titles

The South Australian Government (sub. 49) is concerned about the cost of classification for low volume films, DVDs and videos being purchased by public libraries. This issues seems to lie outside of the scope of this inquiry which is reviewing regulatory burdens on business.

Regulation of Telemarketing

The Australian Direct Marketing Association (ADMA) (sub. DR93) is concerned that under the current state based fair trading legislation the telemarketing industry is subject to differing laws in some jurisdictions and no laws in others. It is ADMA's view that this issue should be addressed by repealing all state and territory legislation and incorporating standards for outbound telemarketing under the Do Not Call Register Act, rather than the new uniform Australian consumer law.

This issue was raised at a late stage in the Commission's review. As the Commission has not had an opportunity to explore this issue and seek input from all of the affected stakeholders, it does feel that it is in position to make any recommendations. Moreover, the Commission notes that this area of regulation has been included in the implementation plan for the new national generic consumer law (Australian Government 2009c). That process is likely to lead to the current

state and territory laws being replaced by a single national regulatory regime. This should address most of the issues raised by ADMA.

Extension of the Do Not Call Register

ADMA (sub. DR93) is concerned about the implications of a Government proposal to extend the scope of the Do Not Call Register to all business and government numbers, fax numbers and emergency service numbers. Its submission outlines some of the possible implications of extending the register and the increased regulatory burden that would be imposed on business.

The proposed extension of the Do Not Call Register was the subject of a discussion paper released in August 2008 by the Department of Broadband, Communications and the Digital Economy (DBCDE 2008b). The Department invited submissions based on its discussion paper and has indicated that it expects the Minister to introduce legislation on this issue later this year.

The possible extension of the Do Not Call Register relates to an expansion of the policy objectives of the current regime, rather than the regulatory burden currently being imposed on business. As such, this issue seems to lie outside of the scope of this review.

In light of the above, and the extensive consultation undertaken by the Department, the Commission does not consider it appropriate to make any recommendation on this issue. The concerns raised by ADMA would be more appropriately addressed through a Regulation Impact Statement accompanying any proposed changes to the regulation.

5 Electricity, gas, water and waste services

Key points

- Major national reforms to the regulatory frameworks covering electricity and gas supply commenced more than 15 years ago, but certain key reforms are still to be finalised, or have only recently been introduced. In many areas therefore, further reforms are best left until sufficient time has elapsed to allow an assessment of the effectiveness and efficiency of the new arrangements. Nevertheless, some actions should be taken now:
  - the Australian Energy Regulator (AER) should examine ways to reduce the cost and complexity of regular access reviews for determining price/revenue caps
  - retail price regulation is distorting consumption and investment decisions and should be abolished by state and territory governments as soon as effective competition has been demonstrated. Until they are phased out, retail tariff regimes should be revised to allow pass through to consumers of energy cost increases associated with a Carbon Pollution Reduction Scheme. Governments should amend the Australian Energy Market Agreement to ensure stronger and clearer commitments to competition reviews by the Australian Energy Market Commission; and an ongoing price monitoring role for the AER
  - regulators should review their consultative processes against best practice consultation principles and work closely with industry to identify how consultation could be improved, including through better coordination of reviews
  - all levels of government need to work cooperatively to reduce the burden associated with excessive reporting obligations. The Standard Business Reporting initiative may provide a good model for achieving such improvements.
- While playing an important leadership role in pursuing greater national consistency, the Australian Government has only limited direct responsibility for the regulation of waste, water, sewerage and drainage services. Many of the concerns raised relate to state/territory responsibilities and consequently are out of scope for this review.
- Few concerns were raised in relation to water regulation and these are best addressed as part of the major COAG work program in this area.
- Concerns about the regulation of waste services were examined only recently by the Commission in its Waste Management Report. The recommendations and regulatory principles developed in that report should be considered in the current development of a National Waste Policy.

5.1 Industry background

This chapter covers the following industries:

- electricity supply
- gas supply through mains systems
- water supply, storage, treatment and distribution
- sewerage and drainage services
- waste collection, treatment and disposal services, including remediation of contaminated materials and materials recovery activities.

Key statistical data for these industries are provided in table 5.1.

In all the aggregate measures presented in table 5.1, the electricity supply industry dominates. The Australian Bureau of Agricultural and Resource Economics notes that with 'around $100 billion in assets, the electricity industry ranks as one of Australia's largest, making a direct contribution of 1.5 per cent to gross domestic product' (ABARE 2008, p. 38). The electricity and gas industries account for approximately 14 per cent of engineering and construction activities in Australia, the third largest after roads and heavy industry (including mining) (Construction Forecasting Council, reported in MCE ETSLG 2009).

In the energy sector, substantial industry restructuring, vertical separation and ownership changes occurred with competition policy reforms (see section 5.2). More recently there has been a trend toward some ownership consolidation, including retail market convergence between electricity and gas, with many energy retailers offering both electricity and gas services.

The rest of this chapter is organised as follows:

- electricity and gas supply (section 5.2)
- water supply, sewerage and drainage services (section 5.3)
- waste collection, treatment and disposal services (section 5.4).

In each section, a brief overview of the relevant regulatory framework is provided before discussing the specific concerns raised.

Table 5.1 **Key industry data**
2006-07

	Employment	*Income*	*Net capital expenditure*	*Value added*
	no.	$m	$m	$m
Electricity generation	9 517	12 791	2 911	4 896
Electricity transmission	2 442	1 592	1 261	1 426
Electricity distribution	28 853	15 562	4 852	7 800
On selling electricity and electricity market operation	5 159	18 829	517	1 383
Electricity supply (total)	**45 970**	**48 774**	**9 541**	**15 505**
Gas supply	2 479	6 358	256	1 062
Water supply, sewerage and drainage services	26 461	13 207	5 351	6 711
Waste collection, treatment and disposal services	24 615	8 447	491	3 141
Electricity, gas, water and waste services (total)	**99 525**	**76 786**	**15 639**	**26 418**

Source: ABS Cat. No. 8155.0 *Australian Industry, 2007-08*.

5.2 Electricity and gas supply

Overview of regulation

The states and territories have the power to make laws with respect to electricity and gas supply. Since the early 1990s governments have cooperated to progressively introduce major reforms to improve the efficiency and competitiveness of energy markets. The reform process was driven by National Competition Policy Agreements and later the implementation of the 2004 Australian Energy Market Agreement (AEMA), and revisions to that agreement in 2006. Specific reforms have included:

- the establishment of the National Electricity Market (NEM) which links the Australian Capital Territory, New South Wales, Victoria, South Australia, Queensland and Tasmania[1]

[1] The NEM is a wholesale market (pool) into which generators sell their electricity, mainly to retailers which buy electricity for resale to business and household customers. The six participating jurisdictions are physically linked by an interconnected transmission network. Western Australia is monitoring developments and will consider harmonisation with, and adoption of, national institutions where appropriate and beneficial for the State. The Northern Territory is currently considering the merits of harmonisation with national arrangements for electricity (CRC 2009a).

- corporatisation or privatisation of state owned utilities and structural separation of previously vertically integrated suppliers
- allowing customers to choose their suppliers (retail contestability)
- the development of consistent national regulation of natural gas (except WA) and electricity (except WA and NT) transmission and distribution infrastructure through National Energy Market Legislation (box 5.1)
- convergence of gas and electricity markets and the establishment of a single set of National Energy Market Institutions to administer the regulatory frameworks (box 5.2).

The states and territories currently maintain control of licensing; rules and codes governing technical safety functions; service reliability standards; land use and planning approvals or policies; retail price regulation; and various regulations to protect consumers. However, several of these areas are under review or transitioning to national arrangements.

All three levels of government are involved to varying degrees in making and enforcing environmental laws. This is the main area of direct Australian Government regulatory responsibility impacting on the energy sector, in particular the mandatory renewable energy target legislation and the associated creation of a market for renewable energy certificates. Under the target (overseen by The Office of the Renewable Energy Regulator) all electricity retailers and wholesale buyers have a legal liability to contribute towards the generation of additional renewable energy.

Since 2001, the energy reform agenda has been led by the Ministerial Council on Energy (MCE), which consists of energy ministers from all Australian jurisdictions.

Energy market reforms are ongoing. The new Australian Energy Market Operator (AEMO) only commenced operations very recently (box 5.2) and certain previously agreed regulatory and governance reforms are still to be implemented. Further potential areas of reform are the focus of reviews and consultative processes. Key streams of the current reform program include:

- the transfer of non-price retail regulation to the national framework via the development of a *National Energy Customer Framework*
- removal of retail price caps where there is effective retail competition
- harmonisation of energy supply industry technical and safety regulation
- a national framework for transmission reliability standards.

Table 5.2 sets out the institutional arrangements that will apply once the agreed transfer of regulatory functions from the states and territories is complete.

Box 5.1 **Summary of national regulation**

Australian Energy Market Agreement (AEMA), 2004 — agreement between the Australian, state and territory governments set the agenda for a transition to national energy regulation and introduced new governance arrangements. Revisions to the Agreement in 2006 included streamlined regulatory, planning, governance and institutional arrangements for the National Energy Market (NEM).

National Electricity Law (NEL) — is the Schedule to the *National Electricity (South Australia) Act 1996*, which establishes the governance and enforcement framework and key obligations surrounding the NEM and the regulation of access to electricity networks. The NEL is applied by state and territory application legislation in NSW, Vic, Qld, SA, Tas and the ACT.

National Electricity Rules (NER) — made under the NEL, these set out the detail of the rules for the operation of the NEM, power system security, access to electricity networks, connection to networks and methods to be used for pricing network services.

National Gas Law (NGL) — is the Schedule to the *National Gas (South Australia) Act 2008* which establishes the governance and enforcement framework and key obligations surrounding the access to gas pipelines and establishes a gas market bulletin board.[2] The NGL is applied by state and territory application legislation in NSW, Vic, Qld, SA, Tas, the NT and ACT. It provides the overarching regulatory framework for the gas transmission and distribution sectors (replacing the Gas Pipelines Access Law and the National Gas Code). The NGL transferred the regulation of covered distribution networks outside WA from state and territory regulators to the AER (see institutions — box 5.2) and covered transmission pipelines outside WA from the ACCC to the AER.

National Gas Rules (NGR) — made under the NGL, these deal with the details of the access regime and bulletin board. The NGL and NGR took effect from 1 July 2008.

Source: AER (2008), ABARE (2008).

2 The gas market bulletin board is a website, covering major gas infrastructure in southern and eastern Australia, that facilitates trade in gas and pipeline capacity by providing information on the state of the gas market, system constraints and market opportunities. Information provision by relevant market participants is mandatory, including pipeline capacity and production and storage capabilities.

Box 5.2 **National Energy Market Institutions**

(i) Policy

Ministerial Council on Energy (MCE) — the sole governance body for initiating and developing Australian energy market policy reforms for consideration by COAG. It also monitors and oversees implementation of energy policy reforms agreed by COAG.

Special-purpose bodies have been created by COAG and MCE to develop and implement specific reform packages for the energy sector.

(ii) Rules development

Australian Energy Market Commission (AEMC) — responsible for the rule making process under the National Electricity Law and National Gas Law, and making determinations on proposed rules and market development in the NEM. The AEMC also undertakes reviews (on its own initiative or as directed by the MCE) of the energy market framework and provides policy advice to the MCE on electricity and gas market issues. The AEMC is funded by the states and territories that are party to the AEMA.

(iii) Regulator and market operator

Australian Energy Regulator (AER) — Electricity: enforces the National Electricity Law and Rules, monitors the wholesale electricity market and regulates electricity transmission (since 2005) and distribution networks (since January 2008) in the NEM. (The regulation of distribution networks in Western Australia and the Northern Territory remain under state/territory jurisdiction.) Gas: (since July 2008) enforces the National Gas Law and Rules, and regulates covered gas transmission and distribution pipelines (except in WA). The AER is fully funded by the Australian Government.

Australian Energy Market Operator (commenced 1 July 2009) — AEMO merged the roles of the National Electricity Market Management Company (NEMMCO) with the gas market operators in NSW, the ACT, QLD, Victoria and South Australia to form a single, industry-funded national energy market operator for both electricity and gas. AEMO assumed NEMMCO's responsibility for the day-to-day operation and administration of the power system and electricity wholesale spot market in the NEM; the registration of participants, the scheduling and dispatch of generators, the management of transmission constraints and the financial settlement of trades in the market. It is also responsible for the operation of the gas bulletin board and is the National Transmission Planner.

Source: AER (2008), ABARE (2008).

Several participants, whilst supportive of the energy regulatory reform process, are concerned about delays in achieving full implementation of reforms. For example, Origin Energy made the following comments in relation to the agreed goals of a National Energy Customer Framework and retail price deregulation:

> … in both cases obstacles remain to full implementation, because momentum has been lost or earlier commitments appear to have been overwhelmed by more immediate

pressures. As a result, from Origin's perspective, commitments made in the COAG and MCE processes have for some time not been matched by practical outcomes at the jurisdictional level.

With benefits so close at hand it is vital that a renewed commitment be made to these goals and the reforms implemented in full. The resources required to drive reforms such as these are considerable. If the reforms are not implemented in full these cost cannot be recouped. (sub. DR89, p. 2)

Table 5.2 **Energy regulation <u>after implementation</u> of national framework**

	Qld	*NSW*	*ACT*	*Vic*	*SA*	*Tas*	*NT*	*WA*
Gas transmission	Australian Energy Regulator (Monitoring and enforcement of national energy laws)							Economic Regulation Authority
Gas distribution								
Electricity wholesale							Utilities Commission	
Electricity transmission								
Electricity distribution								
Retail (non-price)								
Retail pricing	QCA	IPART	ICRC	ESC	ESCOSA	OTTER and GPOC		
Rule changes	Australian Energy Market Commission							
General Competition regulation	Australian Competition and Consumer Commission							

a ESC, Victorian Essential Services Commission; ESCOSA, Essential Services Commission of South Australia; GPOC, Government Price Oversight Commission; ICRC, Independent Competition and Regulatory Commission; IPART, Independent Pricing and Regulatory Tribunal; QCA, Queensland Competition Authority; OTTER, Office of the Tasmanian Energy Regulator.

Source: AER (2008).

Access reviews

Several participants submit that access arrangement reviews are too complex and costly and further that the burden of meeting associated information requests is increasing. There is a particular focus in submissions on the gas access arrangements.

The Australian Pipeline Industry Association (APIA) considers that access arrangement reviews every five years are very expensive and 'often result in limited benefits' (sub. 12, p. 12). Envestra, a gas distributor company, states that 'regulatory reviews are becoming more forensic, with regulators requiring more information' (sub. 13, p. 3) and the Energy Industry (Joint Submission) considers that the increasing complexity and cost is partly attributable to:

> … an increasing tendency for regulatory pricing decision processes to evolve from high-level reviews of the reasonableness of proposed access terms or prices, into a detailed review of all aspects of the commercial operations of regulated infrastructure. As an economic regulator's expertise in this field is limited, these reviews are increasingly characterised by opposing expert views provided on detailed operational aspects of planned network investments, efficiency assumptions, and expected labour costs. (sub. 23, pp. 8-9)

Envestra also submits that the associated cost of this regulatory burden is unregulated with regulators 'passing on their significantly increasing costs via increased licence fees' (sub. 13, p. 3). While it is true that in some jurisdictions regulators recover the costs of access arrangement reviews through fees charged to service providers, this is a matter for state and territory governments and is therefore outside the scope of this review. This will, however, become less of an issue moving forward as the AER, which is fully funded by the Australian Government, progressively assumes responsibility for access arrangement reviews.

Assessment

Generally, the most cost-efficient means for the supply of electricity transmission and distribution and gas distribution services is by a single entity. This is because of the natural monopoly supply characteristics, whereby very large capital costs result in the average costs of provision declining as output increases.

Access regulation aims to capture the efficiency benefits of provision by a single provider, but reduce the risks of monopoly profits and efficiency losses arising where the owner of the asset takes advantage of its market power at the expense of users. An outline of the current access arrangements for electricity and gas supply is provided in box 5.3.

Box 5.3 **Outline of energy access arrangements**

Electricity transmission and distribution

The revenues and pricing of transmission and distribution businesses in the NEM are subject to periodic review by the AER, applying a framework set out in the National Electricity Rules. For transmission businesses, a revenue cap is determined for each network, which sets the maximum allowable revenue a network can earn during a regulatory period — at least five years. In setting a revenue cap, the AER factors in forecast efficient capital costs and an allowance to cover efficient operating and maintenance costs. The regulatory scheme provides incentives for efficient transmission investment and for businesses to reduce their spending through efficient operating practices. There is a service standards/quality incentive scheme to ensure that efficiencies/cost savings are not achieved at the expense of network performance/service quality.

The framework for distribution networks is broadly similar to that used for transmission, but there is a degree of variability in how prices or revenues are regulated (e.g. cap on (weighted average) prices or cap on total or average revenue); the use of incentive mechanisms to encourage distribution businesses to manage their operating and capital expenditure efficiently; and in the treatment of taxation in determining returns on capital.

Gas transmission and distribution pipelines

The National Gas Rules, which took effect on 1 July 2008 (replacing the Gas Pipeline Access Law and National Gas Code (Gas Code)), provide the overarching regulatory framework for the gas transmission and distribution sectors. For 'covered' pipelines the Gas Rules require the service provider to develop access arrangements (and submit them to the regulator for approval) that set out the terms and conditions of access, which must comply with the provisions of the Gas Rules and underpinning legislation, including pricing principles, ring-fencing requirements and rules for associate contracts. The regulatory approach is broadly similar to that applied to electricity networks. The regulator aims to determine revenue outcomes that cover efficient costs, including asset depreciation, operating expenditure and a proxy for a commercial return on capital and the Gas Rules provide for incentive mechanisms to reward efficient operating practices. A key difference is that the Gas Rules set reference (benchmark) tariffs for reference services that are commonly sought by customers rather than revenue caps. The reference tariff is intended to form a basis for negotiation between the pipeline owner and customers, but is enforceable if a party notifies the regulator of a dispute. Service providers must publish reference tariffs (prices) and other conditions of access on their website.

The legislation allows for light regulation in some circumstances, in which case the pipeline provider is obliged only to publish prices and other terms and conditions of access on its website. The National Competition Council has the role of determining whether a pipeline is subject to light regulation.

Source: AER (2008) and AEMC (2009b).

The AER has been progressively assuming responsibility for regulation of electricity transmission (since 2005), electricity distribution (since January 2008) and gas transmission and distribution (since July 2008). Transitional arrangements apply to the ongoing administration of certain existing access determinations by state and territory regulators. The AER only concluded its first five-year access determinations for electricity distribution services — for NSW and the ACT — at the end of April 2009. Thus, it is important to note that the concerns raised about the complexity of price reviews are based to a large extent on the experience with processes that have been followed by state and territory regulators. That said, the Energy Industry (Joint Submission) points out that 'the trend towards increasingly complex and lengthy decisions does not seem to have been affected by the movement of responsibility of some economic regulation … to the Australian Energy Regulator' and it suggests that the problem is a 'systemic, rather than transitional issue' (sub. 23, pp. 9-10).

Virtually all access regimes set controlled prices or revenue by reference to an assessment of costs. The current 'building-block' approach used in the energy sector involves building up a cost base for the facility from its individual components. The cost base generally includes return on capital, depreciation and operating expenses. This approach is seen as objective and transparent, and results in prices which closely track individual service provider costs. But it has been regularly criticised for being extremely information intensive and inefficient. It can impose substantial administrative costs for regulators and compliance costs for owners of covered infrastructure. It requires regulators to obtain and validate information on the asset base of the facility, expected capital expenditure, the cost of capital and efficient operating and maintenance costs. Within the broad building-block approach there are many possible variations in terms of the rate of return allowed, the method of calculating it, the way assets are valued, treatment of risk, depreciation methods and so on. Some of these variations are reflected in the differences in the current approaches of the jurisdictional regulators.

In 2004, the Productivity Commission completed a review of the Gas Code, which proposed several changes to address industry concerns that the regime was deterring investment. This led to the development of new National Gas Law and Gas Rules, with provisions to enhance regulatory certainty for investment and the introduction of a new classification of covered pipeline, subject to a 'light regulation' option.

The Gas Rules include a coverage test to allow for an independent review of whether there is a need to regulate a particular pipeline. Substantial new investment in gas pipelines has led to improved interconnection between gas basins and retail markets in the south-eastern states. This is generating alternative sources of supply, making the market more contestable and limiting the ability of pipeline operators to

exercise market power. The coverage process has led to the lifting of economic regulation — in whole or part — from several major pipelines.[3] Only one new pipeline constructed during the current decade is covered (AER 2008). Pipelines that are not covered are subject only to the general anti-competitive provisions of the *Trade Practices Act 1974*. Access to non-covered pipelines is a matter for the access provider and an access seeker to negotiate, without regulatory intervention.

In broad terms, there are two potential sources of unnecessary burdens associated with current access arrangements. Firstly, there are those that are a consequence of the particular methodological approach chosen, and secondly, there are those that stem from aspects of the decision-making process, within the broad parameters dictated by a chosen methodology. Options for addressing both these sources of burden are discussed in turn below.

Alternative methodologies

Various reviews have considered alternatives to the current building-block approach for determining energy access arrangements, including:

- The Expert Panel on Energy Access Pricing (Chaired by Roger Beale) (2006)
- Australian Energy Market Commission (AEMC) Review of Electricity Transmission Revenue and Pricing Rules (2006)
- Exports and Infrastructure Taskforce (2005)
- Productivity Commission Review of the Gas Access Regime (2004)
- Productivity Commission Review of the National Access Regime (2001)

Regulatory impact analysis, evaluating the costs and benefits of various options, was also carried out prior to the introduction of the current arrangements (see for example, MCE 2006).

Currently, the AEMC is conducting a review of whether the Energy Rules (for electricity and/or gas) should be amended to allow the use of a Total Factor Productivity (TFP) based methodology as an alternative approach for the determination of prices and revenue. Such a review was recommended by the Expert Panel on Energy Access Pricing. The AEMC's final report will be presented to the MCE in December 2009.

[3] The National Competition Council is the coverage review body, but the final decision on coverage is made by government. Decisions are open to review by the Australian Competition Tribunal.

Under a TFP-based approach, a long-term, industry-wide measure of total factor productivity (TFP) is used as a substitute for the firm-specific forecasts of cost and demand used in the current methodology. TFP is an all encompassing measure of the long term, industry-average rate of change of both cost and demand circumstances, relative to the economy-wide rate of change (as captured by the CPI or GDP deflator). Under this approach, if a firm performs better than the average for the industry it retains some or all of the gains, providing an incentive for firms to improve their performance.

As part of their review, the AEMC will be assessing the advantages and disadvantages of the current building-block approach. This will include an examination of the following deficiencies raised by stakeholders in early consultations:

- the information asymmetries facing regulators in applying a building block approach to service providers' proposals
- its firm specific, rather than industry, focus in setting prices to recover efficient costs
- the adversarial nature of the decision-making process and its impact on the behaviour of parties and the outcomes of the process
- the costs (to all parties) of conducting and participating in an assessment of a revenue proposal or access arrangement proposal
- and the frequency, likelihood and costs of reviews and appeals of regulatory decisions under the building-block approach.

Participants in the AEMC Review suggested that TFP may not be the best solution to the deficiencies in the building-block approach. Some service providers considered that the introduction of a TFP methodology would increase their regulatory costs and that savings that may arise from not using a building-block methodology would not be significant. In particular, service providers expressed concern about any additional reporting requirements that may arise and further some claimed that the necessary conditions to implement a TFP do not exist in either the distribution or (especially) the transmission sector (AEMC 2009a).

Many participants, therefore, suggested that the AEMC should expand the scope of their review to consider other alternatives. The AEMC concludes that this would not be appropriate, based on a number of considerations, including amongst others, that:

> … a well considered assessment of other possible revenue and price methodologies would extend the scope of the review and the necessary resources considerably; and both the National Electricity Law (NEL) and the National Gas Law (NGL) refer specifically to the making of rules in regard to the building block approach and TFP and no other methodology. (AEMC 2009a, p. 6)

Decision-making processes

The AER has sought to reduce the compliance costs imposed on business through measures to improve the efficiency of access arrangement decision-making processes, including by:

- the publication of various guidance documents and the use of checklists and prescriptive templates to gather information — this is designed to clarify information requirements and to ensure a common information base
- requesting all required information upfront — this is designed to speed up the decision-making process by reducing 'stop-the-clock' delays whilst the regulator is waiting for defects in submissions to be addressed
- compliance with legislated time limits for decision-making processes
- pre-proposal submission conferences/meetings — these provide an opportunity for the parties to discuss the development of the service provider's proposal to ensure information requirements are clearly understood and to reduce the risk of wasted effort or poorly focused submissions.

The 'all up front' approach to information requests can tend to result in too much information being submitted 'just in case'. While the pre-proposal discussions are one important way of mitigating this tendency, the Energy Industry (Joint Submission) highlighted that the problem can be exacerbated by the nature of decision review processes. Decisions made by the AER in relation to access arrangement proposals are subject to a 'limited' merits review by the Australian Competition Tribunal and/or judicial review by the Federal Court of Australia. Other than the AER, a party to a review may not raise any matter that was not raised in submissions or introduce new material and this can create perverse incentives with respect to information included in access proposals.

Scope for reform

All parties accept that access arrangement reviews will inevitably be costly, information intensive exercises. However, given the very heavy burden for both industry and government, further consideration should be given to making these reviews more efficient.

In the longer term, an independent and public review should examine alternative methodologies for determining maximum revenues or prices. However, it is clear from the discussion above that significant effort has previously been invested in evaluating possible alternatives and there are advantages and disadvantages with the different approaches that need to be carefully weighed up. The objective is to have a process that leads to decisions that encourage efficient investment in gas and

electricity services, and their efficient operation and use to the benefit of users, final consumers and the wider community. Ultimately, the total community benefits derived from the access arrangement determination process must outweigh the aggregate costs imposed on service providers, regulators and other parties. In any future consideration of alternative frameworks the possibly substantial transition costs and uncertainty associated with any change would also need to be taken into account.

More immediately, the AER should consider measures to reduce the complexity of the review process and the volume of information required from businesses. Whilst there is clearly a need for a robust, transparent process of verifying data and assumptions in proposals put forward by regulated entities, there may be scope for the AER to be more targeted in its checking. The focus of the process should be on developing a more sophisticated system that creates the right incentives for the service provider to submit realistic proposals rather than ambit claims. More specifically, consideration could be given to:

- eliminating the need to justify, by way of the submission of detailed information, parameters that have not significantly changed since a previous determination
- a strengthened presumption of acceptance where a proposal from a regulated entity meets broadly specified criteria. Recognising that with many access terms and conditions there can be a range of reasonable values, rather than a single right value, the regulator would only overule 'unreasonable estimates' that sit outside that range.

In a similar vein, there may be merit in the suggestion made by the Energy Industry (Joint Submission) for a 'fast-track' process in certain circumstances. This might be the case, for example, 'where future access charges fall within historical trends, or are based on asset investment programs that have been independently assessed as prudent' (sub. 23, p. 10).

Although there are clearly some advantages associated with a process whereby the parties agree up front on all the information that needs to be submitted, it may be that in some circumstances there would be greater efficiencies if the parties were to agree on a sub set of information only being provided at a later stage on request, if required. This would be based on an assessment that the likelihood that such a need would arise is such that the *expected costs* associated with preparation of the information and inclusion in initial submissions outweighs the *expected benefits*.

With respect to reviews of decisions, the Commission notes that the current arrangements were implemented after an extensive consultation process and the preparation of a regulation impact statement assessing the costs and benefits of alternatives (MCE 2005). This assessment also took into account recommendations

made by the Productivity Commission, in its *Review of the Gas Access Regime* (PC 2004), in relation to gas appeal processes. In determining the optimal design of review processes, a number of considerations need to be taken into account, including regulatory certainty, accountability, transparency, timeliness, costs imposed on industry and government, minimising the risk of 'gaming' and ultimately how best to optimise the likelihood that correct decisions are made. Moving to an alternative 'full' merits review system might address the perverse incentive to include all possible information up front, but such a system also has serious shortcomings, including uncertainty, cost and increased scope for gaming. The current system is an attempt to balance the competing interests involved.

Energy retail price regulation

The Energy Retailers Association of Australia (ERAA, sub. 19) is concerned about the lack of progress in some states in phasing out retail price regulation. It is also concerned that, where price regulation continues, that there will be insufficient flexibility to cover costs associated with various prospective government policies, in particular the carbon pollution reduction scheme (CPRS).

In arguing for retail price deregulation, Origin Energy highlighted some of the costs associated with the existing regime:

> Retail price regulation imposes a considerable regulatory burden on retailers and governments, with no demonstrable countervailing benefit for consumers. The process required to set retail prices is costly and replete with risk: consumers have no way of knowing that costs projections will be accurate or cost-reflective. Retailers face ongoing financial risk and uncertainty in the face of a diverse set of objectives and approaches to price regulation. Efficient retail pricing is achieved through competitive markets. In a monopoly environment, regulation of revenues is unavoidable; where competition is effective the associated cost and risk cannot be justified. (sub. DR89, p. 2)

The Energy Industry (Joint Submission) also calls for the removal of retail price regulation in contestable energy markets, referring to a study undertaken for the Energy Supply Association of Australia by CRA International (ESAA 2007), which found:

> … price regulation in contestable retail energy markets is likely to confer little or no public benefit but impose considerable direct and indirect costs, thus reducing overall welfare. (Energy Industry (Joint Submission), sub. 23, p. 10)

Assessment

While non-price retail energy regulatory functions are transferring to the National Energy Customer Framework (see below), under the Australian Energy Market Agreement (AEMA) retail energy price regulation remains the responsibility of the states and territories (COAG 2006b).

States and territories have agreed (AEMA 2006, clause 14.11) to phase out retail price regulation for electricity and natural gas where effective retail competition can be demonstrated. The AEMC is reviewing the effectiveness of competition in jurisdictions and advising, where effective competition exists, how that jurisdiction can phase out their retail price regulation. However, the relevant state or territory government makes the final decision on this matter. AEMC reviews have been completed for Victoria and South Australia and the next reviews scheduled were for New South Wales in 2009 and the ACT in 2010. The NSW review was deferred in light of the NSW Government's announced plans to sell government owned power retailers. The New South Wales Government has indicated that this review will be conducted in 2011 (AEMC 2009b). The timetable for reviewing the effectiveness of competition in other jurisdictions has not been determined at this stage.

The review of Victorian retail markets found that competition is effective in both the electricity and gas markets (AEMC 2007). In response to the review, the Victorian Government abolished retail price caps from January 2009. Provision was made for the Essential Services Commission of Victoria to undertake expanded price monitoring and report publicly on retail prices. Retailers will also be required to publish a range of their offers to assist consumers in comparing energy prices. The Government retains a reserve power to reinstate retail price regulation if competition is found in the future to be no longer effective.

The AEMC's review of retail energy competition in South Australia was concluded in December 2008 and a report presented to the South Australian Government and the MCE for consideration (AEMC 2008d). The review found that competition is effective for small electricity and gas customers, however, competition was more intense in electricity than in gas (AEMC 2008c). The review recommended that regulation of retail energy prices should end no later than December 2010 for electricity and June 2011 for gas. In April 2009, the South Australian Minister for Energy responded to the AEMC report. He pointed to 'differing views on the level of effective competition in the South Australian energy market' and stated that 'the South Australian Government does not accept the AEMC's recommendation for the removal of price control at this time' (Conlon 2009).

In recognition of the potential for significant impacts on the energy sector as a result of climate change policies, the MCE requested that the AEMC review the electricity

and gas markets in all states and territories. The *Review of Market Frameworks in Light of Climate Change Policies* is seeking to test whether energy market frameworks are resilient to the changes in behaviour that will result from the implementation of a Carbon Pollution Reduction Scheme (CPRS) and an expanded national Renewable Energy Target (expanded RET).

The review will provide its final advice to the MCE in September 2009. In December 2008, the AEMC published the 1st Interim Report for consultation (AEMC 2008b). A key finding of the report was the need for flexibility in the regulation of retailing:

> The CPRS introduces a new, and potentially uncertain, cost into the supply chain for wholesale electricity. In addition, higher wholesale costs also mean higher prudential costs for retailers.
>
> We do not consider that the current retail price regulation arrangements are sufficiently flexible to be able to cope with these potentially large and rapid changes in retailer costs. …
>
> While there are a number of processes underway to investigate potential changes to address these issues, we consider that there is a risk if these reforms are not progressed and implemented in line with the introduction of the CPRS and expanded RET. (AEMC 2008b, p. vi)

The Commission endorses the AEMC's findings. The Commission has previously argued that retail price caps should be removed as soon as effective competition has been established (PC 2005c, 2005d, 2008b). This would improve the efficiency of energy markets by allowing more cost-reflective tariff arrangements to be introduced, thereby improving the incentive for new investment and the incentive for consumers to use energy commensurate with its economic cost. Where governments consider there is a need to protect certain groups of consumers from the effects of higher energy prices, then consistent with the AEMA, this is best done 'through clearly specified and transparently funded state and territory community service obligations that do not materially impede competition' (AEMA 2006, Clause 14.11(b)).

Where regulation needs to be maintained as a transitional measure, governments should revise retail tariff regimes to ensure they are efficient and allow retailers appropriate flexibility to pass on costs associated with the introduction of a CPRS or other policies to address climate change. In this regard, the Commission welcomes the recent amendments to the AEMA to specify that, where retail prices are regulated, energy cost increases associated with the CPRS and the Renewable Energy Target will be passed through to end-use consumers.

Extensive work will need to be undertaken to develop methodological approaches to enable the practical implementation of the COAG commitment to allow pass

through of higher energy costs. In the short term there is still uncertainty regarding the CPRS policy itself. Once the policy is determined, however, developing a uniform methodology or effective jurisdictional based differentiated methodologies will be problematic. The AEMC notes:

> Carbon will be another input cost to the wholesale price of energy. It will be difficult for regulators to separate changes in wholesale energy costs caused by the, potentially volatile, price of carbon from changes in other wholesale costs, including those arising from the displacement of high carbon intensity (lower base cost) sources of energy by low carbon intensity (higher base cost) sources such as gas and renewables.
>
> Existing price setting processes are focused on periods of between one and three years. In the CPRS environment costs will be less predictable requiring the approaches to cost identification and price setting used by regulators, in each state and territory, to be modified. Modifications will be necessary to ensure timely response to changes in costs so as to avoid excessive rents by retailers or margin squeeze leading to retailer exit and consequential market disruption. (AEMC, pers. comm., 12 June 2009)

The AEMC's 2nd Interim Report of its *Review of Market Frameworks in Light of Climate Change Policies*, released in June 2009, included the following draft recommendation:

> By the time the CPRS commences all jurisdictions retaining retail price regulation should have developed an adjustment mechanism for energy and carbon related costs which:
>
> - can be invoked as frequently as six monthly subject to a cost change threshold;
> - is symmetrical to allow adjustment for increasing or decreasing costs; and
> - optimally can be initiated by retailers where costs are rising.
>
> The case for this additional flexibility is strongest if products enabling retailers to hedge carbon-inclusive energy cost risk do not emerge in the short to medium term. This is more likely in the initial years of the CPRS. (AEMC 2009b, pp. 49-50)

The Commission considers that the MCE should commission the AEMC to undertake further work with the state and territory regulators to identify suitable approaches to cost identification and determining how retail tariff regimes should be modified to be responsive to the higher costs related to the CPRS. Where there are clear efficiencies from doing so, regulators should agree to consistent approaches and methodologies for regulating retail prices across jurisdictions.

In the current AEMA, there does not appear to be a clearly established process for follow up reviews of competition where an initial review by the AEMC has recommended the removal of price regulation, but that recommendation has not been accepted by the relevant jurisdiction, as has occurred in South Australia. Origin Energy suggested that in such circumstances the jurisdiction must provide:

- A transparent rationale for their decision, using evidence to identify where competition is inadequate;
- Proposed steps to be taken by the jurisdictional government to address remaining limitations in the competitive environment;
- A date within the next twelve months by which to report on progress in addressing limitations in the competitive environment as identified, with new measures proposed, if required; and
- A date within the next twelve months by which time a new decision on removing price regulation will have been taken. (sub. DR89, p. 4)

The Commission considers that, at a minimum, the AEMA should be amended to make it clear that that the current commitment to biennial reviews 'until all retail energy price controls are phased out' (AEMA 2006, clause 14.11(a)(iii)) also applies where, after an initial review, the effectiveness of competition is disputed between the AEMC and the relevant government. Such subsequent reviews would need to focus, in particular, on rigorous data collection and analysis in relation to the elements of the earlier reviews that were contentious.

Even where, after an AEMC review, a government decision has been taken to remove retail price regulation, it is important that follow up monitoring occurs to ensure that effective competition prevails in the energy markets. The AEMA states that the phase out of retail price regulation 'may involve a period of price monitoring' (clause 14.14(b)) and allows for:

> … the exercise of a reserve price regulation power by the State or Territory where effective competition for categories of users ceases, provided that the power is only exercised in accordance with a regulatory methodology promulgated by the AEMC, and is subject to review by the AEMC of the effectiveness of competition in accordance with clause 14.11.

The recent decision by the Victorian Government, made explicit provision for price monitoring by the state regulator. Similar considerations will apply when other jurisdictions decide to phase out price regulation. There would be advantages in a national approach to price monitoring overseen by the AER. Where price monitoring indicated competition may no longer be effective the AER (or the MCE) could request the AEMC to conduct a further review.

RECOMMENDATION 5.1

The Australian Energy Market Agreement should be amended to:

- ***provide a clear timetable for future reviews by the Australian Energy Market Commission (AEMC) of the effectiveness of competition in energy markets in those states and territories not yet reviewed by the AEMC***
- ***clarify the process for follow up reviews of competition in those jurisdictions where an initial review by the AEMC has recommended the removal of price regulation, but that recommendation has not been accepted by the relevant jurisdiction***
- ***require ongoing price monitoring by the Australian Energy Regulator, for a period of at least three years, where retail price regulation has been removed.***

RECOMMENDATION 5.2

The Ministerial Council on Energy should commission ongoing work involving the states and the Australian Energy Market Commission to consider how the cost identification process used by existing regulators in each state will need to be modified to be responsive to changes in costs as a result of the Carbon Pollution Reduction Scheme.

Reporting obligations

Concerns relating specifically to the information requests associated with Access Reviews are discussed above, but more generally several participants in the energy sector are concerned about what they perceive to be excessive information collection and reporting requirements, including duplication and excessive prescriptiveness (in terms of the nature, timing and format of data). There is also concern that the reporting burden is increasing, with current proposals for additional information gathering powers for regulators, which business considers are unnecessary.

The following quotes are illustrative of the concerns raised in submissions by participants from the energy sector:

> … AER is requiring parties to resubmit material already submitted to the AER, even if it is part of an earlier submission to the ongoing regulatory process. Often information requests require the provision of information that has already been provided for a different purpose or is available through a simple web search. … such requests amount to requiring market participants to conduct research work for regulators rather than an appropriate information request. (APIA, sub. 12, p. 14)

> Energy distribution businesses have been served with notices that are up to 30-40 pages long, requiring in many cases the provision of information which the regulated business does not collect for its normal commercial operations, and the categorisation of existing information in a manner not consistent with current business systems. (Energy Industry (Joint Submission) sub. 23, p. 7)
>
> As an example of the simple direct costs of these increasing obligations, in 2007 gas transmission operator GasNet sought specific allowance of around $90 000 per annum for additional regulatory compliance staffing and auditing resources to deal just with increased workload associated with the new information reporting requirements under the new *National Gas Law*. While the AER approved in-principle the need for such additional resources, delays in the entry into force of the Law meant that such costs were deferred in that specific case. With the new Laws now in place, however, it can be expected that similar increased reporting costs are now being encountered by electricity and gas transmission and distribution businesses operating under the new national framework. These costs will ultimately in turn affect the profitability and competitiveness of private sector energy producers and consumers. (Energy Industry (Joint Submission) sub. 23, p. 7)
>
> Additional information gathering powers have been proposed in the draft legislation for the Australian Energy Market Operator (AEMO) in relation to their role as the National Transmission Planner (NTP), preparation of the Gas Statement of Opportunities (GSOO) and gas Bulletin Board. … The current arrangements have proven to be effective, and the need for less efficient, intrusive information gathering instruments is neither justified nor warranted. (Energy Networks Association, sub. 43, p. 4)

The Packaging Council of Australia (PCA) has similar concerns in relation to the multiple state and Commonwealth energy and water regulation reporting requirements. These concerns are also assessed generally in this section. The PCA notes that various schemes have differing objectives and standards of data gathering and reporting which creates confusion and unnecessary cost. This is particularly a concern for firms operating across a number of jurisdictions. The PCA also comments on the increase in reporting requirements:

> This has given rise to overly complex regulation and the sense that data collection and reporting requirements are sometimes established "for the sake of it" without the information being used in any coherent policy way. (sub. 17, p. 2)

General concerns about inconsistencies and overlaps in energy efficiency and greenhouse gas reduction policies are discussed separately below, but the PCA raised specific concerns about information gathering and reporting obligations in relation to the various schemes:

> Each State currently has differing standards of data gathering and reporting and differing time lines for both reporting and for changes to the thresholds [that determine businesses reporting and compliance obligations].
>
> The impact of these differences is confusion and added costs. … For larger organisations, operating many sites over a number of States, it has presented significant

challenges to allocate appropriately trained and experienced staff to enable understanding of the organisation's obligations and how to comply. At a corporate and site level there is a fundamental need to understand the raft of reporting requirements and differing obligations and align such obligations with existing company data gathering and reporting. …

All … schemes [with the exception of the Victorian Environmental Resource Efficiency Plan] require reporting in a specific manner, and some with external independent verification. (PCA, sub. 17, p. 3)

Assessment

Businesses accept that extensive information is often necessary in order for the regulators to make appropriate decisions in the interests of the broader community, and that the regulated firms are generally the only or best source of such information. It is essential, however, that requests for information from business are the minimum necessary consistent with the efficient achievement of regulatory objectives.

The Commission has not been able to undertake an assessment of concerns relating to *specific* information requests or reporting obligations. Insufficient evidence was provided during consultations to enable a proper evaluation and, in any case, such an assessment would be beyond the capacity of this broad ranging review.

Regulators such as the AER and the AEMC are aware of the need to minimise reporting burdens. The AEMC considers regulatory burdens and costs when considering changes to the rules and the AER endeavours to tailor information requests to take account of standard business record keeping processes. Moreover, wherever significant new reporting obligations have been imposed it has been necessary for the regulators (or the MCE) to undertake regulatory impact analysis and associated consultation with business.

Nevertheless, the concerns raised with this review indicate that current reporting obligations are not optimal. More needs to be done to ensure information requests are streamlined and better coordinated. Regulators should not be requesting information from businesses where such information has already been provided or provided in a slightly different format or is publicly available. There needs to be a greater discipline on regulators to research available information and liaise effectively with other regulatory bodies.

Concerns about excessive reporting obligations are not new and have been raised over many years and across most areas of regulation. Similar concerns were raised, for example, with the Regulation Taskforce (2006) and in the Commission's two previous reviews of regulatory burdens (PC 2007, 2008a).

Governments have been responding by developing initiatives such as Standard Business Reporting (SBR), the National Greenhouse and Energy Reporting (NGER) System and the Online System for Comprehensive Activity Reporting (OSCAR).

SBR is discussed in some detail in appendix B. It is still in the development phase and is not expected to be implemented until 2010. Although initially it will be limited to reporting of financial information to certain Commonwealth and state and territory agencies, the Commission considers that there is scope for fundamental elements of the SBR model to be applied across a broad range of regulatory areas in the future. These elements are:

- making forms and information requests clearer, easier to understand and more consistent
- introducing a single secure way to interact on-line with multiple agencies and improving collaboration and data sharing
- adopting a common reporting language
- direct electronic communication of data and pre-filling of forms

Specifically in relation to concerns about reporting obligations for climate change related measures, governments have taken a number of steps to reduce the burden.

Commonwealth, state and territory governments are working, through COAG, toward streamlining of reporting of greenhouse gas emissions and energy data through a single national reporting point, the National Greenhouse and Energy Reporting (NGER) System. Governments have agreed to a nationally consistent approach for existing and future greenhouse and energy programs, outlined in the NGER Streamlining Protocol, and are in the process of amending mandatory and voluntary reporting requirements to streamline data collection for their programs with the NGER System.

> The COAG objective to streamline greenhouse and energy reporting requirements to reduce the red tape created by multiple and varying program reporting requirements is closely aligned with that of the Standard Business Reporting (SBR) … (Department of Climate Change, sub. DR81, p. 4)

The Commonwealth Department of Climate Change is also working on the establishment of the Australian Climate Change Regulatory Authority (ACCRA), which will administer the NGER System, the Carbon Pollution Reduction Scheme and the Renewable Energy Target. The rationalisation of regulatory responsibility for these three areas of climate change regulation within a single regulatory body will allow for standardisation of reporting and should create efficiencies and reduce the costs of reporting for participating entities. The new regulator will be established upon passage of the Carbon Pollution Reduction Scheme Bill 2009.

The online reporting tool for greenhouse and energy reporting (OSCAR) has been developed to meet the objectives of calculating and generating energy and emissions reports to various government programs, many with differing reporting programs. One aim of OSCAR is to facilitate the cross-program sharing of data to reduce the burden of duplicative reporting. The PCA considered that further development of OSCAR was required in order to address business concerns:

> This has long been presented as the key reporting tool through which energy and water tracking will be streamlined and made more efficient and effective. In reality the system has been under development and consultation for a number of years, it is still limited in its use, is not compatible with State-based requirements and requires the allocation of significant resources and training. (sub. 17, p. 4)

The Department of Climate Change has been undertaking substantial developments to OSCAR to ensure it is ready for the significant increase in the number of entities reporting through the tool and further development will commence in the second half of 2009 to support the approach outlined in the NGER Streamlining Protocol. To assist corporations to meet their greenhouse and energy reporting obligations under the NGER Act, the Department has released new user guides and e-learning material and has been conducting training sessions around the country (Department of Climate Change, sub. DR81).

As these systems become fully operational and businesses become more familiar with them, they are likely to significantly reduce the compliance burden associated with greenhouse and energy reporting. Whilst the approach adopted seems broadly consistent with the objectives and underlying principles of SBR, the Commonwealth Department of Climate Change should liaise closely with the Treasury Department to ensure that the different reporting systems are consistent wherever possible, and developed in such a way as not to preclude closer integration in the future.

More generally, regulators need to periodically review and justify the existing reporting burdens they impose on business. Any proposals to impose new burdens must be subjected to a rigorous business compliance cost assessment as part of a broader regulatory impact analysis.

All levels of government need to work cooperatively to reduce the burden associated with reporting obligations by:

- ***eliminating unnecessary requests for information, including where possible reducing the frequency of requests***
- ***where appropriate, and agreed with business, sharing information between regulators***
- ***standardising the language and forms used, and the type of data requested and wherever possible aligning reporting obligations with existing company data gathering and reporting***
- ***facilitating on-line submission of information.***

Reforms to reporting obligations impacting on energy, water and waste services should, as far as possible, be consistent with the systems being developed as part of Standard Business Reporting (SBR) so as to facilitate an extension of the SBR taxonomy and the use of SBR services for report creation and delivery in those sectors in the future.

National Energy Customer Framework

States and territories maintain responsibility for regulating the activities of electricity and gas retailers and there are significant differences between the jurisdictions in the obligations they impose. These differences (for example in relation to: terms and conditions of contracts; frequency and content of bills; and the information reporting requirements of jurisdictional regulators) increase the compliance burden for retailers operating across more than one jurisdiction and with the introduction of retail contestability, retailers are increasingly operating across a number of jurisdictions. The Energy Retailers Association of Australia (ERAA) submits that:

> ... current consumer protection arrangements governing the retailing of gas and electricity are complex, divergent and inefficient. (sub. 19, p 3)

Under the proposed National Energy Customer Framework (NECF), certain retail (non-price) regulatory functions will transfer to a national regulatory framework administered and enforced by the Australian Energy Regulator and the Australian Energy Market Commission. However, there is currently no commitment from Western Australia to apply the national framework, nor from the Northern Territory to apply the national framework in respect of electricity.

The main objectives for the creation of the NECF are to streamline the regulation of energy distribution and retail regulation functions in a national framework and develop an efficient national retail energy market including appropriate consumer protection.

Participants raise various concerns in relation to the proposed NECF, including:

- that it will introduce major new 'heavy handed' enforcement powers and compliance obligations on gas transmission pipelines that are unnecessary and inconsistent with the original intention of the Framework (APIA, sub. 12)
- the potential for regulatory burden to arise during the transition to the new regime (Energy Industry (Joint Submission), sub. 23)
- that it will not address burdens from residual areas of consumer protection frameworks which will remain under state/territory control (Energy Industry (Joint Submission), sub. 23)
- the reforms are taking too long to finalise and implement (ERAA, sub. 19).

Assessment

The Commission has not conducted a detailed assessment of these concerns because they relate to prospective changes. Moreover, the proposed new NECF and its various components has been the subject of very extensive and ongoing stakeholder consultation. The proposed National Framework was also assessed in the Commission's recent *Review of Australia's Consumer Policy Framework* (PC 2008b). In response to the Commission's review, Australian governments agreed to a new consumer policy framework, comprising a single national (generic) consumer law and streamlined enforcement arrangements. A consultative process on the proposed reforms has been conducted in parallel with consultation on the development of the industry-specific NECF.

The MCE agreed in December 2007 that legislation to give effect to the NECF would be introduced to the South Australian Parliament by September 2009. The First Exposure Drafts of the NECF, including a first draft of the National Energy Retail Law, Regulations and Rules were only released for consultation at the end of April 2009. The Exposure Drafts were released by the MCE Standing Committee of Officials, but the policy positions contained in the package had not yet been endorsed by Energy Ministers. A further round of consultation on a Second Exposure Draft is expected to occur late in 2009, prior to the legislative package being finalised and introduced to the South Australian Parliament in the 2010 Spring session.

Stakeholders have expressed concerns about delays and the lack of a clear timetable for the implementation of the NECF. The Energy Supply Association of Australia (ESAA), for example, submitted:

> … without a clear timeframe for transition there is a significant risk that this important reform process will be further delayed and that the Council of Australian Government's commitment to a single, national framework will not be delivered. esaa considers there is scope for the MCE to work closely with jurisdictions following the current round of consultation to further clarify the timeframe and develop appropriate incentives for transition to the NECF. (sub. DR79, p. 3)

The MCE (2009b) has agreed that each participating jurisdiction will develop NECF implementation plans for consideration at the MCE meeting at the end of 2009, with a view to providing greater certainty for stakeholders about when the NECF will come into operation.

The Commission notes that some matters will initially remain under the control of the states and territories, and will transition to the national framework at a time that will be subject to the discretion of each jurisdiction. Even once the proposed national customer framework is fully implemented, the states and territories will retain control of many areas of regulation. In addition, detailed implementation of some of the measures encompassed by the national framework will also be left to individual states and territories to determine. Thus, significant jurisdictional variations in requirements will continue. Origin Energy stated:

> To the extent that jurisdictional variations remain and retailers are required to manage different systems in each state, the NECF will have failed to achieve its core objective – a national regime. (sub. DR89, p. 6)

In light of the retention of state and territory control over many important matters, the Commission in its Consumer Policy Review described the proposed new policy framework as 'a hybrid, rather than a truly national regime' (PC 2008b, p. 471). The Commission recommended, amongst other things, that Australian governments agree to a longer term goal of a single set of consumer protection measures for energy services to apply across Australia, but leave their development and implementation until the process of creating national energy markets is further progressed. The Commission continues to advocate the pursuit of this longer term goal.

In the meantime the priority for governments should be to ensure that the proposed NECF is implemented as quickly as possible and with jurisdictional variations kept to a minimum. As always, however, the desire for quicker implementation should not come at the expense of good process and achieving the best outcomes. The concerns raised by participants with this review reinforce the need for the proposed

reforms to be subjected to regulatory best practice processes, including effective consultative processes (see below).

Origin Energy, however, emphasised that the balance now must be towards expediting the implementation process, whilst at the same time ensuring that jurisdictions account for and justify exceptions and work toward their elimination:

> The process of review has been so extensive it is inconceivable that the balance of interests reflected in the NECF should require further detailed scrutiny and input. In light of this painstaking balancing of interests that has occurred over many years, jurisdictions looking to vary this framework must be explicit about their objectives.
>
> To this end, timelines should be established for jurisdictions to achieve full implementation. In the interim, jurisdictions should keep transparent records of outstanding exceptions to the national regime; the justification for these; and steps proposed to eliminate these exceptions. (sub. DR89, p. 6)

It is also vital, as part of this process, that the development of the NECF legislation fully takes into account the interaction between the industry-specific regime and the generic National Consumer law. The regimes must be complementary and ensure there is no duplication, overlap or conflicting requirements.

Again, consistent with best practice regulatory processes as set out in the COAG Best Practice Regulation Guide (COAG 2007b), the new Framework must include a review clause that would ensure its effectiveness and efficiency in meeting its goals, including avoidance of unnecessary compliance burdens, is subject to independent evaluation within five years of implementation. The Commission notes that COAG has, consistent with the Commission's previous recommendation (PC 2008b), agreed to a process for reviewing all industry-specific consumer regulation (Treasury 2009).

Multiplicity of climate change policies and programs

As in the previous two annual reviews of regulatory burdens, major concerns have been raised about the large number of inconsistent and overlapping climate change and energy efficiency policies and programs.

The Energy Retailers Association of Australia (ERAA, sub. 19), for example, considers current state and territory energy efficiency policies are uncoordinated, inconsistent, duplicative, ineffective and costly. Similarly, the Energy Industry (Joint Submission) highlights the 'increasing number of overlapping energy efficiency and greenhouse focussed regulatory and market-based schemes … being developed and implemented at Commonwealth, State and Territory, and local government levels' (sub. 23, p. 11).

Assessment

COAG is making progress in addressing inconsistent and overlapping climate change and energy efficiency policies and programs through a number of initiatives.

The recently announced *National Partnership Agreement on Energy Programs* (COAG 2009b) has the objective of achieving greater consistency across Commonwealth, state and territory government energy efficiency policies and programs by removing duplication and overlap.

COAG has committed to a cooperative national response to address climate change, including support for a national emissions trading scheme and a nationally-consistent set of complementary policies and measures that achieve emissions reductions at least cost. The Commission has previously noted that, with the introduction of a national emissions trading scheme, other policies and programs would be needed only to fill any gaps beyond the scheme's reach or satisfy rationales not achieved through the scheme (PC 2008d).

At its November 2008 meeting, COAG endorsed a set of principles and a process for jurisdictions to review and streamline their existing climate change mitigation measures, with the aim of achieving a coherent and streamlined set of climate change measures in 2009 (COAG 2008c).

The Commission supports these principles developed by COAG, and notes in particular that for regulatory measures to satisfy the criteria:

- they must meet best-practice regulatory principles, including that the benefits outweigh the costs
- consideration should be given to regulatory and compliance costs imposed on the community.

In *The Strategic Review of Australian Climate Change Programs,* completed in July 2008 ('the Wilkins Review'), all Australian Government climate change programs were assessed against a set of principles (aligned with those subsequently endorsed by COAG) to determine whether they were complementary, transitional or non-complementary to the Carbon Pollution Reduction Scheme (CPRS):

> Of the 62 programs reviewed during the Wilkins Review, four had ceased by the conclusion of the Review in July 2008 and an additional 13 programs were scheduled to cease by June 2010. The Government has rationalised the delivery of the remaining climate change programs to more effectively combat climate change and better support the CPRS. …
>
> The Government has since, in June 2009, concluded the Solar Homes and Community Program, which previously provided support for installation of solar panels. It also

announced, in June 2009, the phased conclusion of the Remote Renewable Power Generation Program. (Department of Climate Change, sub. DR81, p. 5)

The Commonwealth Department of Climate Change is taking steps to reduce the burden associated with reporting obligations for climate change measures, including the establishment of a single new regulatory body for three areas of climate change regulation (see discussion of reporting obligations above).

Several states have commenced evaluations of their climate change policies. The Commission urges all governments to ensure that rigorous and transparent assessments of all their climate change mitigation and energy efficiency measures, consistent with the agreed COAG principles, are completed as quickly as possible. This will minimise the scope for unnecessary regulatory burdens under existing frameworks and importantly avoid the imposition of additional burdens associated with the interaction of these measures with an emissions trading scheme, once implemented. Measures should only be retained where they are shown to be complementary and they generate additional net benefits for the community. The same rigorous criteria must also be applied before introducing any new measures.

Renewable energy schemes

The Australian Government's Mandatory Renewable Energy Target (MRET) Scheme has the objective of encouraging increased generation of electricity from renewable energy sources. In 2007, the Government committed to ensuring that at least 20 per cent of Australia's electricity supply is generated from renewable sources by 2020.

Under the MRET, electricity retailers and other large purchasers of electricity ('liable parties') are required to meet a share of the renewable energy target in proportion to their share of the national wholesale electricity market. The legislation provides for the creation of renewable energy certificates (RECs) by generators of renewable energy. The RECs, once registered, are traded and sold to liable parties who may surrender them to the Renewable Energy Regulator to avoid paying a shortfall charge for non-compliance.

Concerns about the renewable energy certificates scheme were raised by Rheem Australia in last year's *Annual Review of Regulatory Burdens on Business: Manufacturing and Distributive Trades*. Rheem submitted that undue complexity was leading to substantial administrative costs for participating businesses as well as uncertainty about the tax treatment of the certificates (PC 2008a, pp. 145-7).

The Commission decided to defer consideration of renewable energy schemes until this year because most of the businesses affected by the scheme are energy retailers and wholesale purchasers of electricity. However, no specific new concerns were raised in submissions to this year's review.

Assessment

Australian governments have agreed to implement a new expanded national renewable energy target (RET) scheme. The new scheme brings both the national MRET scheme and existing state-based targets into a single national scheme, designed to meet the Government's 20 per cent by 2020 renewable energy target (COAG 2009a). It is expected that the expanded RET scheme will be implemented through Commonwealth legislation in 2009, with increased targets commencing in 2010 and increasing annually thereafter.

An extensive consultation process has been conducted to inform the design of the Scheme, including the opportunity for stakeholders to comment on exposure draft legislation. Rheem and major energy industry stakeholders have participated in this ongoing consultation process. Given this parallel review activity, the Commission does not intend to comment on specific aspects of the RET schemes.

However, the Commission has previously expressed strong reservations about the merits of renewable energy targets, with an effective emissions trading scheme in place:

> A MRET operating in conjunction with an ETS would not encourage any additional abatement, but still impose additional administration and monitoring costs. To the extent that the MRET is binding (which is its purpose) it would constrain how emission reductions are achieved — electricity prices would be higher than otherwise and market coordination about the appropriate time to introduce low-emissions energy technologies would be overridden. If it was non-binding, it would simply increase administrative, compliance and monitoring costs. Moreover, it would also help to foster a perception that governments are amenable to interfering with the least cost abatement objective of the ETS. This could encourage other potential beneficiaries to seek special programs that neither increase abatement nor reduce its cost. (PC 2008d, p. xvii)

The Department of Climate Change states that the scheme has been 'designed to operate in tandem with the CPRS' (sub. DR81, p. 5). This is despite the findings of Professor Ross Garnaut in the Final Report of *The Garnaut Climate Change Review*:

> Implementing the expanded MRET alongside the emissions trading scheme means that these two policy instruments, with their differing objectives, will be interacting in the electricity market. This clash of objectives will potentially be detrimental to electricity

> users (households and businesses) and electricity producers (incumbent and new providers). (Garnaut 2008, p. 354)
>
> There is an interesting and seemingly perverse consequence of expanding MRET at the same time as the emissions trading scheme is to be implemented. Having both schemes operating side by side could see an increase in coal-fired power generation (by more than 2000MW) as gas-fired plants are crowded out by MRET. This would not occur if the emissions trading scheme were operating without MRET. (Garnaut 2008, p. 356)

The Commission notes that the Wilkins Review of Australian Climate Change Programs (see above) recommended that the RET should be regarded as a transitional program. Notwithstanding that the CPRS will be 'the primary driver of renewable energy' (Department of Climate Change, sub. DR81, p. 5), it is expected that the RET will operate for another 20 years, not ending until 2030. Therefore, the operation and design of the RET must continue to be regularly evaluated (along with all other ongoing climate change-related policies), to ensure consistency with best practice regulatory principles, including achieving net benefits for the community.

Solar feed-in tariff schemes

The Energy Retailers Association of Australia (ERAA, sub. 19) has several concerns about state-based solar feed-in tariff schemes:

- they are not cost-effective or efficient
- they can compromise the achievement of other policy objectives (eg keeping energy prices low to protect consumers)
- they have been implemented in a haphazard, inconsistent way.

Assessment

Most states and both territories offer solar feed-in tariff schemes, but tariffs and terms and conditions vary widely. A feed-in tariff is a premium rate paid for electricity fed back into the electricity grid from a designated renewable electricity generation source like a rooftop solar system.

At its November 2008 meeting, COAG agreed to a set of national principles to apply to new feed-in tariff schemes and to inform reviews of existing schemes (COAG 2008c, p. 10). The COAG decision requires further action by the MCE, including to promote consistency in feed-in tariff policy with previous COAG agreements, particularly the Australian Energy Market Agreement, but also agreements relating to competition policy and climate change. The MCE, at its 10

July 2009 meeting, agreed to a work program to give effect to the COAG principles (MCE 2009b).

While the intention of the national principles is to promote national consistency of schemes across Australia, the Commission is concerned that governments have not made a strong enough commitment to a more uniform approach. The principles are very broad and jurisdictions appear to retain substantial discretion to determine their own approach to scheme design.

As is the case with renewable energy schemes more generally, feed-in tariff schemes need to be re-examined in the context of a broader consideration of climate change and energy efficiency/greenhouse reduction strategies and specifically the introduction of a CPRS.

The Commission has serious doubts about the efficiency, in the context of an emissions trading scheme, of renewable energy measures that distort markets by favouring particular technologies (PC 2008d). Should such measures be retained, at a minimum, governments should commit to a timetable for achieving a harmonised national solar feed-in tariff scheme.

Concerns relating to the regulatory and policy framework

Concerns are raised about fundamental aspects of the regulatory or policy frameworks governing electricity and gas supply, including:

- the coverage of some economic regulation is too broad, either because it fails to take account of current market realities, or because it duplicates/overlaps with general laws:
  - APIA (sub. 12) considers that ring fencing (structural and operational separation) requirements in gas are no longer necessary and that regulation of the gas transmission sector does not adequately consider competitive pressure or countervailing powers that constrain market power. It expressed the view that the general access provisions in Part IIIA of the Trade Practices Act should be sufficient for the transmission sector.
  - the Energy Industry (Joint Submission, sub. 23) points out that a failure to fulfil the commitment, contained in the Australian Energy Market Agreement, to certify industry-specific access regimes has created the potential for infrastructure to be covered both by the national access regime under Part IIIA and the access regime set out in the National Electricity Law and associated statutory rules:

> Until this issue is resolved, owners of nationally significant energy assets are required to contemplate the application of two existing access regimes applying to a single set of assets. (sub. 23, p. 5)

- the split of responsibilities between national and state/territory regulation creates inefficiencies, including inconsistencies and overlap or duplication (Energy Industry (Joint Submission), sub. 23):
  - Envestra (sub. 13) is concerned that the retention by the states and territories of responsibility for certain areas of regulation (in particular licensing) results in overlap with national requirements, for example a doubling up of compliance reporting to both the AER and state regulators. Envestra also considers that the jurisdictional regulators have too much discretion in their licensing powers (for example, in relation to service and reliability standards imposed on energy distributors)
  - even where areas of regulation are nominally covered by the national regime, specific derogations lead to differences between jurisdictions. The Energy Networks Association (sub. 43) notes, for example, that exemptions from national electricity rules mean each state has differences in regulations.
- excessive convergence of electricity and gas regulation. APIA (sub. 12) claims that the MCE has gone too far in its efforts to develop common (consistent) regulatory frameworks for gas and electricity by failing to adequately recognise the fundamental differences between gas and electricity markets.

Assessment

The current national frameworks and the retention of certain regulatory powers for the states and territories, reflect the outcomes of *policy* decisions and, in relation to many areas of regulation, the relatively recent implementation of positions agreed between the jurisdictions. Implementation of the current arrangements followed comprehensive reviews and a very extensive process of consultation with stakeholders.

In relation to the economic regulation of gas pipelines, the Commission notes that the current National Gas Law and Gas Rules embody many of the recommendations it made, with a view to enhancing regulatory certainty for investment, in the 2004 Review of the Gas Access Regime. As discussed above, the legislation now allows for light regulation in certain circumstances. Further, significant new investment in gas pipelines has improved supply options and market contestability. This has led to a reduction in the number of pipelines subject to economic regulation.

Any decisions to make changes to address the concerns raised with this review, would need to be based on a thorough analysis of *all* the costs and benefits of

alternative options. Addressing questions such as the appropriate split of regulatory responsibilities between the states/territories and the national regime; the most efficient degree of commonality in the regulatory frameworks and institutional arrangements covering electricity and gas; and the coverage of economic regulation, are beyond the scope of this study.

Moreover, jurisdictions have already committed to reviews once all the previously agreed national regulatory reforms have been implemented and have been in place for sufficient time to allow a proper assessment of their effectiveness and efficiency. The Commission notes that some major reforms have either occurred only quite recently (for example, the transfer of responsibility for regulation of gas transmission and distribution pipelines to the Australian Energy Regulator took effect less than one year ago) or are still to be finalised (for example, the National Energy Customer Framework).

The first of the foreshadowed reviews is of derogations and jurisdictional differences. Much has been achieved already in creating greater consistency in regulation of electricity and gas supply services, and the NECF and harmonisation of technical and safety regulation will represent further major advances once implemented. However, more needs to be done to eliminate unjustified differences in the regulatory regimes across the jurisdictions. In April 2009, COAG restated its commitment that the MCE should review, and remove or harmonise, all derogations, and other state-specific differences from the broader national energy framework. Originally this review and reform process was to have been completed by June 2008, but it was delayed to allow for the transfer of all national energy functions to the national legislation, including the implementation of the NECF. The Commission concurs with the following statement by the COAG Reform Council in its March 2009 Report to COAG:

> … the MCE should develop a new timetable against which this task may be assessed to ensure that it will be done expeditiously, as a key part of creating a genuinely national energy market. The Council will expect an ambitious timetable to be in place by the time of its 2010 Report to COAG. (CRC 2009a, p. 20)

The second review that governments have previously committed to is of energy market governance arrangements. It was anticipated that this review would occur five years after the new national framework was fully implemented. While it is understandable that a specific timetable or deadline for this review has not been determined because there is uncertainty regarding finalisation of the implementation of previously agreed national reforms, governments should seek to commit to such a timetable as soon as practicable.

The review of Part IIIA scheduled to commence by 2011 may provide an opportunity to consider the coverage of energy access regimes. However, it may be

appropriate for the Australian Energy Market Commission to specifically review economic regulation of the gas supply industry and provide advice to the Ministerial Council on Energy on whether there may be scope for the wider application of a lighter-handed regulatory approach.

Consultation and other regulatory process concerns

Some of the strongest and most widespread concerns relate to aspects of the *processes* for developing new regulatory proposals or amending existing frameworks, including:

- that generally there is too strong a presumption in favour of regulatory solutions to perceived problems, without evidence of market failure — examples provided by the Australian Pipeline Industry Association (APIA) included:
  - the National Gas Bulletin Board and the Short Term Trading Market
  - the *proposed* Gas Statement of Opportunities
  - new enforcement powers under the proposed National Energy Customer Framework (sub. 12)
- an excessive number of reviews is imposing an onerous burden on businesses and industry associations that are required to respond to consultation opportunities (Energy Networks Association (ENA), sub. 43)
- a lack of coordination in reviews and consultative processes results in overlapping and duplicative work streams (ENA, sub. 43; APIA, sub. 12)
- there are instances where consultation does not occur early enough (ENA, sub. 43; APIA, sub. 12)
- industry views contributed through consultations are not adequately considered or reflected in government responses and the Government does not provide sufficient justification where it decides not to implement review recommendations (APIA, sub. 12)
- governments do not involve industry enough in the design and development of regulations or alternatives to regulation (APIA, sub. 12).[4]

Some other process-related concerns were raised by a single participant during the consultation period after the release of the draft report. These related to:

- aspects of the enforcement of regulations

[4] This last issue was also raised as a concern by Queensland Recycling, Alex Fraser, (sub. 25), in relation to waste services regulation.

- the accountability of regulators
- inadequate opportunities for review of regulatory decisions
- the need for greater transparency and guidelines by market regulators.

As these latter concerns were not addressed in the draft report and were not presented in a public submission, the Commission was not able to test whether they were more widely held by industry nor consult with regard to an appropriate response. Accordingly, the Commission has not been able to fully address them in this report.

Assessment

The above concerns would be addressed by ensuring that, consistent with existing best practice principles:

- all proposals for new or amended regulations are subjected to rigorous ex ante process requirements, including best practice consultation
- new regulations should only be introduced where there are demonstrated net benefits and existing general regulatory frameworks or alternatives to regulation are shown to be inadequate
- regulators responsible for the administration and enforcement of regulations are accountable and their processes and decisions are: transparent; consistent; and open to appeal and review
- regulations are reviewed to assess their actual effectiveness and efficiency in meeting policy objectives.

For regulatory decisions made by the Australian Government, best practice principles and requirements are set out in the *Best Practice Regulation Handbook* (Australian Government 2007a). In the case of intergovernmental regulatory proposals, being developed by Ministerial Councils (including the Ministerial Council on Energy) and National Standard-Setting Bodies, the relevant principles are contained in the COAG *Best Practice Regulation Guide* (COAG 2007b).

The Office of Best Practice Regulation (OBPR), within the Australian Government Department of Finance and Deregulation, monitors and reports on compliance with the Australian Government's best practice requirements and also has a similar role, at the direction of COAG, in relation to intergovernmental regulation making and the development of national standards. With respect to the COAG requirements, a regulation impact statement (RIS), assessed by the OBPR, is required at two stages:

- the first for community consultation with parties likely to be affected by the regulatory proposal
- the second or final RIS, reflecting feedback from the community, for the decision-making body.

In its most recent published report, the OBPR reported that the Ministerial Council on Energy (MCE) complied in full with the COAG best practice regulation requirements in 2007-08 (OBPR 2008a, p. 47). However, for decisions made between 1 April 2006 and 31 March 2007, the COAG RIS requirements were not met by the MCE at the consultation stage and/or the decision-making stage in four cases (OBPR 2007, p. 81).

The OBPR notes that the depth of analysis required for consultation is lower than that at the decision-making stage:

> In many cases, the RIS for consultation focuses on the identification of the problem, objectives, and a range of feasible options (non-regulatory and regulatory), and a preliminary impact analysis of the options. A RIS for the decision-making stage should reflect the additional information and views collected from those consulted, and provide a more complete and robust impact analysis. (OBPR 2007, p. 71)

The Commission recognises that for the early consultation stage RIS, there will often be considerable uncertainty surrounding the likely design and final implementation details of options being considered, making the collection of data and estimation of likely impacts problematic. It is therefore not reasonable to expect as complete an analysis as is required for the final RIS for the decision maker. However, it is at this early stage of the process that well informed feedback from stakeholders has the greatest potential to improve the efficiency and effectiveness of the final proposal. To the extent possible, the consultation RIS should incorporate compliance cost analysis in preliminary form, based on the best available data at the time, with ranges and sensitivity analysis used to account for uncertainty.

Consultative processes

Effective consultation is clearly a vital element in best practice regulation making and the ongoing administration of regulation. Industry knowledge, including information about the likely compliance costs associated with different options, can contribute to better solutions and to a higher level of support for, and compliance with, measures once implemented.

Industry of course wants to have its views taken into account, indeed concerns are raised about businesses not being involved enough in the process or their views not being adequately considered (see, for example, the views of APIA and QLD

Recycling, Alex Fraser, stated above). On the other hand, if there are too many calls for input from business or if consultations are uncoordinated, or otherwise inefficient, (also evidenced by concerns outlined above) industries ability to effectively participate in the process is compromised.

The Commission heard much evidence of review fatigue, with businesses and industry groups stating that they simply couldn't keep up with the extensive and wide-ranging consultation processes they are requested to participate in. As an indication of the burdens placed on their industry, APIA lists 24 separate consultative processes that participants in the gas transmission industry had been involved in, from the time this year's annual review of regulatory burdens was announced at the end of November 2008. APIA submits:

> The sheer volume of consultation processes leads to the difficult position of having to choose between processes. Many of the consultation processes are accompanied by hundreds of pages of documentation for comment. Typically, lack of participation in a process is taken by Government to be seen as approval or non-concern with the proposed changes. The reality is few companies have the capacity to devote the necessary resources to remain across the issues and consultation processes involved. Furthermore, in making a choice between consultation processes, the 'value' of participation is considered — that is, whether industry has any expectation that its views might actually be considered or whether the consultation is a token exercise. (sub. 12, p. 6)

As noted by the AEMC, however, much of the pressure for reform comes from the industry itself. For example, a high proportion of the proposals for changes to the national energy rules, and consequent consultative processes, are driven by the industry.

Many of the concerns about consultative processes have been raised with the previous two annual reviews of regulatory burdens on business and before that with the Regulation Taskforce on Reducing the Regulatory Burdens on Business. In responding to the Taskforce Report in 2006, the Australian Government adopted a whole-of-government policy on consultation, which sets out best practice principles that need to be followed by all agencies when developing regulation. The policy is based on seven principles, including the following that are particularly relevant to the concerns raised by participants:

- Appropriate timeliness — '… stakeholders should be given sufficient time to provide considered responses'.
- Transparency — 'policy agencies need to explain clearly the objectives of the consultation process, the regulation policy framework within which consultations will take place and provide feedback on how they have taken consultation responses into consideration'

- Accessibility — 'stakeholder groups should be informed of proposed consultation, and be provided with information about proposals, via a range of means appropriate to those groups'. (Australian Government 2007a, p. 4)

Other principles cover: continuity; targeting; consistency and flexibility; and evaluation and review. The Government's Consultation Requirements and the best practice principles are set out in the *Best Practice Regulation Handbook* (Australian Government 2007a). There would be merit in refining the Consultation Policy and the best practice principles to make more explicit reference to the need for coordination between agencies in their requests for feedback from stakeholders.

In February 2006, COAG committed to improving mechanisms for consultation with business and other stakeholders. The Best Practice Regulation Guide (COAG 2007b) now also makes reference to the Australian Government's best practice consultation principles.

The Australian Government has implemented related mechanisms to support more effective consultation. These include the requirement for annual regulatory plans[5] and the establishment of a Business Consultation Website.[6] These mechanisms should, in principle, facilitate better coordination between departments and agencies so as to avoid major consultation exercises affecting a particular sector occurring in parallel.

There also needs to be effective cooperation and coordination between regulatory agencies in different jurisdictions. There should be an expectation that all relevant regulators across Australia take into account other consultation processes that may be impacting on stakeholders before determining their consultation timetable.

The Commission acknowledges that energy regulators do already endeavour to coordinate their review and consultative processes, for example through meetings and exchanges of information. These arrangements between the AER, AEMC and the National Electricity Market Management Company (the Australian Energy Market Operator since July 2009) are formalised in Memorandums of Understanding. Moreover, there will be times when overlaps are unavoidable, for example where reviews or consultative processes have legislated timetables.

5 Departments and agencies responsible for regulatory changes are required to publish an Annual Regulatory Plan, containing information about recent changes to business regulation and proposed regulatory activity, including consultation opportunities and an expected timetable.

6 The website was established to: enable registration of relevant stakeholders prepared to be consulted on particular regulations, automatically notify stakeholders of relevant consultation opportunities, include information about new and upcoming changes to regulation, and provide links to current and past consultation processes (www.consultation.business.gov.au).

That said, the concerns raised suggest there may be scope to do more. Governments could, for example, consider the establishment of a single national consultation database or a series of linked databases that would enable easier and early access to information about planned consultations.

In relation to the specific concern regarding inadequate feedback being given to stakeholders on how consultation responses have been taken into consideration, the Commission found evidence to suggest that both the AER and the AEMC are generally following good practice. The use of tables setting out stakeholder concerns issue by issue and the regulatory body's responses appear to be a very transparent mechanism for communicating how consultation feedback has been considered. It is important, however, that such practices are employed consistently by these bodies and also by the Ministerial Council on Energy and its Working Groups. Similarly, when responding to the recommendations of reviews, governments should be transparent in justifying where decisions are taken not to accept those recommendations. This is consistent with existing RIS requirements.

More generally, the Ministerial Council, its working groups and national energy regulators need to ensure that their consultative processes are consistent with established best practice principles. The Australian Government's best practice consultation principles should be amended to explicitly refer to the need for coordination between agencies seeking feedback from the same stakeholders, and wherever possible the avoidance of overlapping/parallel consultation and review processes.

The Commission also encourages energy regulators to objectively and critically review their own consultation practices against the best practice principles with a view to identifying where improvements can be made. Such a review would be best conducted in close cooperation with business and could include round-table discussions that provide an opportunity for regulators and stakeholders to discuss their specific concerns. The Commission notes that since the draft report, the AEMC has been seeking the views of stakeholders, via a survey, on its overall performance, including the effectiveness of consultation and communication.

Other issues

The following issues have not been assessed in detail because they relate to state and territory responsibilities and/or are subject to current review and are therefore considered out of scope for this review.

Energy transmission planning and permitting

The Energy Industry (Joint Submission) raises concerns about inconsistencies in state and territory approaches to transmission planning and permitting:

> Inconsistent State and Territory approaches, and complex processes in some jurisdictions have the potential to hamper the timely provision of new or upgraded transmission services. (sub. 23, p. 14)

COAG agreed in 2007 to enhance transmission planning arrangements — through the development of a national transmission planning function (NTPF) — to address concerns that the current jurisdiction-by-jurisdiction approach to planning did not adequately reflect investment priorities for the national electricity market as a whole. At the request of the MCE, the AEMC developed a detailed implementation plan for the NTPF to be undertaken by the Australian Energy Market Operator (AEMO).[7] The NTPF commenced operation with the establishment of the AEMO in July 2009. The Commission notes that the AEMO is to publish an annual national transmission network development plan outlining efficient development of the power system (including a long-term strategic outlook), however, it is not intended for the development plan to replace local planning and it would not be binding on transmission businesses or the AER.

The MCE has signalled an intention to review the effectiveness of the new transmission planning arrangements after five years of operation.

Energy technical and safety regulation

Energy specific technical and safety regulation is a state and territory responsibility. The MCE, at its June 2008 meeting, agreed to establish the Energy Technical and Safety Leaders Group (ETSLG) to undertake work towards improving the consistency of state and territory regulations — such as occupational health and safety requirements — and specifically to develop a Harmonisation Plan. A Discussion Paper, setting out a proposal for progressing a harmonised legislative framework within which state and territory energy supply industry technical and safety regulation will operate was released for consultation in February 2009 (MCE ETSLG 2009).

Based on the options presented in the discussion paper, the Energy Networks Association (ENA, sub. 43) and the Energy Industry (Joint Submission, sub. 23) are concerned that the proposed harmonised regime will be overly prescriptive, with

[7] The AEMC *Final Report to the MCE on the National Transmission Planning Arrangements Review* was published in July 2008 (AEMC 2008a).

input-based regulation being adopted, rather than a more flexible outcomes focused approach.

Given that these concerns are about prospective changes and are currently the subject of a review process, the Commission does not intend to make specific recommendations in this area. However, it is important that the work of the ETSLG on harmonisation of regulations is consistent with regulatory best practice processes and regulatory design principles as required under the COAG Best Practice Regulation Guide (COAG 2007b), including that regulations should not be unduly prescriptive. Performance and outcomes-focused regulation will generally (but not always) be more efficient because of the flexibility they afford businesses to adopt compliance strategies that are the most cost-effective. It is essential that a rigorous process of consultation and impact analysis is used to determine the approach that generates the highest net benefits for the community as a whole. An important element of this process will be estimating and fully taking into account the compliance burden associated with different options.

Following consideration of stakeholder comments on the discussion paper, the ETSLG has been developing an Energy Technical and Safety Harmonisation Enhancement Plan. A draft of this plan is expected to be released in September 2009, together with a consultation Regulation Impact Statement (MCE 2009b). A Final Harmonisation Plan is likely to be presented to MCE early in 2010.

Inconsistencies in regulation of gas meters

Envestra raises the specific issue of inconsistencies between jurisdictions in regulatory requirements for gas meters:

> Envestra supplies gas meters to its customers in Victoria and in Albury, New South Wales. But while the same make and model of gas meter is purchased for both jurisdictions, Envestra must maintain separate stocks of gas meters to service its 23 000 Albury consumers and its 525 000 Victorian consumers. This is because New South Wales legislation requires gas meters installed in that state to be stamped with a NSW seal of approval. The additional administrative and operational burden of complying with the NSW legislation is ultimately borne by Albury consumers. (sub. 13, p. 2)

Governments have been working for nearly two decades to achieve greater consistency in trade measurement regulation between jurisdictions. By 2006 all states and territories had adopted Uniform Trade Measurement Legislation. However, continuing inconsistencies and different interpretations prompted COAG to identify trade measurement as a high priority regulatory 'hot spot'. Work has been progressing on the implementation of a national system of trade measurement

to be administered by the Commonwealth through the National Measurement Institute (NMI). The new system is to commence on 1 July 2010.

These reforms will not, however, address the issue of inconsistencies in gas meter regulations. The National Measurement Act was amended in 1999 to include Part VA, which provided for the Commonwealth to carry out type (pattern) approval of utility meters and initial verification.[8] Initially all classes of meters were exempt with the intention being that the exemption would be lifted for particular classes of meter once the necessary infrastructure was developed. The exemption has been lifted for certain water meters and progress has been made towards lifting the exemption for domestic electricity meters. NMI plans to address gas meters once work on water and electricity meters is further developed. NMI has already taken part in certain international meetings on gas meter standards.

The Commission also notes that the ETSLG discussion paper (MCE ETSLG 2009, p. 17) uses gas meters as an example of regulatory inconsistency and specifically calls for stakeholder comments on such inconsistencies.

Any gas meter that can legally be used in one Australian jurisdiction should be able to be used in any other jurisdiction without modification. Reform needs to be expedited and should be pursued by the Ministerial Council on Energy through its current work on harmonising energy technical and safety regulation in consultation with the Ministerial Council of Consumer Affairs, which has been overseeing national trade measurement reforms.

5.3 Water supply, sewerage and drainage services

Overview of regulation

The Australian Government has limited *direct* involvement in the regulation of water supply, sewerage and drainage services. These services are regulated at the state and local government level. The Australian Government does, however, play a major leadership and coordination role in relation to national policies and programs relating to water. In April 2008, the Australian Government announced funding under the National Plan on Water (Water for the Future) to address: action on climate change; using water wisely; securing water supplies; and supporting healthy rivers and waterways (DEWHA 2009a).

[8] These changes were made following the Kean review of Australia's Standards and Conformance Infrastructure (Keane 1995). Monitoring of meters in use remains the responsibility of state and territory authorities.

There are various existing and prospective national reforms and governance structures, including the Intergovernmental Agreement on a National Water Initiative (NWI) (box 5.4).

The COAG Working Group on Climate Change and Water has a key role in progressing reforms and advising COAG. It has been focusing on four priority areas: addressing over allocation and improving environmental outcomes; enhancing water markets; urban water reforms; human resources, skills and information (NWC 2008b).

Concerns about water regulation

Perhaps reflecting the major parallel review and reform agenda, few concerns were raised with this review in relation to water regulation.

The Minerals Council of Australia (MCA, sub. 9) is concerned about national water access reform and made a number of specific suggestions for enhancing efficiency in the allocation and pricing of water and improving access by the minerals industry (similar concerns were submitted by the MCA to the Commission's *Annual Review of Regulatory Burdens on Business: Primary Sector* (PC 2007)). The MCA also calls for the National Water Initiative (NWI) to be implemented in full and for the Australian Government to ensure adequate resourcing to expedite water reform.

The Packaging Council of Australia (PCA, sub. 17) has concerns about excessive, overlapping and overly prescriptive water regulation reporting requirements. These concerns were addressed in the general discussion of reporting requirements in section 5.2.

Assessment

In assessing various water regulatory issues impacting on the primary sector (PC 2007), the Commission examined progress in water reform and found that this area was very much a work-in-progress, with an extensive policy agenda and agreed processes for developing regulatory regimes.

Box 5.4 **National regulatory and institutional frameworks for water**

Intergovernmental Agreement on a National Water Initiative (NWI), 2004 — overseen by COAG and being implemented over a ten year period, the NWI sets out the objectives, outcomes and actions for national water reform. The overall objective is to achieve a nationally compatible market, regulatory and planning based system of managing water resources for rural and urban use that optimises economic, social and environmental outcomes. All signatories (including the Australian Government) agreed to prepare an Implementation Plan, including steps and timelines for implementation of key actions under the NWI.

National Water Commission (NWC) — an independent statutory body established under the *National Water Commission Act 2004*. Its role is to drive the national water reform agenda and it provides advice to COAG and the Australian Government. The main functions of the NWC are to: assess governments' progress in implementing the NWI; assist with implementation of certain elements of the NWI; and administer the Water Smart Australia and Raising National Water Standards programs.

Murray-Darling Basin Authority — established under the *Water Act 2007*, the Authority reports to the Federal Minister for the Environment and Water Resources. It is required to prepare a 'Basin Plan' for adoption by the Minister, which includes limits on the quantity of water that may be taken from Basin water resources, and rules about trading of water rights.

Natural Resource Management Ministerial Council (NRMMC) — comprising Australian, state and territory and NZ government ministers with responsibility for land and water management,[9] the Council is tasked with overseeing implementation of the NWI agreement (particularly the actions that require national coordination). NRMMC is supported by a Standing Committee of Department Heads/CEOs of relevant government agencies.

National Water Initiative (NWI) Committee — comprises senior officials from each jurisdiction, the Environment Protection and Heritage Council (EPHC) Standing Committee, the NWC, and the Primary Industries Standing Committee.

Australian Competition and Consumer Commission (ACCC) — has a role in regulating the water market and water charging. In relation to Murray-Darling Basin water resources, the ACCC is responsible for: advising the Murray-Darling Basin Authority on the development of water trading rules; advising the Minister for the Environment and Water Resources on regulated water charge rules and water market rules; and monitoring and enforcing the water charge rules and water market rules.

Access to some Water and Sewage Infrastructure can be subject to the National Access Regime, Part IIIA of the Trade Practices Act.

Bureau of Meteorology — national coordination role for water data and information.

Source: DEWHA (2009a), NWC (2008a, 2008b).

9 Papua New Guinea and the Australian Local Government Association have observer status.

The Commission emphasised the need for new regulatory frameworks for property rights and trading in water to be developed in accordance with best practice principles to ensure that fragmentation, overlap and complexity are overcome. In particular, the Commission recommended that 'the new national framework for property rights and trading in water should facilitate market transactions so that scarce resources go to their highest value uses and any exemptions from the framework should be fully justified' (PC 2007, Response 3.35). This was accepted by the Australian Government in its response to the report (Australian Government 2008a).

The Commission is currently undertaking a study into alternative market mechanisms for water recovery in the Murray Darling Basin. The terms of reference require the Commission to examine the impacts of water recovery on water markets and transaction and compliance costs of water recovery for program applicants and the Government. The Commission has also been asked to consider the scope to go beyond open tender processes as the principal way of purchasing water entitlements and options for overcoming any impediments to new and established water purchase mechanisms. The final report is to be completed by late January 2010.

At its November 2008 meeting, COAG agreed to:

- a number of initiatives to improve the operation of water markets and trading through faster processing of temporary water trades
- coordinate water information and research through the development of a national water modelling strategy
- adoption of the enhanced national urban water reform framework to improve the security of urban water.

Given the substantial parallel and ongoing review and reform activity and the Commission's earlier consideration of water issues, these matters are not considered further in this report. It is essential that governments continue to assign a high priority to reforms in the water area. This should include ensuring that sufficient resources are assigned to ensuring the timely implementation of measures to enhance efficiency and reduce unnecessary regulatory burdens.

5.4 Waste collection, treatment and disposal services

Overview of regulation

State and territory and local governments are primarily responsible for regulation of waste services. State and territory regulations, for example, cover the licence conditions for constructing and operating a landfill. State and territory governments have developed waste minimisation strategies, imposed landfill levies and subsidised recycling. They also have a role in the coordination and direction of local government actions. Local governments typically have responsibility for land-use planning and development approvals and the collection and disposal of municipal solid waste.

The Australian Government does, however, have a leadership role and/or actively participates in national packaging and other environmental initiatives that are relevant to waste services, with a particular focus on developing consistent national approaches. The Australian Government also regulates the export and import of hazardous waste, consistent with international commitments and is responsible for a number of bilateral and multilateral trade agreements, which have a bearing on the management of waste.

The main vehicle for achieving national coordination is the Environment Protection and Heritage Council (EPHC). The Commonwealth, state and territory environment Ministers recently agreed to develop a National Waste Policy (discussed below). The major Commonwealth legislation, national agreements and coordination mechanisms are outlined in box 5.5.

Concerns about waste regulation

Various concerns are raised in relation to aspects of waste regulation, including:

- inconsistencies in waste regulations within and across jurisdictions, including differences in definitions and classifications (Packaging Council of Australia (PCA), sub. 17 and QLD Recycling, Alex Fraser, sub. 25)
- there are multiple government bodies at local, state and Federal level and a lack of clarity with respect to legislative boundaries and jurisdictional responsibilities (QLD Recycling, Alex Fraser, sub. 25)
- governments are introducing new measures without sufficient consideration of existing laws (QLD Recycling, Alex Fraser, sub. 25)

- waste regulations are inappropriately being used to address perceived upstream environmental issues and regulations to manage the use and disposal of used packaging are often not proportionate to the potential environmental impacts (PCA, sub. 17)
- procurement specifications/standards are inconsistent and too prescriptive and often rule out recycled content that would meet an objective performance outcome at lower cost (QLD Recycling, Alex Fraser, sub. 25)
- environmental risks associated with the dumping in land fill of lighting waste containing mercury are not being fully or consistently taken into account (CMA Eco Cycle, sub. 24)
- the inappropriate classification of secondary resource material as waste results in excessive and inequitable (relative to equivalent materials) licensing requirements and associated record keeping and reporting (QLD Recycling, Alex Fraser, sub. 25).

Concerns that governments do not involve industry enough in the design and development of regulations or alternatives to regulation (QLD Recycling, Alex Fraser, sub. 25 and APIA, sub. 12) are discussed in section 5.2 above.

The PCA also raises a number of specific concerns in relation to the National Packaging Covenant. These are discussed under a separate heading below.

Several state or local government specific concerns (that are beyond the scope of this study) are also raised by QLD Recycling, Alex Fraser (sub. 25), including:

- the poor standard of administration of planning laws
- lengthy timeframes for gaining approvals
- a lack of sanctions on unlicensed operators.

Assessment

Most of the concerns raised with this review were also raised with the Commission's *Waste Management* Inquiry in 2006 and many were also examined as part of the Senate Inquiry into the management of Australia's waste streams, in 2008. The Government's response to the Final PC Report was released in July 2007 (Australian Government 2007b).

Box 5.5 **Commonwealth waste-related legislation, national agreements and coordination mechanisms**

Hazardous Waste (Regulation of Exports and Imports) Act 1989 (Cth) — controls the trade of hazardous waste (including municipal solid waste) in an environmentally sound manner and to protect human beings and the environment. Implements Australia's obligations under the Basel Convention.

Environment Protection and Heritage Council (EPHC) — comprises Ministers from all Australian jurisdictions and New Zealand (incorporates the NEPC). The NEPC Service Corporation provides support and assistance to both EPHC and NEPC.

National Environment Protection Council (NEPC) — a statutory body comprising the environment Ministers from all Australian jurisdictions. Established under the *National Environment Protection Council Act 1994* the NEPC has the objective of reducing distortions to businesses and markets from differences between the states and territories in their environment protection measures and has the power to introduce NEPMs.

National Environment Protection Measures (NEPMs) — a regulatory device for developing a common set of rules that are then applied by the states and territories either through adoption of consistent policies and/or regulation.

Movement of Controlled Waste National Environment Protection Measure (NEPM) — provides a framework for developing and integrating state and territory systems for the management of the movement of controlled wastes between states and territories, including ensuring that such wastes are properly identified, transported, and handled in ways that are consistent with environmentally sound practices.

National approach to the reuse and recycling of industrial wastes — EPHC has developed a national approach to the reuse and recycling of materials such as bauxite residues, steel slag and fly ash, which may be used as a fertiliser or soil conditioner.

National Waste Minimisation and Recycling Strategy (NWMRS) — published by the (previous) Australia New Zealand Environment and Conservation Council (1992).

National Kerbside Recycling Strategy — developed to advance some of the policy actions outlined in the NWMRS, including recycling targets agreed between governments and industries for certain containers and packaging.

Source: DEWHA (2009b), EPHC (2009) and (PC 2006b).

At the November 2008 meeting of the Environment Protection and Heritage Council (EPHC), the Commonwealth, state and territory environment Ministers agreed to develop a National Waste Policy and as part of this process a comprehensive report will be compiled on current actions and emerging issues. The Australian Government Department of the Environment, Water, Heritage and the Arts (DEWHA) is leading this project. A consultation paper was released in April 2009 (DEWHA 2009c) and a series of public consultation sessions were held across Australia during April and May 2009. The consultation process sought input from

business, governments and the broader community on the potential scope of, and process for, developing a national waste policy and on priority issues that should be considered. A discussion paper, *Draft National Waste Policy Framework — less waste more resources*, was released for public comment in July 2009 (DEWHA 2009b). The intention is to reach agreement on the new policy at the EPHC meeting in November 2009.

In light of the recent reviews and the work in progress in developing a National Waste Policy, the Commission has not assessed the concerns raised in detail. The development of a National Policy is a further opportunity to assess the effectiveness and efficiency of current approaches, including addressing inconsistencies across jurisdictions and other sources of unnecessary burdens on businesses.

In developing a National Waste Policy, governments must ensure full compliance with the *COAG Best Practice Regulation Guide* (COAG 2007b), including the requirement for regulatory impact analysis. This would include, where regulatory measures are proposed, demonstrating that government intervention is justified and that regulation is the best option. In addition, the recommendations and policy principles developed in the Commission's *Waste Management* Inquiry Report (PC 2006b) should be taken into account. The selected principles set out in box 5.6 are based on the Commission's report. While these are largely consistent with the Government's response (Australian Government 2007b), not all the Commission's recommendations were accepted by the Government.

In response to the specific concerns raised by participants with this review and consistent with the Waste Management Report, the Commission considers that the development of a National Waste Policy should include:

- an assessment of the effectiveness and efficiency of existing waste management regulation
- agreement on a national definition of waste and a national waste classification system and consideration of the applicability of an SBR-type taxonomy (appendix B)
- a review of processes that may result in inconsistent or inequitable treatment of certain materials
- an exploration of opportunities to achieve further consistency in regulatory standards applying to waste
- an examination of the scope to make greater use of performance-based and risk-based standards and classification systems
- ensuring information collection and reporting obligations imposed on business are the minimum necessary to effectively achieve regulatory objectives and there is national consistency in the data requested and the definitions used (see section 5.2 and appendix B).

Box 5.6 **Some guiding principles for waste policy**

- Waste management policy should primarily be focused on reducing, to acceptable levels, social and environmental risks
- Government intervention should only be considered where it would lead to net benefits to the community after considering all financial, environmental and social costs and benefits
- Specific waste management responses must be the most effective and efficient way of addressing an identified problem — alternative options, including 'do nothing', must always be considered
- Waste classification systems and exemption processes must be well designed to ensure that opportunities for the recovery and recycling of materials are not unduly constrained by the classification of those materials as waste
- Product standards and specifications for government purchasing should be performance-based wherever possible so as to avoid any discrimination in favour of virgin products or materials over recycled
- Upstream environmental protection and resource conservation goals may be more effectively and efficiently addressed using direct policy instruments. The case for using waste management policies to address these goals must be justified, on a case-by-case basis, using cost-benefit analysis
- All waste policies, strategies and support measures should be as transparent as possible
- Information requests and data collection should be coordinated and consistent across jurisdictions wherever possible and data should only be collected where there is a clear policy need.

Source: The principles are based on the *Waste Management* Inquiry Report (PC 2006b), with some reformulation for brevity and relevance to this study.

In addition, the Commission considers that National Waste Policy should be careful not to compromise a focus on net community benefit by giving undue attention to the use of the waste hierarchy as a rigid set of priorities for waste treatment, arbitrary target setting for resource recovery, maximising 'resource efficiency' (when the more appropriate approach would be to account for all resources not just physical resources), and the use of landfill levies for achieving unrelated objectives.

National Packaging Covenant

The Packaging Council of Australia (PCA) while generally supportive of the NPC — describing it as 'a successful co-regulatory scheme to efficiently and effectively measure and promote environmental improvement in packaging' (sub. 17, p. 7) —

sees scope to significantly improve the Covenant framework. PCA's specific concerns in relation to the NPC, include:

- objectives are not clear or specific
- coverage is too wide, diminishing its effectiveness
- too much reporting is required against too many KPIs and some KPIs are redundant
- superfluous and impractical reporting requirements and data gathering that does not assist in achieving NPC objectives
- some jurisdictions have either extended or sought to introduce regulations that would conflict with the Covenant.

The mobile phone company Vodafone (sub. 47) is also concerned about the possible introduction of a new audit process under the NPC that would place an additional burden on business.

Assessment

The National Packaging Covenant (NPC) is a voluntary (co-regulatory) product stewardship measure whereby producers assume part of the responsibility for their product and its packaging throughout its lifecycle. While voluntary, the Covenant is backed up by the National Environment Protection (Used Packaging) Measure, which imposes requirements on those organisations that do not sign up to it. Regulatory responsibility for the NPC lies with a council composed of representatives from government (including the Australian Government), industry associations and the community.[10]

The NPC was examined by the Commission in its 2006 *Waste Management* Inquiry Report (PC 2006b). Concerns about the NPC were also raised in last year's *Annual Review of Regulatory Burdens on Business: Manufacturing and Distributive Trades* (PC 2008a), including the burden of reporting requirements, inappropriate targets and low levels of monitoring, auditing and enforcement.

An independent Mid-Term Performance Review of the NPC conducted last year (Lewis 2008) was presented to the Environment Protection and Heritage Council in November. The Commission notes that, as part of the consultation process for the review, certain stakeholders raised concerns about the time and cost involved in the collection and reporting of data.

[10] For further information see PC (2008a, pp. 167-168).

Overall, the Mid-Term Review found that the NPC has made significant progress towards meeting its targets and there was strong support amongst signatories and other stakeholders for a continuation of the Covenant beyond 2010. However, the report also identified various actions that could be taken to improve the effectiveness, efficiency and transparency of the NPC, including to enhance compliance and the quality and completeness of reporting. Possible design improvements for a future NPC were also identified, including in relation to KPIs and data collection and reporting systems. The EPHC, at its May 2009 meeting, requested that the NPCC continue developing and drafting a new Covenant for consideration at its November 2009 meeting, ensuring that it 'contains well developed protocols for the evaluation of the performance of individual members' (EPHC 2009). The Department of Environment, Water, Heritage and the Arts has advised that the burden of reporting requirements, inappropriate targets and low levels of monitoring, auditing and enforcement are issues being looked at as part of the drafting of the new Covenant Mark III. It also noted that the PCA is represented on the NPCC and is directly involved in the drafting of a post 2010 Covenant (DEWHA, pers. comm., 30 July 2009).

The NPC is being considered in the context of the new National Waste Policy (see above), particularly in relation to the possible development of a national approach to product stewardship generally (DEWHA, pers. comm., 30 July 2009). This process should include a comprehensive consideration of the costs imposed on businesses as well as the community benefits and whether alternative measures could deliver greater net benefits. In particular, much stronger evidence should be brought to bear on the need for the NPC (and other product stewardship or extended producer responsibility schemes). Any additional net community benefits generated by the schemes, over and above general waste regulations, must be clearly articulated. Such evidence would need to be part of a regulation impact statement process before any decision is taken on the National Packaging Covenant Mark III or alternative approaches.

6 Transport

Key points

- The inconsistent state and territory government regulation surrounding the operation of road and rail freight imposes a considerable regulatory burden on business. This has been acknowledged by Australian Governments and has been a focus of recent government reforms.
- Despite a number of previous attempts, it has been difficult to advance regulatory reforms in road and rail. In particular, the use of model legislation made limited progress in addressing regulatory inconsistency because of the flexibility it provided to jurisdictions. However, all jurisdictions have recently agreed to implement national regulatory frameworks to overcome inconsistencies in these sectors.
- But care should be taken to ensure that a national framework does not impose additional regulatory burdens.
- Inconsistencies across jurisdictions remain in relation to maritime safety regulation and between the Australian and Victorian Governments in regard to ballast water management. A single national maritime safety system is being developed and a national system for ballast water management needs to be developed and implemented as soon as possible.
- Aviation has also been subject to scrutiny as part of the Australian Government's current review of national aviation policy.
- The urgency in implementing a new aviation security regime after September 2001 resulted in a significant increase in the amount of regulation and a number of ensuing problems.
- In some instances, airlines are required to take responsibility for matters that are outside their control and provide information concerning other agencies, or information that is already in the public domain.
  - the use of approved exemptions would shift from a 'one size fits all' approach to aviation security regulation and enable the industry to develop alternative arrangements that satisfy the regulated requirement with lower compliance costs.
  - The existing aviation security advisory forum should be better utilised to provide a focus on consultation with industry to improve regulatory outcomes in this area.
- The long delays in implementing the aviation safety reform program have resulted in two systems of regulation operating side-by-side, adding further complexity to the arrangements. This program needs to be completed in the agreed to time frame.
- The price notification arrangements applying to regional airline services using Sydney Airport should be subject to review on their expiry in 2010.

Australia's overall economic performance is closely linked to the efficiency of its transport sector, particularly because of the long distances between dispersed population and production centres. Improving the regulatory environment in which Australia's transport sector, particularly freight transport, operates has been an ongoing issue for Australian governments over the past decade.

The inconsistent state and territory government regulation surrounding the operation of road and rail transport and aspects of maritime regulation has been the focus of recent COAG reforms. Regulation of the aviation sector, which is mainly the responsibility of the Australian Government, has also been subject to scrutiny as part of the Australian Government's current review of national aviation policy. Despite reform efforts much remains to be done.

6.1 Road transport

The states and territories are largely responsible for the regulation of road transport. Inconsistency in road and vehicle regulation has been an ongoing issue for the road freight industry:

- as early as 1991, Australian Transport Ministers agreed to establish a National Road Transport Commission (NRTC) to develop uniform regulation for the operation of vehicles and consistent charging for vehicle registration
- in 1994, road reform was absorbed into the National Competition Policy
- in 2004, the NRTC was replaced by the National Transport Commission (NTC) which has a broader charter to reform transport regulation.

The most recent attempt to produce a uniform national approach involved the development of 'model' laws whereby individual jurisdictions agreed to model their own legislation, standards and codes of practice on a model document. While this approach enables jurisdictions to adapt the model to suit their individual circumstances, this flexibility, along with jurisdiction specific exemptions, has resulted in differences in the adoption, application, interpretation and enforcement of these model laws. As a result a road transport business operating across state borders still has to comply with multiple, often inconsistent regulations.

Various NTC reviews have found that efforts to achieve uniform or consistent legislative outcomes in this area have not been successful (Department of Infrastructure, Transport, Regional Development and Local Government 2008).

Industry concerns

Inconsistency in road transport regulation

The industry concerns focus on the inconsistency in road transport regulation. This is not surprising as around half of Australia's road freight, on a tonne-kilometres travelled basis, is carried across state borders (ABS 2001). The Australian Trucking Association (ATA) notes:

> The scope of existing road transport related laws is broad and housed in multiple layers within multiple governments. There is much overlap and inconsistency. (sub. 3, p. 3)

In quoting a member organisation, NatRoad, it goes on to say:

> … there are individual pieces of legislation in every state and territory governing numerous issues that affect the day to day operation of road freight transport businesses, ranging from fatigue (in some States this can be three different pieces of legislation), driving hours, vehicle axle and gross weights, dimensions, road rules, driver licensing, registration, vehicle access, driver behaviour, vehicle roadworthiness, load restraint, vehicle design, combination design, emissions and noise control, to name a few. Each of these matters is duplicated around the country, and none, not one is the same. (sub. 3, p. 5)

The industry comments that previous attempts by Australian Governments at reform have failed to deliver due to the continuance of multiple regulations and regulators. The ATA remarks:

> The sad part is we can provide multiple other examples of well-intended national road transport reforms failing to deliver the intended result due to multiple laws and multiple regulators. For example, Higher Mass Limits Reform was agreed in 1999 yet in 2009 it is still not delivering the promised benefits. Performance Based Standards, similarly has not delivered the productivity results promised to COAG by the road agencies. Access for B-double vehicles can be controlled by three different mechanisms in any individual state: a determination under the Federal Interstate Transport Act, a state based notice, or an individual access permit. Competing operators may not enjoy the same access for identical B-double vehicles. (sub. 3, p. 6)

The Victorian Freight and Logistics Council (sub. 8) made a number of comments on the inconsistent regulatory environment in which heavy vehicles operate. In particular it refers to the use of lowest common denominator regulation in respect of vehicle types that can be used in cross border trips, the lack of a national registration system for vehicles and different regulation facing Heavy Mass Limit (HML) vehicles.

The Council also refers to the inconsistent implementation and application of nationally agreed reforms. For example:

> September 2008 saw the implementation of new national laws to manage heavy vehicle driver fatigue. …
>
> However, there were inconsistencies in the adoption of these fatigue laws across the states, particularly in New South Wales where Occupational Health and Safety (OH&S) Long Distance Driver Fatigue Regulation 2005, adds a layer of complexity to OH&S rules and is not wholly consistent with the national fatigue reform package. (sub. 8, p. 3).

Performance Based Standards (PBS) enable high productivity vehicles to be used when they meet certain performance standards as opposed to the more inflexible Australian Design Rules. Despite agreement to implement PBS, the Victorian Freight and Logistics Council notes:

> Unfortunately industry has found the implementation and approval process for PBS time-consuming and inconsistent. This has arisen both in the approval of vehicles and the identification and access to state road networks.
>
> Despite a COAG direction for states and territories to classify their road networks into four PBS access levels and also for network maps to be published by December 2007, many are still to be completed. (sub. 8, pp. 4-5)

These cross-border inconsistencies impose significant costs on business. A study for the Australian Logistics Council (ALC) (2008) on the costs imposed by these regulatory inconsistencies on heavy vehicle operators in the Sunraysia, Riverland region of New South Wales, Victoria and South Australia found that there were possible savings of $250 to $750 per load if access to higher mass limits were available. Based on the number of cross-border movements, this equated to savings of tens of millions of dollars per year (ALC 2008).

Assessment

Despite efforts to increase regulatory consistency across jurisdictions, progress has been slow. Model legislation has not delivered the desired outcomes of greater uniformity and further regulatory reform is now being considered to achieve national uniformity in road transport regulation (Department of Infrastructure, Transport, Regional Development and Local Government 2008).

In 2008, the Australian Transport Ministers, through the Australian Transport Council (ATC), agreed in principle to a single national regulatory framework for heavy vehicles and a Regulatory Impact Statement (RIS) was prepared to implement such a framework. This framework will consist of a single regulator to administer the laws, a national registration and licensing system and national laws

covering the current regulations concerning mass limits, restricted access, standards, speeding and associated enforcement and compliance activities. The ATC endorsed the RIS in May 2009 and recommended that COAG proceed further to develop arrangements to have a national framework in place by 2013. This was agreed to by COAG in July 2009 (COAG 2009b). However, the ATC recognised that there were many issues of both principle and detail which needed to be worked out to deliver a national regulatory approach (ATC 2009).

The Northern Territory Government (sub. 45) had called for the RIS to adequately examine these reforms to ensure there was sufficient flexibility in approach to meet different jurisdictional circumstances, particularly in the provision of freight services to remote areas. Without such flexibility there was the risk that national regulation would give rise to the Northern Territory's road freight transport industry operating under a regulatory regime more attuned to the needs of more heavily populated areas. It says:

> The Northern Territory would in principle support a national regulator for the road transport industry if the supporting policy was to provide for cross border flexibility, particularly in terms of access for heavy freight vehicles to the national road network.
>
> Access is a critical issue for the Northern Territory as heavy vehicles are a principal mode of transport for both intra-Territory and interstate freight movements. …
>
> In the national effort to standardise access, the main issue for the Northern Territory is the lowest common denominator factor, which results in potential efficiency losses from unnecessary access conditions. (sub. 45, p. 3)

Clearly, differences in circumstances must be recognised. Where variations to national regulation are required they should be based on circumstance rather than jurisdiction. For example, if transport regulation needs to be different in remote areas, regulation should reflect this in a way that ensures remote areas in all jurisdictions are treated in the same way. The problem with each jurisdiction making their own variations is that there is then a plethora of rules for each circumstance.

This reflects the principle underlying the PBS scheme for road access of 'matching roads to vehicles' as opposed to jurisdictions considering access on a case-by-case basis (NTC 2008b).

The industry strongly supports the ATC decision to establish uniform heavy vehicle legislation administered by a single national regulator (sub. 3). The ATA notes:

> Road transport is national industry and its efficient regulation is in the nation's interest. It is time to provide for an efficient single national regulator applying a single body of law. (sub. 3, p. 7)

The NTC also supports this approach to deliver national seamless outcomes:

> … as a reform body with 17 years experience with both model and template law approaches to developing regulation it is our experience that both model and template approaches face significant challenges to deliver nationally seamless outcomes. While in our experience a model law approach has been more successful than template, national laws administered by national regulators is the best approach to deliver a seamless national economy in the future. (sub. DR58, p. 2)

The RIS explored a number of options as to how this could be achieved including template legislation, complementary legislation or by a referral of power by the states and territories to the Commonwealth. The ATA (sub. 3, p. 7) supports a referral of powers to the Commonwealth to establish a 'single national regulator applying a single body of law'.

The RIS process is to provide a cost-benefit analysis of the various options. In the Commission's view, an effective RIS process, including a transparent cost-benefit analysis, is the appropriate mechanism to determine which option should be adopted and the most effective means for its implementation. Once the option with the greatest net benefit to the community is chosen and implemented the effectiveness of these arrangements should be assessed.

In implementing a new regime some key points should not be overlooked:

- Care needs to be taken to ensure that a national regime does not impose any additional regulatory burdens – uniformity is not an end itself, but rather is desired because multiple systems create unnecessary regulatory burdens. As the Northern Territory Government's submission makes clear, it is possible for a drive to uniformity to increase rather than decrease burdens.
- The position of operators that do not cross jurisdictional boundaries need to be given consideration in the process to ensure they are not asked to adopt a system that imposes greater burdens than they currently face.
- History shows that it is extremely difficult to move beyond commitments to uniformity into actual uniformity on the ground. All jurisdictions need to be vigilant in pursuing the goal of a truly national system right down to the impact at the operator level.

National registration for rental vehicles

The Transport and Tourism Forum (sub. DR76) raises the need for a national registration system for rental vehicles. Car rental companies manage large fleets of vehicles that are often dropped off by tourists in a different location from where the vehicle was collected and is registered. As most jurisdictions require vehicles to be

'resident' in the state where they are registered, unless there is demand for a 'one way' rental to return the vehicle to the jurisdiction in which it is registered, car rental companies may have to return these vehicles by truck.

> Currently, national rental vehicle organisations have to truck cars between states so that fleets meet registration requirements in particular jurisdictions. This situation is cumbersome and costly for businesses and a good example of the inefficiency of multiple road legislations. A single nation road registration system would overcome many of these issues. (sub. DR76, p. 13-14)

Assessment

To date, there have not been widespread calls from business for a national registration system for passenger motor vehicles or discussion by jurisdictions as to the benefits of implementing such arrangements. Nevertheless, such arrangements may need to be considered by the ATC in the future.

The jurisdiction national car rental companies register their vehicles in is likely to be determined by the relative cost of registration and the demand for rental vehicles in that location. There is clearly a cost to rental companies in having to truck a vehicle back to the state in which it is registered in the absence of being able to secure a return rental. While not ideal, rental companies have employed commercial strategies to offset such costs, such as levying a charge for returning a rental vehicle to a different location from where it was collected, and in managing large fleets will take account of the savings available from the different registration fees charged in each jurisdiction.

6.2 Rail transport

As with road freight transport, state and territory based regulation means that rail operators operating across jurisdictions have to contend with regulatory inconsistency and a fragmented regulatory environment.

The Australian rail industry has undergone considerable change since the 1990s. A significant reform has been the privatisation of government owned rail businesses including the Australian Government's interstate passenger and freight services. The Australian Government's present involvement in rail transport is through its management of the interstate network and the provision of access to train operators through the Government owned Australian Rail Track Corporation (ARTC).

There have been ongoing efforts by Australian governments to improve the regulatory framework in which rail transport operates. Since the sale of its rail

operations, the Australian Government has sought to create a defined interstate rail network to be operated as a single network by the ARTC to provide seamless access to interstate rail operators.

A major ongoing issue has been the development of a consistent approach to rail safety regulation. As early as 1996 Australian Government and state and territory government transport ministers signed an intergovernmental agreement on rail safety to ensure nationally consistent rail safety regulation. However, different requirements and the lack of mutual recognition by jurisdictions of safety accreditation means that rail operators have to obtain multiple accreditations if they wish to operate across borders.

In 2004, the ATC endorsed the development of model national rail safety legislation, the Rail Safety Bill 2006, with the intention that all jurisdictions would reproduce the model legislation (with scope for individual variations, including in relation to 'non core' provisions). Importantly, provisions for the formal mutual recognition of the safety accreditation gained by operators in other jurisdictions were not contained in the model rail safety legislation (NTC 2008a).

In addition to the problems of scope and variation in the model Bill, states have set different dates for its implementation. COAG set a revised deadline for all states to have the provisions of the Bill introduced by December 2008, although Tasmania was granted an extension to the end of 2009 (Webb 2009).

Given these problems, the ATC decided to have the NTC prepare a RIS to develop a single national rail safety and investigation framework. This is discussed further below. Participants to this review also raised concerns with certain aspects of economic and environmental regulation and their impact on rail transport.

Industry concerns

Multiple rail safety regulators and investigators

The existence of multiple rail safety regulators and rail safety investigators is a major concern to participants.

The ARTC notes that:

> … the current institutional arrangements for administering rail safety regulation in Australia potentially hinders the capacity of governments and industry to deliver the same high standard of rail safety across the board. Current arrangements also impact on the ability of the industry to operate efficiently, and therefore compete with other modes of transport. (sub. 15, p. 4)

The Australasian Railway Association (ARA) (sub. 22) notes that safety regulation is duplicated as there are safety regulators for each jurisdiction and overlaps between rail safety legislation and OHS legislation.

The ARA, in a survey of its members (Synergies 2008) estimates that the direct cost of complying with this duplicated and overlapping rail safety regulation is $23 million per year, with an estimated cost of $42 million for the whole industry. The avoidable component, based on information provided by the respondents to the survey, is between 5 and 75 per cent of total compliance costs.

Assessment

Following the inability of model legislation to deliver the required national rail safety regime, the ATC in July 2008 directed the NTC to prepare a RIS for a single, national rail safety regulatory and investigation framework.

The draft RIS, in evaluating various options, concluded that the option of a single national safety regulator and investigation framework was the superior option and would enable the attraction and more efficient allocation of resources (NTC 2008a). The RIS was endorsed by the ATC in May 2009 and it recommended that COAG proceed to develop a single national rail safety framework (ATC 2009).

However, there appears to be difficulties in including urban rail in the national framework. At its July 2009 meeting, COAG agreed to develop a national rail safety regulatory system with further consideration of the scope and form of the regulator following further consideration of advice from the Standing Committee on Transport. The Committee is to advise as to the scope and form of the regulator, particularly in relation to urban rail systems and the interface with interstate and freight operations (COAG 2009b). This has raised concerns from industry, not only because of the potential to further delay implementing a national rail safety regulatory framework, but also because rail operators may have to continue to deal with a fragmented rail safety system operating under separate national and metropolitan systems (*Australian*, 11-12 July 2009, p. 18).

The ARTC (sub. DR77) viewed this referral for further work from the Standing Committee on Transport as a deferral on any decision to establish a single national rail safety regulator:

> ARTC is concerned with this non-committal approach to rail, despite there being wide recognition and agreement that both road and rail require reform in this area. It is unclear why a firm decision on road has been made, but any decision for rail has been deferred. (sub. DR77, p. 3)

Nevertheless, the industry endorses the single national safety regulator and rail safety investigator. The ARA says:

> The rail industry recommends an alternative model of regulation based on a national rail safety regulator. A single national regulator and investigator are expected to result in reduced business compliance costs and improve regulatory efficiency and effectiveness. (sub. 22, p. 9)

The ARTC:

> … endorses NTC's recommendation that a single national rail safety regulator be created and concludes that a single national regulator will deliver improvements to rail safety and industry efficiency. (sub.15, p. 4)

A single national rail safety regime, which includes urban rail systems, should be pursued without further delay. In pursuing the goal of a national rail safety regime, all jurisdictions need to ensure that these arrangements do not impose any additional regulatory burdens on rail operators, including those currently operating within a single jurisdiction. A significant proportion of rail freight movements, over 80 per cent on a tonne-kilometres travelled basis, are intrastate due to the movement of bulk commodities, such as coal, to ports or processing centres (ABS 2001). The effectiveness of these national arrangements should be assessed once they have been implemented and have had time to take effect.

OHS regulation

Both the ARTC (sub. 15) and the ARA (sub. 22) raise concerns about inconsistencies across the state and territory OHS regimes. The ARA notes:

> There are 15 Acts with powers over occupational health and safety (OH&S) nationwide affecting rail operation and 72 different OH&S regulations. … The duplication of effort and inconsistencies in interpretation involved in adhering to the requirements of this framework across government jurisdiction impose significant compliance costs on multi-state employers and operators. (sub. 22, p. 9)

Assessment

Such inconsistencies in OHS laws have been a long standing concern for firms in all sectors of the economy operating across state borders. In light of this, COAG signed an intergovernmental agreement in July 2008 that formalises the commitment of all governments to adopt model OHS laws. The agreement specified that OHS harmonisation meant national uniformity of the OHS legislative framework in conjunction with a nationally consistent approach to compliance and enforcement. These arrangements for national uniformity are to be implemented by 2011 (PC 2008a). A model OHS Act and the relevant provisions were agreed to by the

Workplace Relations Ministers Council in May 2009 (Workplace Relations Ministers' Council 2009).

Environmental regulation

There have been ongoing concerns surrounding the overlap and duplication between the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the various state and territory environmental assessment and approval processes.

More specifically, and in the context of this review, the ARTC (sub. 15) points out that due to its status as a 'Commonwealth agency' under the EPBC Act ('the Act'), it is subject to assessment and approval processes under the Act as well as under state and territory legislation.

Assessment

Under the EPBC Act, any 'Commonwealth agency' must seek Commonwealth ministerial approval for 'any action that has, will have or is likely to have a significant impact on the environment inside or outside the Australian jurisdiction'.

However, the ARTC is subject to *both* state and Australian Government environmental approval and assessment processes as:

- it is deemed a 'Commonwealth agency' under the Act because all its shares are owned by the Australian Government
- it is a company under the *Corporations Act 2001* and therefore must comply with environment and planning laws in every state and territory (for example *Environmental Planning and Assessment Act 1979 NSW*).

To address this overlap, the ARTC suggests an exclusion from the EPBC Act (sub. 15). The definition of 'Commonwealth agency' in s528 of the Act expressly provides for the exclusion of a particular entity from the definition by means of a regulation. This power was used to prescribe Telstra Corporation in 2001 under clause 19.02 of the Environment Protection and Biodiversity Conservation Regulation 2000. No other entity has been prescribed to date.

An alternative provision, s28(4) of the Act would also remove this overlap, but the Commission notes that it has not been utilised to date. Under this provision, the Minister may make a written declaration that all actions, or a specified class of actions taken by a specific Australian Government agency are exempt from environmental assessment and approval procedures provided the agency complies

with existing state and territory environment protection and conservation legislation.

The use of a Ministerial declaration under s28(4) would provide greater flexibility than the instrument of exclusion under s528 of the EPBC Act as a Ministerial declaration s28(4) can, if desired, be applied to a subset of ARTC actions, rather than a blanket exclusion of all ARTC activities.

These provisions should be explored between the ARTC and the Department of Environment, Water, Heritage and the Arts as a means of alleviating ARTC's duplicative reporting requirements.

More broadly, the ARTC (sub. DR77) also comments on the multitude of environmental regulation which result in overlaps, duplication and inconsistencies across jurisdictions. The ARTC believe that Australian and state and territory government regulators should facilitate and ensure national consistency for both existing and any new legislation.

Some progress has been made in regard to the duplication and overlap between the EPBC Act and state and territory environmental assessment and approval processes. The Australian Government and each state and territory have agreed to bilateral assessment agreements to overcome duplication and overlap in the environmental approval and assessment processes (BRCWG 2009).

In respect of the environmental regulation pertaining to rail operations, such as noise and air pollution regulations, a range of different regulations apply in different jurisdictions. The ARTC (sub. DR77) notes that an inventory of environmental regulation undertaken by the CRC for Rail Innovation identified 151 pieces of environmental legislation. However, as the CRC for Rail Innovation (2009) survey found, rail operators in different states faced different regulatory problems and while certain regulations were stringent in one jurisdiction they could be non-existent in others. As such, it is not clear that consistency is necessary for all environmental regulation applying to the rail industry. The benefit of regulatory consistency is where multiple systems create unnecessary regulatory burdens for those operating across jurisdictions.

Pricing distortions between road and rail

The ARA (sub. 22) is concerned with pricing distortions between road and rail freight transport and proposes that a single consistent pricing regime be developed to ensure efficient competition between the two modes of transport.

The Tourism and Transport Forum (sub. DR76) view is that rail is disadvantaged relative to road transport in relation to long haul freight as, despite recent government investment in rail, the road industry continues to receive a significantly larger proportion of funding.

Assessment

Pricing distortions between road and rail freight have been examined by the Commission in previous reviews. The Commission's inquiry into *Road and Rail Freight Infrastructure Pricing* (PC 2006a) examined the potential causes of inefficiency in road and rail freight arising from pricing regimes and concluded that competitive distortions between road and rail have been limited and were not a significant source of market inefficiency.

Multiplicity of access regimes

The ARA (sub. 22), the ARTC (sub. 15) and the Tourism and Transport Forum (sub. DR76) draw attention to the multiplicity of access regimes covering rail in Australia. Currently there are five state based access regimes and the interstate standard gauge network linking Brisbane and Perth is currently covered by four different access regimes (the ARTC's access regime only covers the interstate network from Kalgoorlie to the Queensland border with separate regimes applying between Perth and Kalgoorlie, the Queensland border and Brisbane and in the Sydney metropolitan area).

The ARA (sub. 22) notes that this multiplicity of regulators and the different pricing regimes has the potential for transactions costs to be incurred by rail operators in dealing with regulators and inconsistencies in the manner in which access prices are set. This could give rise to the inefficient use of, and investment in, the rail industry. The ARTC (sub. 15) comments that access regulation should not necessarily be uniform across all rail infrastructure, but consistent as to the way prices are set.

Assessment

The Bureau of Transport and Resource Economics (BTRE) (2006) study, *Optimising Harmonisation in the Australian Rail Industry*, found that some pricing diversity in the provision of access was desirable to reflect a number of factors such as competition in the freight market for the goods the train is carrying, the ability to price discriminate across users to improve cost recovery, to reflect the different levels of wear and tear on the track from different types of locomotives and rolling stock using the track and the level of congestion on the track. It concluded that

although pricing levels and structures needed to be flexible, it was unnecessary for charges for similar services and financial structures to vary across jurisdictions.

In recognising the inconsistency in the access pricing principles and regulation across jurisdictions, COAG (2006a), as part of the Competition and Infrastructure Reform Agreement (CIRA), agreed to implement a simpler and consistent national system of access regulation for nationally significant railways based on the ARTC access undertaking covering the interstate network.

However, progress in achieving consistent access arrangements has been slow. The agreement to implement a nationally consistent system of rail access regulation was subject to certain conditions which have delayed the program.

On parts of the standard gauge interstate network the implementation of an access regime based on the ARTC model was subject to the outcome of commercial negotiations with the relevant track managers. This is because the interstate rail network between Perth and Kalgoorlie and between the New South Wales border and Brisbane is not operated by the ARTC. The Perth to Kalgoorlie interstate track is operated by WestNet under a long term lease arrangement with the Western Australian Government and the track between the New South Wales Border and Brisbane is owned by the Queensland Government and operated by Queensland Rail and subject to their respective state rail access regimes.

As to intrastate rail track, the CIRA only required the ARTC access model to be applied on major freight corridors on a case-by-case basis depending on a cost-benefit analysis of including these corridors under the ARTC model. There are few intrastate rail networks where issues of market power and/or vertical integration are significant and accordingly there is little benefit to be gained by introducing access regulation. The Productivity Commission (2006a) found that where rail was competing with road there was not a strong case for access regulation, apart from those lines carrying coal in New South Wales and Queensland and other areas of the bulk freight market where there could be a case for retaining such regulation.

In 2008, the COAG Reform Council (CRC) (2008) in its report on implementing the National Reform Agenda noted that progress had stalled and recommended that COAG ask the BRCWG to consider how to best progress the national system of rail access.

The BRCWG (Business Regulation and Competition Working Group) recommended that for the interstate track between the New South Wales border and Brisbane, the ARTC model would apply - although, there may need to be some variations to meet contractual obligations.

For the interstate track between Kalgoorlie and Perth, the BRCWG considered it was not worthwhile to implement an ARTC model at present as the costs would exceed the benefits of changing from the current access arrangements. This is because WestNet with over 40 years remaining on its lease of the track was likely to seek compensation were a new access regime to be adopted. Under the lease, WestNet is entitled to seek compensation from the Western Australian Government for any material changes to the access regime. The ARTC model in utilising a different asset valuation methodology from the Western Australian rail access regime could reduce the value of WestNet's asset base and therefore the access prices it could charge for using the asset. Consequently, the Western Australian Government is unlikely to consider implementing the ARTC access model given the issue of compensation to the lessee of the track.

As to intrastate rail networks, the BRCWG recommended that governments should continue to apply their own rail regimes where they exist and seek certification of those regimes under the National Access regime under Part IIIA of the Trade Practices Act as agreed to under the CIRA to provide a simpler and consistent approach to regulation (CRC 2009a).

The CRC (2009), in its 2009 report to COAG on implementing the National Reform Agenda, concluded that the task of establishing a national rail access regime had not been completed. The CRC also highlighted that the review of the CIRA due to commence in 2011 may need to reconsider if and how a national access regime is to be achieved. In response, COAG noted the approach recommended by the BRCWG was consistent with the CIRA commitment and that CIRA was to be reviewed in 2011 (CRC 2009b).

The process to date suggests a new approach beyond the current CIRA commitment is warranted if progress is to be made in implementing a nationally consistent system of rail access regulation. However, the parties to the current CIRA agreement will have to determine if there are benefits in having a simpler and nationally consistent system of rail access regulation and how such a system should be achieved, including the issue of compensation surrounding the interstate track in Western Australia.

Access pricing for passenger services

The Tourism and Transport Forum (sub. DR76) raises the issue of rail passenger services being priced at a rate comparatively higher than for freight rail services despite the differences between the two in terms of speed and weight and the subsequent wear and tear on the track. It is claimed that the failure of rail track infrastructure operators to differentiate between freight and passenger services in

their pricing structures is an impediment to the viability of long distance passenger operations (sub. DR76).

Assessment

Such pricing arrangements are not inconsistent with the pricing principles contained in Part IIIA of the TPA and clause 6 of the Competition Principles relating to access pricing. The legislation provides for access price structures to allow multi-part pricing and price discrimination when it aids efficiency (Section 44ZZCA, *Trade Practices Act 1974*). Charging higher rates for passenger service may reflect factors other than wear and tear on the track, such as congestion, the amount of track being used by the service, the extent to which other operators use the line and the ability to charge different prices across users to improve cost recovery (BTRE 2006).

A single national access regulator

The ARTC (sub. 15) comments that having two separate regulatory bodies, the National Competition Council (NCC) and the Australian Competition and Consumer Commission (ACCC) adjudicating on access regimes is inefficient and that the ACCC should be the single regulator of national infrastructure. In commenting on the draft report, the ARTC (sub. DR77) clarified its position and proposed that the ACCC take on the certification role of the NCC whereby state and territory governments can seek to have access regimes certified as effective by the NCC. Once a regime is certified as effective it is provided immunity from the declaration provisions under Part IIIA of the Trade Practices Act (TPA).

Assessment

The institutional arrangements surrounding the role of the NCC and the ACCC were comprehensively examined through the Commission's review of Part IIIA of the TPA dealing with the national access regime. The Commission (2001) concluded that there were sound public policy arguments for retaining the separation of responsibility for assessing whether the regime should apply (the role of the NCC) from the responsibility for the regulation of services that are covered (the role of the ACCC). Under a single regulator model, conflicts of interest may emerge, as the body with the power to regulate an activity would also have the power to determine whether the activity should be placed under the regulatory framework.

The certification of state and territory access regimes by the NCC involves assessing whether the access regime should apply to a particular service. As such,

the Commission considers that the certification of state and territory access regimes should remain with the NCC.

Part IIIA of the Trade Practices, is scheduled for an independent review in 2011 and this is the most appropriate forum to assess the operation of, and changes to, the national access regime.

Other concerns

Land use planning and controls

The ARA (sub. 22) proposes the integration of land use and transport planning in jurisdictions across Australia. The ARA says while planning professionals had agreed in principle to the integration of these functions, integration was rarely practiced, apart from Western Australia where these functions were co-located in the Department for Planning and Infrastructure. The ARA contends that failure to integrate land use and transport planning results in inefficiencies in both functions (sub. 22).

The Transport and Tourism Forum (sub. DR76) is also concerned that in many jurisdictions there is a lack of coordination between land use and transport planning leading to inefficiencies and excessive costs.

The ARA (sub. 22) also recommends that government planning protect land for future transport infrastructure use, including the necessary land for rail corridors and intermodal terminals.

Assessment

State government institutional arrangements regarding land use planning and the security of land tenure are important to the rail sector. However, such broader issues are primarily matters for state and territory governments and extend beyond the scope of this review.

6.3 Water transport

Participants' concerns in this area focused on maritime transport, in particular coastal shipping. Australia's coastal shipping industry operates under a complex regulatory structure which has been subject to considerable scrutiny over the past two decades. The focus of many of these reviews and subsequent reforms has been

to improve the efficiency of the industry through reducing crew sizes, investing in more modern vessels and the introduction of more flexible work practices.

A particular focus of these reviews has been the licensing or cabotage arrangements under Part VI of the *Navigation Act 1912*. These provisions require foreign flagged vessels to obtain a licence and employ crew under Australian pay and conditions when operating in Australian waters. Although the cost impact of these arrangements on business has been ameliorated to some extent through the increased provision of permits to unlicensed vessels, the licensing arrangements limit access to potentially more cost-effective coastal shipping services and reduce the competitiveness of Australian firms relying on coastal shipping.

These permits also provide a further regulatory layer, as they can only be issued for single or continuing voyages where no licensed vessel is available to meet the needs of shippers or the service provided by the licensed vessel is inadequate and it is in the public interest to grant the permit.

These arrangements were recently examined in a broader review of Australia's coastal shipping industry by the House of Representatives Review (2008).

Industry concerns

The Australian Shipowners Association (ASA) is concerned that the prior reporting requirements for domestic ballast water in Victoria is a significant, onerous and unnecessary burden on ships' captains and officers, 'whose attention is better utilised in ensuring the safe navigation of the vessel under their command' (sub. 10, p. 4). Further, these prior reporting requirements are inconsistent with the current Australian international ballast water management requirements, which are administered by the Australian Quarantine and Inspection Service (AQIS) (sub. 10, p.4).

Assessment

Domestic ballast water refers to water sourced from Australia's territorial sea, and its management is the responsibility of the states. Conversely, international ballast water is regulated throughout Australia by AQIS.

Victoria has administered a system for the management of domestic ballast water alongside the AQIS system since 2004 — to date, Victoria is the only jurisdiction with a domestic ballast water management system in place. Victoria's reasons for

introducing this system of domestic ballast water management are given in the policy impact statement:

> Given that the majority (83 per cent) of ship visits to Victoria are from a domestic last port of call, further delays in the development of an effective national system for ballast water and marine pest management will have significant potential to result in harmful impacts to Victoria's marine uses and values.
>
> Therefore, it is important that the issue of domestic ballast water management is addressed in Victoria. (EPA Victoria 2006, p. 12)

Under this Victorian system, every ship that visits a Victorian port must submit a 'ballast water report form' to the Environmental Protection Authority of Victoria (EPA Victoria). If the ship has domestic ballast water on board, it must also submit a 'ballast water log'. Both these forms must be submitted to the EPA *prior* to entering Victorian waters, preferably 24 hours before. If the ship intends to discharge the domestic ballast water, it must then receive approval, in writing, from the EPA prior to the discharge of any domestic ballast water into Victorian waters.

In addition, it is mandatory for ships' masters to assess the risk status of any domestic ballast water using an online risk assessment system which classifies ballast water as 'high–risk' or 'low–risk'. Upon entering information into the risk assessment tool, the master receives a risk assessment number which must then be entered on the ballast water report form. Victoria then uses these risk assessment results to approve or prohibit the discharge of domestic ballast water. EPA Victoria's assessment differs from that made by the online risk–assessment tool only in 'exceptional circumstances', where the risk assessment tool does not reflect current data (EPA Victoria 2008, p. 8).

Conversely, under the AQIS system monitoring international shipping, ballast logs with information about uptake ports, ocean exchanges and intended Australian discharge locations, are not normally required to be sent to AQIS pre–arrival. Instead, AQIS officers examine it during their physical attendance on board each vessel. The EPA Victoria and AQIS schemes for management of ballast water are otherwise consistent.

The rationale for this prior reporting requirement in the Victorian system is to provide certainty to ships' masters as to whether their domestic ballast water requires management. Under the AQIS system, all non–Australian sourced ballast water which has not already been subject to ballast water management options is deemed to be 'high-risk', and therefore requires management using one of several approved 'management options'. However, this assessment is not as clear for domestic ballast water, since ballast water from different Australian ports have different risk–assessments (e.g. ballast water from the Port of Brisbane is

considered low risk whereas ballast water from Sydney area ports is considered high-risk).

The potential problem of the online risk–assessment tool not reflecting current data appears to be low, since this occurs only in 'exceptional circumstances'. Further, the online system could be modified to instruct ships' masters to prior report only in cases where pest information is changing, new, or unclear, and has not been updated in the system. The same outcome of protecting Victoria's waters from marine pest incursions could therefore be achieved without an unnecessary reporting burden on ships' masters and provide certainty as to whether their domestic ballast water required further management.

The Commission also notes that efforts are currently underway to implement a unified national ballast water regulation system, including both domestic and international ballast water. This process began in 1999, with the creation of the National Taskforce on the Prevention and Management of Marine Pest Incursions. In April 2005, an Intergovernmental Agreement on a National System for the Prevention and Management of Marine Pest Incursions was signed by the appropriate states and territories, with model legislation due to be in place within 12 months, alongside detailed implementation plans to be in place by October 2006.

However, to date, there is no national system in place, and no timeframe for its implementation. Undoubtedly, this inconsistency between the AQIS and Victorian Government ballast water regimes has been prolonged by the delays in implementing this national system. The implementation of a national system, with Victorian participation, would eliminate any inconsistencies, including prior reporting.

RECOMMENDATION 6.1

The Australian Government, through COAG, should expedite the development and implementation of the National System for the Prevention and Management of Marine Pest Incursions.

Inconsistency and duplication between Australian and state government vessel survey requirements

The Australian Shipowners Association (sub. 10) is concerned that larger vessels subject to Australian Government survey under SOLAS (Safety of Life At Sea) conventions are not in alignment with Universal Shipping Laws (USL) which cover smaller vessels subject to state government survey. As a result, where a SOLAS surveyed vessel engages in intra-state voyages a further state government survey in

line with the USL is required, resulting in significant costs and time to the vessel owner. Moreover, the requirements under SOLAS in most, if not all areas, exceed the USL requirements. The Australian Shipowners Association (sub. 10) concluded with the expectation that the implementation of the single national maritime safety system would alleviate this inconsistency and any subsequent duplication of vessel survey.

Assessment

The ATC has recently endorsed a RIS to establish a single national system of maritime safety under the Australian Maritime Safety Authority for all commercial vessels operating in Australian waters. COAG agreed to these reforms in July 2009 and the ATC is to report to COAG in 2010 as to the way forward to implement this national system for it to come into effect in 2012 (ATC 2009) (COAG 2009b). The proposed single national maritime safety system should address the overlap of the SOLAS and USL systems to minimise regulatory burdens.

Pilot exemptions in Queensland

The Australian Shipowners Association (sub. 10) raises concerns with the Queensland Government requirements for pilots to be used on vessels transiting the Great Barrier Reef. Under the Queensland Transport Operations (Maritime Safety) Regulations, masters of vessels registered in Australia do not require a pilot whereas the same master when commanding a foreign registered vessel is required to use a pilot.

Assessment

Although the pilot exemptions for Australian registered vessels transiting the Great Barrier Reef appear to create an anomaly between foreign and Australian registered vessels, being a Queensland Government regulation, it is outside the scope of this review.

Fast tracking of ACCC authorisations under Trade Practices Act

Shipping Australia (sub. 11) raises the issue of fast tracking authorisations to undertake anti-competitive conduct under the TPA similar to the approach used under Part X of the Act. Part X provides international liner shipping services to and from Australia with exemptions from the TPA 30 days after registration of the arrangements. Shipping Australia (sub. 11) raises the prospect of fast tracking the

authorisation of anti-competitive arrangements relating to sea and air freight where there are clear national benefits. It says:

> Perhaps fast tracking the registration and authorisation of such arrangements by the Australian Competition and Consumer Commission could have substantial productivity benefits for trade related industries that have a direct connection with sea or air freight. (sub. 11, p. 3)

Shipping Australia is also critical of the existing authorisation process under Part VII of the TPA:

> The current authorisation process under the Trade Practice Act is long, costly and uncertain and this suggestion is put forward as a possible remedy where clear national interests and trade facilitation objectives are involved. (sub. 11, pp. 3-4)

Assessment

Part X of the TPA is not an ideal model through which to provide exemptions from the TPA. In its review of Part X of the TPA, the Commission (PC 2005b) highlighted that for all practical purposes Part X provided automatic registration of all carrier agreements, reflecting the judgement that all agreements provided a net public benefit. In addition, agreements were allowed to operate until sufficient complaints by shippers initiated an ACCC investigation and that investigation concluded that the agreements should be deregistered. Importantly, this presumption of net public benefit ran counter to the general provisions of the TPA where the onus of proof was on those seeking exemptions for anti-competitive agreements to demonstrate a net public benefit before an exemption was provided. In light of this, the Commission's preferred option was to repeal Part X and have liner shipping services subject to the general authorisation provisions under Part VII of the TPA.

These general provisions under Part VII of the TPA provide for the ACCC to authorise anti-competitive behaviour where there are net public benefits associated with that behaviour. At present, the ACCC has a time limit of 6 months in which to consider the application of a non-merger application for authorisation. This time limit was introduced following concerns raised with the 2003 Dawson review of the TPA (Dawson et al. 2003) surrounding the time taken by the ACCC to consider an application.

An authorisation provided under the Act involves an important process which requires the ACCC to balance the public interest against any lessening of competition from the restrictive arrangements. As such, an adequate time frame is required to assess these matters and ensure all relevant interests are fully considered. Whether or not the current time limit is adequate is an issue that would need to be considered in a broader review of the TPA.

In summary, the Commission has previously recommended that Part X of the TPA be repealed and liner shipping services be subject to the general authorisation provisions of the TPA and would not support fast tracking authorisations to undertake anti-competitive conduct for sea and air freight under the TPA.

Other water transport issues

The Tourism and Transport Forum (sub. DR76) raises the problem of states not automatically recognising the maritime qualifications granted in another state and different standards for commercial boat building.

The arrangements surrounding the mutual recognition of occupations were examined by the Productivity Commission in its *Review of Mutual Recognition Schemes* (2009) which found that although mutual recognition arrangements had served Australia well there was scope for improvement. To this end, the Commission (PC 2009) made a number of recommendations designed to strengthen governance arrangements, raise awareness and reduce uncertainty to improve the operation of the schemes. As for commercial boat building standards, the National Maritime Safety Committee (NMSC), consisting of all state and territory maritime authorities, is working towards the introduction of uniform design and construction standards in the commercial boating sector. The Committee has revised the Uniform Shipping Laws (USL) which are being introduced into the *Navigation Act 1912* as the first step towards the introduction of National Standards for Commercial Vessels (NMSC 2009).

The Tourism and Transport Forum (sub. DR76) also notes that swine flu events on board a cruise ship in 2009 highlighted the lack of harmonisation between Australian Government and state government health authorities. Clearly, there are benefits in a coordinated approach to dealing with outbreaks of infectious disease, but developing a more effective response to such matters is outside the scope of this review.

6.4 Air transport

The regulation of airline and airport operations is primarily the responsibility of the Australian Government — in addition to regulating aviation, in the past it also owned and operated airlines and Australia's major airports. However, there have been a number of important changes to the regulatory framework surrounding the aviation sector over the past decade resulting from:

- long term leasing of the major passenger airports

- the sale of the general aviation aerodromes to private operators
- the impact of airport development and operations on their surrounding communities
- the upgrading of aviation security in response to increased security threats.

Much of the focus of participants in the aviation industry to this review is on the aviation security regulations. This reflects the changed regulatory environment following the events of September 2001 and the implementation of a new aviation security framework through the *Aviation Transport Security Act 2004* (ATSA) and the associated Aviation Transport Security Regulations 2005 (ATSR). The Act and the associated regulations are overseen by the Office of Transport Security (OTS) located in the Department of Infrastructure, Transport, Regional Development and Local Government (the Department). There are now approximately 275 security based regulations compared to 125 under the previous arrangements (sub. 46).

Other main concerns raised related to:

- certain aspects of safety regulation
- aviation safety regulation
- airport regulation
- advanced passenger processing
- the passenger movement charge
- slot compliance at Sydney Airport
- possible conflicts between aviation regulation and disability discrimination legislation.

Against this backdrop, the Australian Government is currently conducting a major review of national aviation policy and regulation with a Green Paper released in December 2008 and a White Paper to follow in the second half of 2009.

Concerns with aviation security

Regulations that have no security outcome and are outside the control of an airline

In commenting on a number of regulations contained in the ATSA and ATSR Qantas notes:

> … there are a number of regulations that have no security outcome or with which compliance is impractical, but nonetheless places an obligation on us. (sub. 46, p. 4)

For example, Qantas is required to provide details to the OTS as to the roles and responsibilities of other Commonwealth, state and territory agencies in respect of airport security as part of its Transport Security Program. Such information is already known to the OTS as airport operators are required to provide this information (sub. 46). Qantas also has to provide the OTS with information that is already in the public domain or already known to the OTS. This includes information on the roles and responsibilities of Commonwealth agencies and details of the operators aircraft, type and number (sub. 46).

In other instances, regulation applies to Qantas, but is outside its control. For example, Qantas (sub. 46, p. 4) is required to, 'deter and detect unauthorised access into airside areas, by people aircraft vehicles and things'. However, access to airside areas by aircraft is handled by air traffic control and personal access is inferred, but not authorised, by displaying a valid Aviation Security Identification Card (ASIC). Similarly, although regulation requires Qantas to ensure that checked baggage is not accessible to unauthorised persons from the time it is checked in until it is available for collection, baggage at international terminals and some domestic airports is, for varying periods of time, the responsibility of the airport operator's baggage system and outside the control of Qantas (sub. 46).

Inconsistencies and lack of harmonisation/mutual recognition of overseas security regulation

A further issue in security regulation is the inconsistency with international security requirements. In this regard, Qantas (sub. 46) comments that the International Civil Aviation Organisation's (ICAO) list of items prohibited in the cabin of aircraft had been amended by the Australian Government resulting in a number of inconsistencies.

Consequently, the United States Transport Security Agency permits knitting needles in the cabin whereas Australian Government regulations do not. Similarly, under the Liquid, Aerosols and Gels (LAGS) requirements, passengers carrying oversized duty free arriving from overseas in Sydney could continue on to Melbourne on domestic flights whereas if the same passenger were to transfer to a Qantas international flight from Sydney to Melbourne the duty free LAGS would be confiscated.

Similarly, the Tourism and Transport Forum (sub. DR76) points to the inconsistency on the bans on metal cutlery under Australian regulation where a passenger flying from Australia to the United States will be given plastic knives on the international flight and then metal knives on the domestic flights in the United

States. It went on to call for a more risk-based approach to passenger screening to bring Australia into line with international standards.

Qantas also comments that as the Transport Security Program required under the ATSA regulations is not aligned with international practices, Qantas is required to submit an ICAO equivalent document in other jurisdictions (sub. 46).

Nevertheless, Qantas (sub. 46) believes that such issues could be resolved via agreements with overseas regulators and through the application of mutual recognition.

Sydney Airports (sub. DR56) also endorses the need to harmonise international security measures through stronger ties with aviation security agencies in the United States, Canada and the European Union.

Assessment

With increased threats to aviation security since 2001, the Australian Government developed security arrangements to meet the wider community concerns and perceptions of such threats. The rapid growth in security measures to protect the travelling public created an expansion of regulations with a number of ensuing problems.

The Wheeler Review (2005) into airport security and policing noted that the *Australian Transport Security Act 2004* and its regulations were developed with less than optimal consultation in order to expedite their introduction by March 2005. The Australian Government's Aviation Review Green Paper (2008b) recognised that the post-2001 expansion of security measures had not always been smooth, creating a series of anomalies which needed to be addressed.

In certain instances, aviation security regulation was not subject to the RIS process or failed the process prior to implementation. For example, the RIS relating to increased air cargo security on international passenger transport aircraft was considered inadequate by the Office of Regulation Review (ORR) as it failed to demonstrate that the proposed regulation provided a net benefit to the community. The RIS for this matter was not tabled with the Bill (PC 2006d). Other regulation, such as that specifying the items and quantities of LAGS that can be taken through screening points, was granted an exceptional circumstances exemption from the RIS process. Under these arrangements, regulations granted such an exemption are required to be subjected to a post-implementation review within 1 to 2 years (OBPR 2007).

The Australian Government, through the Aviation Review Green Paper (Australian Government 2008b), has indicated that it will review a number of security arrangements including passenger and aircraft screening, the identity checking regime, the aviation security training program and examine the greater use of technology in providing aviation security. It also indicated that it would take steps to address a number of findings in the Wheeler Review (2005).

In the area of international consistency, the Australian Government has indicated that regulators will visit overseas last port of call airports to discuss security measures and provide reciprocal arrangements for foreign regulators to review Australia's security arrangements (Australian Government 2008b). That said, securing international consistency will continue to be problematic in areas where the Australian Government requires a higher standard of security than that in place in overseas airports providing last port of call services to Australia.

The Aviation Review Green Paper (Australian Government 2008b) also noted that the Australian Government intends to implement a prohibited items regime in line with the ICAO's prohibited item list following the ICAO review of prohibited items. This will remove certain regulatory anomalies surrounding what can be carried into the aircraft cabin.

While the Australian Government's review of aviation policy and regulation intends to address a number of broader regulatory issues in aviation security as well as some of the specific concerns raised with this review, there are certain measures that could lessen the regulatory burden on airlines with respect to existing regulation and in the implementation of future regulations.

For example, Qantas (sub. 46) suggests exemptions, variations and alternative procedures should be granted by the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government on the advice of the OTS. Such an approach, similar to the CASA regime in which exemptions can be provided to a regulation, would overcome a 'one size fits all' approach to regulation (box 6.1).

The use of exemptions, variations or alternative procedures to the existing regulation would enable individual businesses greater flexibility in meeting, or even exceeding, the desired regulatory outcome. Allowing for such exemptions and variations would also better reflect the suggested approach of the Wheeler Review (2005) into aviation security which recommended that each organisation take a risk-based approach, tailoring measures to meet the assessed risk as opposed to following prescriptive measures.

RECOMMENDATION 6.2

The Aviation Transport Security Act 2004 should be amended to enable the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government, on the advice of the Office of Transport Security, to grant exemptions, variations and alternative procedures to the existing aviation security regulations that would meet the required regulatory outcome.

Box 6.1 **CASA Exemptions**

Businesses can apply under section 308(1) of the Civil Aviation Regulations 1988 to be exempt from specified provisions of the regulations. Parties must, in their application, provide reasons in support of the requested exemption. Exemptions can also arise from industry discussions, CASA internal research, or be given as an interim measure pending changes in legislation.

In assessing the merits of an exemption, CASA must take into account any relevant considerations relating to the interests of safety. If approved, exemptions are issued through a legislative instrument, and usually for a limited time.

Some examples of these exemptions include exemptions from the display of national colours for some aircraft, exemptions from staff number restrictions and exemptions from restrictions in night acrobatic flights for pilots in air shows.

Source: CASA (2009a).

Turning to more specific concerns raised by participants, regulation should not require business to take responsibility for matters over which it has no control or require business to provide information concerning other agencies or information that is already in the public domain. Improving communication between the regulator and the industry prior to implementing aviation security regulations could improve alignment of the regulation with the required outcomes and lessen the risk of implementing unnecessary or unachievable regulatory requirements.

The Aviation Security Advisory Forum (ASAF) is the Department's consultative body and comprises senior departmental officials and senior industry representatives. The Forum should consult with industry as to the objective of proposed regulation and the required outcome. This forum could also be used to raise, discuss and address industry concerns regarding existing regulations, such as any unnecessary information requirements or unachievable regulatory requirements placed on industry.

Such an approach, as well as the use of exemptions and variations discussed above, was supported by Qantas (sub. DR61) in its response to the draft report as it would

generate more efficient and effective outcomes in regard to aviation security regulation.

However, BARA (Board of Airline Representatives of Australia) (sub. DR53), in responding to the draft report, is highly sceptical of utilising the ASAF to improve consultation with industry in regard to proposed regulation due to:

> ... how poorly ASAF has performed in the past in consulting with industry stakeholders about the actual wording of new aviation security legislation. (sub. DR53, p. 2)

BARA (sub. DR53) supported the Qantas (sub. 46) proposal in implementing a more formal consultation process, whereby a proposed or draft regulation would be released for public consultation (using a process similar to the notice of proposed rule making (NPRM) [1] used by CASA in regard to aviation safety regulation). BARA's view is that:

> … a formalised consultative process in relation to aviation security regulations, based on the NPRM model, would improve the transparency of the process and ultimately deliver a more targeted regulatory regime that does not unnecessarily interfere with the efficiency of airline and airport operations. (sub. DR53, p. 2)

Although such a process would enable formal consultations between the regulator and industry, it would also duplicate certain aspects of the RIS process and increase the complexity in implementing certain regulations. It is not clear that creating an additional consultative mechanism and layer of administrative process is required to improve consultation with industry in regard to proposed aviation security regulation. Moreover, the changes proposed by the Commission to the RIS process would improve the consultation process and increase transparency. These changes are discussed further in chapter 9.

The Commission considers that the ASAF provides the necessary framework to improve the consultation process with industry in regard to aviation security regulation. The more effective use of the ASAF in conjunction with the proposed changes to the RIS process would provide a more efficient approach to enhance consultation between the regulator and industry to improve regulatory outcomes.

RECOMMENDATION 6.3

The Aviation Security Advisory Forum should provide a greater focus on consultation with industry with regard to existing and proposed aviation security regulation.

[1] This system provides for consultation with industry in developing regulation. Although somewhat similar, it was in use prior to the adoption of the RIS process and provides a draft of the proposed changes for comment including options for change, and depending on the nature of the regulation, a cost-benefits analysis. A drafted regulation is then released for further comment prior to the finalisation of the regulation.

Inconsistent security requirements for domestic and international passengers

Perth Airport (sub. DR85) calls for consistent security requirements for international and domestic passengers. This would allow Perth Airport to implement a common departure lounge within the same terminal as outlined in its Master Plan and reduce duplication of facilities, operating and maintenance costs and provide greater flexibility in meeting changes in the aviation market. In turn this would benefit passengers from lower cost and ultimately better facilities.

Assessment

The different security requirements for passengers on domestic and international flights reflect the different security issues, such as the LAGs requirements, and international obligations relating to security on international flights. Furthermore, there is nothing in the Aviation Transport Security Act or Regulations that requires separate departure lounges or terminals for domestic and international services.

Airports in Australia, such as Adelaide and Darwin, do operate international and domestic services through a common departure lounge within the same terminal. At these airports, all passengers will go through the normal screening process, and the international passengers are separately screened for LAGs around the same time as they undergo outgoing migration, customs and quarantine processes.

Concerns with aviation safety regulation

Virgin Blue (sub. 51) is concerned that much of the aviation safety and operational regulation is rigid, overly prescriptive and lagging behind new generation technology and international best practice. Also, despite many years of review and reform, progress in implementing performance-based regulation remains slow.

For example, Virgin Blue points to the Civil Aviation Order under the Civil Aviation Regulations detailing the ratio of cabin crew to passengers. To obtain approval to operate a B737 aircraft with four cabin crew it was required to demonstrate that safety would not be adversely affected. Having demonstrated the ability to operate with a reduced cabin crew of four, a Disallowable Instrument had to be tabled in the Senate by CASA to provide an exemption from the Civil Aviation Order. Although this approach to crew ratios has been adopted by all major airlines operating in Australia through exemptions, the legislation relating to these Orders remains in place (sub. 51).

A further example of the rigidity in the regulation and the costs imposed on airlines was the process faced by Virgin Blue to obtain an Australian air operators certificate for an aircraft already operating in New Zealand through a related airline:

> … [for] Pacific Blue to be able operate one of our Australian registered B737-800 aircraft on their network, they were required themselves to hold a full Australian issued Air Operators Certificate and go through an entire entry control process with CASA. This is despite the fact that they were already approved to operate the identical aircraft on their New Zealand issued operating certificate. This whole process consumed many months of work and cost tens of thousands of dollars. (sub. 51, p. 4)

In light of such rigidities, the Australian and New Zealand Governments made the necessary legislative amendments in 2006 to provide for mutual recognition of an Air Operators Certificate issued by the other country's aviation safety authority. These arrangements came into effect in March 2007 (CASA 2009b).

The complexity of the regulation is also a concern to Virgin Blue (sub. 51). This is often exacerbated by the frequently different interpretations by CASA staff of the technical requirements, which in an audit situation, often results in one officer refuting the work of another. Moreover, the complexity of the regulation requires considerable research into often obscure documents which may not reflect modern aviation technology.

Qantas (sub. 46) notes that although CASA's stated policy is not to impose unnecessary costs on business this was not always the case. For example, a certified hard copy of the Air Operators Certificate (AOC) must be carried onboard all international flights which requires Qantas to reissue its eight-page AOC 10 to 12 times per year to some 150 aircraft.

Qantas (sub. 46) refers to the Safety Management System (SMS) in place for aviation safety, under which AOC holders are responsible for effectively managing their own risks. Although supportive of the SMS, Qantas notes that it is costly and complex to develop and introduce systems to comply with new regulation for an airline operating a variety of aircraft type in a number of locations. For example, the introduction of the SMS involved two days of human factors training which was estimated by CASA to cost business around $175 000, but for a large organisation such as Qantas these estimated costs were only around 10 per cent of the actual costs incurred.

Qantas contends that due consideration of these costs in the RIS process would help overcome many of the problems associated with unnecessary or inappropriately costed regulatory burdens.

Virgin Blue (sub. 51) also refers to the costs imposed on airlines in regard to safety regulation. In particular, it refers to the direct and indirect costs to Virgin to obtain the required approvals to launch its trans-Pacific carrier, V-Australia:

> The genesis of these costs is related to the complex nature of the aircraft and the proposed operations that relied on the application of relatively new operational safety standards dealing with Extended Diversion Time Operations (EDTO). While this was understood and accepted as part of the overall process, CASA had no documented standards under which such an application was to be managed and as a result cost overruns were experienced. (sub. 51, p. 4)

Virgin Blue further notes that in such circumstances where airlines are undertaking large investments there needs to be a higher degree of certainty and predictability than provided by the current arrangements (sub. 51).

Assessment

CASA is undertaking a regulatory reform program which involves the consolidation of regulations and orders and the introduction of performance-based regulation to enable industry to use the most appropriate systems and procedures to meet the required safety outcomes. This regulatory framework comprises:

- outcome-based regulation
- technical standards outside the regulation to provide additional clarity
- acceptable means of compliance which sets out methods of demonstrating compliance with the regulation
- guidance material to provide suggestions and explanations to meet the intent of the regulations.

However, there have been ongoing concerns, including from participants to this review, that the regulatory reform program has not been achieving the required outcomes in a reasonable time frame. Such concerns are not surprising given the reform program commenced in 1996 and is still not completed. For example, the Tourism and Transport Forum says:

> Despite many years of review and reform, the implementation of performance-based regulation is still incomplete. (sub. DR76, p. 5)

Similarly, Perth Airport comments:

> The aviation safety and operation regulations are rigid, overly prescriptive and lagging behind new technology and international best practice and despite many years of review and reform the implementation of performance based regulation is incomplete. (sub. DR85, p. 2)

In recognition of the concerns of industry, an Aviation Regulation Review Taskforce (the Taskforce), chaired by Allan Hawke was established in 2007 to determine how best to complete the regulatory reform program (Aviation Regulation Review Taskforce 2007). The Taskforce found that inadequate resources in the Office of Legislative Drafting and Publishing (OLDP) in the Attorney-General's Department had caused significant delays in completing the program. This involves replacing the Civil Aviation Regulations 1988, which are supplemented by the Civil Aviation Orders, with the Civil Aviation Safety Regulations 1998. These delays had resulted in two systems of regulation operating side-by-side adding further complexity to the arrangements.

The Taskforce requested that CASA develop a timeframe for completion of the regulatory reform program and recommended that the Minister and CASA commit to submitting all drafting instructions to the OLDP by the end of 2008 for implementation by 2011 and that additional resources be provided to the OLDP solely for the purpose of drafting CASA regulations to assist with completion of the program. To this end, CASA and the Department of Infrastructure have provided funding to engage additional drafting resources in OLDP to work exclusively on CASA regulations (CASA 2008). The Taskforce also recommended that CASA continue a one-year post implementation review for each regulatory part after the reform program has been completed.

The Government in its Aviation Green Paper signalled a further commitment to the Taskforce's key recommendation of ensuring the regulatory reform program is completed by 2010-11 (Australian Government 2008b).

As the regulatory reform program has not been completed, the Commission is unable to comment on the overall effectiveness of these arrangements. Nevertheless, the use of performance-based regulation should address industry concerns surrounding the rigidity and prescriptive nature of aviation safety regulation and provide for greater recognition of appropriate international standards. For example, the more recently implemented Civil Aviation Safety Regulations refer to overseas safety regulation including the United States Federal Aviation Regulations and the European Joint Aviation Requirements in regard to meeting airworthiness standards.

The Department of Infrastructure, Transport, Regional Development and Local Government and CASA need to ensure that the reform program is completed in the agreed to time frame to remove the current complex arrangements whereby the industry is operating under two sets of regulatory arrangements. In addition, the regulatory arrangements should be reviewed following implementation to assess their effectiveness.

In assessing the impact of new regulations, the actual costs of implementation need to be considered when businesses are being asked to carry that cost under regulatory arrangements based on the self-management of risk such as the Safety Management System.

Concerns with airport regulation

Price regulation of regional aviation at Sydney Airport

Special charging and access arrangements apply at Sydney Airport for regional airlines. This is to provide regional airlines and passengers from regional centres 'affordable' access to Sydney Airport. As part of these arrangements, the provision of aeronautical services to regional airlines at Sydney Airport is subject to price controls which requires Sydney Airport to notify the ACCC of any proposed changes in charges for services provided to regional airlines.

SACL (sub. DR56) calls for the current price regulation arrangements to be reviewed on their expiry in 2010 and before any further arrangements are implemented. SACL's view (sub. DR56) is that normal commercial arrangements under which prices are directly negotiated between regional airlines and the airport should apply.

Assessment

The special arrangements for regional airlines, including the prices notification arrangements, in regard to Sydney Airport were discussed in detail by the Commission in the most recent review of price regulation of airport services (PC 2006e). In its summary, the Commission found that it was not clear if there would be a need for price protection for regional airlines following the adoption of stronger processes for investigating any significant misuse of market power. It concluded that if price notification for regional airlines using Sydney Airport were to continue, its impact should be kept under review.

In accordance with good regulatory practice, the price notification arrangements applying to regional airlines using Sydney Airport should be subject to an independent review on their expiry in 2010.

RECOMMENDATION 6.4

The price notification arrangements applying to regional airlines using Sydney Airport should be subject to independent review on their expiry in 2010.

Airport curfews

The Tourism and Transport Forum (sub. DR76) points to a number of changes to improve the operation of airport curfews, particularly in regard to Sydney Airport. These involve:

- recognising the noise implication of diverting aircraft that are on their final approach as refusing dispensation increases noise and carbon emission and imposes costs on airlines
- taking into account aircraft type when granting curfew dispensation
- aligning the Sydney Airport Curfew regulations which allow for a maximum of 24 aircraft arrivals per week in the 5.00 am to 6.00 am shoulder period of the curfew with the *Sydney Airport Curfew Act 1995* which allows up to 35 aircraft arrivals per week
- reserving these additional slots in the shoulder period for quieter aircraft such as the A380 and soon to be introduced aircraft.

The Tourism and Transport Forum considers that aligning the regulations with the Act would make Sydney more accessible for long haul airlines and international visitors (sub. DR76).

Assessment

At present, there are curfews in place at Sydney, Adelaide, Essendon and Gold Coast airports which restrict aircraft movements at these airports between 11.00 pm and 6.00 am. Sydney airport is subject to the *Sydney Airport Curfew Act 1995*, Adelaide to the *Adelaide Airport Curfew Act 2000* and the curfews in place at Essendon and the Gold Coast Airport operate under the *Air Navigation Regulations 1999*.

The legislation and regulations governing the curfew arrangements are based on blanket restrictions on passenger carrying aircraft, outside of emergencies. Some curfew arrangements provide for specific exemptions for certain aircraft that meet a specified noise standard and are under a specified weight. For example, at Sydney and Adelaide airports, specified freight aircraft and other specified aircraft less than 34 tonnes that meet noise standards are exempt from the curfew.

Aligning the Sydney Airport curfew regulations with the Act would allow additional aircraft to utilise the shoulder period between 5.00 and 6.00 am. Nevertheless, performance based regulation based on a permissible level of noise for all aircraft using the airport between certain hours could provide a more

effective means of protecting the amenity of surrounding airport communities than the current prescriptive arrangements. This would ensure that a specified noise level was met during the late evening/ early morning hours, provide an incentive for the operation of lower noise aircraft and remove the anomalies in the current arrangements.

However, given the diversity of stakeholder interests surrounding these curfews, full consideration of these issues would require extensive consultation as part of a wider review of the arrangements. In the case of this review, the issue of the curfew arrangements at Sydney Airport were only raised following the release of the draft report which truncated the time available to adequately examine and consult on this issue and the wider issue of using curfews to address aircraft noise.

Moreover, the curfew arrangements have been examined as part of the Australian Government's Aviation Policy Review (2008b) and the Government has proposed that the curfew arrangements at Sydney, Adelaide, Gold Coast and Essendon airports remain in place.

Quality of service reporting by the Australian Competition and Consumer Commission (ACCC)

The *Airports Act 1996* provides for the ACCC to undertake quality of service monitoring of those airports subject to price monitoring. This quality of service monitoring acts as a complement to price monitoring by identifying if airport operators are improving profitability by reducing service standards or running down assets. It also assists in placing price movements in relation to changes in quality, particularly where quality improvements sought by customers have necessitated new investment.

Sydney Airport Corporation Limited (SACL) (sub. DR 56) is concerned that the current monitoring regime used by the ACCC suffers from a number of problems which affects its validity and usefulness. This includes assessing the performance of an airport on matters over which it has little or no control, such as the length of time passengers wait at check-in counters and inbound passengers wait at Customs and AQIS inspection points.

In addition, SACL raises a possible conflict of interest in surveying airlines as to the performance of an airport:

> The conflict of interest that exists in asking a commercially motivated organisation (an airline) for its views on one of its commercial counterparts and suppliers (an airline operator) is obvious. Airlines have a clear commercial interest in talking down the performance of an airport as they seek to gain a commercial advantage to employ in the

> course of significant commercial negotiations. It is naïve to consider otherwise (sub. DR56, p. 4).

SACL (sub. DR56) further comments that although passenger survey results are used to compare performance across airports, the passenger surveys undertaken by airport operators for the ACCC do not require a consistent methodology to measure quality of service. As airport operators undertake their own passenger surveys, different questions are asked at different airports, different sample sizes are used, the surveys do not specify how representative these samples are of passengers and do not take into account the views of non-English speaking passengers. Moreover, the current quality of service monitoring arrangements require Sydney Airport to allocate significant staff resources to collate and collect information and check reports.

In contrast, the Tourism and Transport Forum (sub. DR76) questions the need for a rigid monitoring regime given that the significant levels of investment by airports to improve passenger terminals and facilities would ensure high quality services standards and facilities at Australian airports.

Assessment

Quality of service monitoring was examined by the Productivity Commission (2006e) in its *Review of Price Regulation of Airport Services.* The Commission recommended that quality of service monitoring be retained, but improved and streamlined.

The PC (2006e) and the ACCC (2008a), in its quality of service monitoring guidelines, recognised that there are few services totally under the direct control of an airport operator and the provision of airport services is undertaken by a number of entities including the airport operator, sub-lessees, government and the airlines. Given this, the ACCC survey, as required under the *Airports Act 1996*, focuses on those facilities and services provided by the airport operator, or by an entity with an agreement with the airport operator to provide those services.

The passenger surveys undertaken at each airport differ in their coverage and detail, but are required to provide information on specific airport services such as passenger check-in, baggage processing, toilets, gate lounges, trolleys, signage, car parking and airport access in accordance with the regulations under the *Airports Act 1996*. Surveys at most airports ask respondents as to their satisfaction with the services on scale of 1, very poor, to 5, excellent. The passenger survey is only one input used to produce the overall performance ratings which compare service quality across airports. Other inputs include the airline survey, the Australian

Customs Service whole of government survey and other indicators for each airport and a weighting of these scores by the number of observations in each category (ACCC 2008b).

At present, airport operators are able choose the lowest cost means of surveying their passengers to provide the required information. Requiring airport operators to utilise similar methodologies in preparing their passenger surveys would enable more consistent comparisons across airports in this area, but it would require more prescriptive regulation and may impose additional costs on airport operators.

An airline 'talking down' the performance of an airport in a quality of monitoring survey to gain an advantage in negotiations with an airport operator is likely to be part and parcel of the commercial negotiations between these parties.

The quality of airport service monitoring is currently being reviewed by the Department in conjunction with the Australian Government's Aviation Review. A discussion paper was released in March 2009 calling for submissions and the findings of the review will form part of the Aviation Review White Paper to be released in the latter half of 2009 (Department of Infrastructure, Transport, Regional Development and Local Government 2009). The Commission considers that this review process is the most appropriate process to consider the overall validity and usefulness of these arrangements in complementing the price monitoring arrangements.

Modelling future noise exposure

Under the provisions of the *Airports Act 1996*, Sydney Airport is required to prepare a Master Plan for the airport which includes an Australian Noise Exposure Forecast (ANEF). The ANEF is an aircraft noise exposure index used in Australia and is based on the United States Federal Aviation Administration's (USFAA) noise exposure forecast system. The Integrated Noise Model (INM) used in the preparation of the ANEF was developed by the USFAA and is the standard for noise modelling worldwide.

SACL (sub. DR56) comments that the methodology used in modelling the future noise exposure is flawed as it uses existing aircraft and it does not take into account technological change, in that new aircraft are quieter than existing aircraft.

> It is a methodology that pretends that technological change over the next 20 years will not assist in reducing noise impacts of aircraft — even though the evidence to the contrary in the form of the A380 already flies from Sydney Airport several times everyday. (sub. DR56, p. 6)

According to SACL (sub. DR56), because of this the ANEF in the Sydney Airport Master Plan knowingly overestimates Sydney Airport's future noise footprint. As such, the noise contours provided in the ANEF map as part of Sydney Airport's Master Plan were further away from the airport then they should be and more land was affected by zoning and development constraints.

SACL (sub. DR56) acknowledges that this is a complex issue and difficult to resolve, but suggests that some reasonable allowance be made to the ANEF methodology to take account of the new generation of quieter aircraft that would be in use in 2029. This in turn, would provide more accurate ANEFs to inform planning and development decisions.

Assessment

The development of the ANEF noise contour map showing the forecast of aircraft noise levels expected in the future is the responsibility of the airport operator and the endorsement of the technical accuracy of the ANEF is carried out by Airservices Australia. In deciding whether to endorse an ANEF, Airservices Australia must be satisfied with the input data the airport has used in regard to aircraft types, that the runway usage and flight path data used as an input are operationally suitable, the forecast number of aircraft movements and type of aircraft operating are in line with the physical capacity of the airport, the contours have been modelled correctly and that the proponent has demonstrated that it has paid due regard to all issues raised by state and local government authorities in relation to the ANEF (Information provided by Airservices Australia).

The INM uses a large data base of existing certified aircraft. Modifications can be made to the noise and performance of aircraft databases already in the INM to provide an indicative noise level for future aircraft types. Such modifications need to be substantiated by supporting noise and performance data, such as that provided by the aircraft manufacturer, and then considered to be technically accurate by Airservices Australia.

Also, as major airports are required to update their Master Plan every five years, the use of new aircraft technology will be reflected through updates to the ANEF.

The more accurate predictions of future noise impacts are on areas surrounding airport operations, the more helpful they will be in informing planning and development decisions. The current arrangements and methodology used in preparing ANEFs are able to make allowances for the use of new and quieter aircraft. Whether or not modifications are required to these arrangements and to the methodology to take greater account of changes in technology is outside the scope of this review.

Conflicts between environmental and aviation safety regulation at airports

Perth Airport raises the issue of conflicting environmental and aviation safety legislation stating:

> Where there is a conflict between environmental legislation and aviation safety legislation then aviation safety should take precedence. Carnaby's Black Cockatoo is an issue at Perth Airport and it is not possible to comply with both environmental and aircraft safety requirements. (sub. DR86, p. 3)

Assessment

The EPBC Act provides for protection of the environment, especially where matters are likely to be of national environmental significance. Under the legislation, an entity must not take action that has, or will have, a significant impact on matters of national environmental significance without approval from the Minister for the Environment. Perth Airport is subject to the provisions of the EPBC Act as it operates on Commonwealth land and in relation to Carnaby's Black Cockatoo given its status as a threatened species.

At the same time, Perth Airport in accordance with aviation safety regulation must ensure that the operational environment around the airport does not pose hazards to aircraft — for example through potential bird strike.

If the activities of Perth Airport are likely to have an impact on Carnaby's Black Cockatoo — for example, clearing their habitation as part of wildlife hazard controls or in the process of airport development — Perth Airport is required to refer this matter to the Department of the Environment, Water, Heritage and the Arts to formally assess whether Ministerial approval is required. This may occur, for example, when airports complete their master plan, which is released once every five years and details the future operations and development of the airport.

There does not appear to be any direct conflict between the EBPC Act and the aviation safety regulations as wildlife hazard controls are not explicitly forbidden by the EBPC Act, but may require Ministerial approval. Although the Ministerial referral processes contained in the EBPC Act do place some burden on business, they nonetheless provide the means to provide for the safety of aircraft and passengers and the protection of the environment in regard to airport operations and future airport development.

Compliance with Disability Discrimination Legislation

Qantas (sub. 46) raises the issue that in complying with aviation safety, aviation security and OHS regulations it could be in breach of disability discrimination legislation. It says:

> Compliance with other legislation imposes requirements that at times conflict with the terms of the disability discrimination legislation, and this conflict places a significant burden on Qantas. (sub. 46, p. 17)

It provides a number of examples of possible conflicts.

- *Exit row seating*. A problem could arise were a passenger with a disability to request an exit row seat. Under the civil aviation safety regulations the airline operator is required to ensure disabled persons are not seated to obstruct access to an emergency exit. However, the person refused such seating due to their disability could then proceed to take action under the disability discrimination legislation.
- *Carriage of assistance animals*. Carriers are not to carry assistance animals other than a dog for a sight or hearing impaired person without CASA approval and may still refuse carriage on safety grounds. It is difficult for the carrier to determine the level of training the animal has received and how it will behave during the flight. There is also an increasing number of requests from passengers to travel with 'comfort animals' that assist the passenger to cope with stressful or other specific situations. Refusal to carry such an animal poses the risk of breaching disability discrimination legislation.
- *Screening of mobility aids.* Mobility aids carried in the hold of an aircraft are required to be security screened to re-enter the secure area to be ready for collection at the arrival gate. This is in accordance with the Aviation Transport Security Transport Regulations. However, this has resulted in complaints from passengers for the delay in picking up their mobility aids.
- *Carriage of mobility aids.* The increasing size and weight of mobility aids such as electric scooters and some wheelchairs means that such aids do not fit through the doors of baggage holds and limitations have to be placed on this equipment. However, Qantas (sub. 46) is comfortable in defending any such action brought under disability discrimination legislation in regard to this issue.
- *Manual Handling.* Lifting required by airline staff to assist passengers from their own wheelchair into airline wheelchairs and the manual transfer of these passengers into the aircraft seat. This creates potential conflict between an airline's OHS obligation to its staff and passengers with disabilities.

Assessment

Where there is the possibility of conflict between disability discrimination legislation and other legislation, Qantas (sub. 46) points to the defences available to defend claims brought against it under disability discrimination legislation:

> The Group considers that it can rely on the unjustifiable hardship defence where it is required to comply with competing legislation, in circumstances where it is not possible to comply with both pieces of legislation simultaneously. (sub. 46, p. 17)

Nevertheless, from Qantas's perspective it would be preferable not to have to defend any such claims arising from conflicts between disability discrimination legislation and aviation related legislation. Good regulatory practice should, in any case, ensure businesses are not put in the position of having to breach one regulation to meet another.

In respect of exit row seating issues, the Aviation Access Working Group is developing changes to the civil aviation safety regulations to avoid conflict with disability discrimination legislation. This group was formed in 2009 to develop practical measures to improve access to air transport. It is chaired by the Department and comprises representatives from all major Australian airlines, CASA, airports, certain government agencies, disability advocacy groups and the Australian Human Rights Commission. Amendments have been made to the Civil Aviation Order (CAO) 20.16.3 which requires airlines to ensure that passengers seated in an aircraft exit row are fully able and willing to assist with access through emergency exits in the event of an emergency. These amendments came into effect on 1 August 2009. To provide greater certainty, the CAO is being prescribed so that an aircraft operator acting in direct compliance with the CAO will be protected from the complaint of unlawful discrimination under the *Disability Discrimination Act 1992* (DDA). This is expected to take effect in the latter part of 2009.

The issue of assistance animals, in particular what constitutes such an animal, has been an issue for a range of businesses. Retailers, transport operators and local governments have all raised concerns that the DDA does not provide an adequate definition of an assistance animal and could provide recognition to animals other than trained guide or hearing dogs (PC 2008a). This leaves such businesses open to actions under the DDA were they to refuse entry or boarding to people with pets or other animals claimed to be an assistance animal in order to comply with other regulations relating to transport safety or food safety.

Following a review by HREOC (HREOC 2003) a recommendation was made to amend the DDA. These proposed amendments more clearly defined what constitutes an assistance animal and excluded those animals or pets used for

companionship or reassurance in social situations. These amendments, contained in the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, will come into effect in August 2009.

The screening of mobility aids to re-enter the secure area to be at the arrival gate for use by passengers clearly does cause delays. However, all items, including mobility aids for people with disabilities, entering or re-entering a sterile area are required to be screened under the Aviation Transport Security Regulations 2005. Indeed, delays at airports in order to meet security requirements are not uncommon and represent the trade-off between meeting travelling convenience and public safety. Airlines, like other transport operators, have to deal with oversized goods on a regular basis. However, the Commission has been advised that the Aviation Access Working Group, referred to above, is examining the screening and carriage of mobility aids.

As to the manual handling issue, the Aviation Access Working Group referred to above is best placed to examine any potential conflict between assisting disabled passengers and an airline's OHS obligation to its staff. This issue is also being examined by the Aviation Access Working Group.

The issues discussed above highlight the difficulty in attempting to regulate or provide exemptions for each and every possibility. Qantas (sub. 46) suggests that the Disability Standards for Accessible Public Transport 2002 should contain a clear exemption in relation to compliance with civil aviation safety, transport security and OHS legislation. This approach is supported by the Transport and Tourism Forum (sub. DR76) and BARA (sub. DR53).

Considering such a broad exemption raises the wider issue of whether safety, security and OHS legislation applying to other transport industries should also be exempted from these Standards. Moreover, the Disability Standards for Accessible Public Transport 2002 are currently under review. These Standards, made under the DDA as subordinate regulations, establish minimum accessibility requirements to be met by the provider and operators of public transport and public transport infrastructure. The Standards set out requirements in relation to issues such as access paths, manoeuvring areas, ramps and boarding devices, allocated spaces, handrails, doorways, controls, symbols and signs, the payment of fares and the provision of information. The review, undertaken by the Allen Consulting Group, released a draft report for comment in 2008 with a final report yet to be released. The Standards do provide for exemptions and are subject to a regular five year review. Any exemptions to the Standards should be considered through these mechanisms.

Nevertheless, there are particular Standards which clearly do impact on aviation safety. For example, the Standards (section 5.1) require that there must be resting points for passengers along an access path where the distance between the services or facilities exceeds 60 metres. As Perth Airport (sub. DR85) notes, such resting points for passengers cannot be installed on the airport apron between the terminal building and the parked aircraft without compromising the safety of aircraft operations. Until the outcome of the review is known, such issues should be handled by the Aviation Access Working Group.

Other concerns

Advanced Passenger Processing — compliance threshold for fines

Under the Advanced Passenger Processing (APP) arrangements airlines are required to provide the Department of Immigration and Citizenship (DIAC) with biographic information on all passengers and crew travelling to Australia. The Government's objective with the APP system, as set out in the *Migration Act 1958*, is to have airlines report on each passenger and crew member entering Australia. This information is collected at check-in and transmitted to DIAC where it is cross-checked against immigration data bases for use by border agencies prior to the arrival of the aircraft.

Advanced reporting was introduced in 1998 on a voluntary basis and the mandatory APP system was introduced in 2003 requiring airlines to provide APP on *all* passengers and crew entering Australia.

Qantas (sub. 46) is concerned that the Australian Government has recently amended the regulations to impose fines on carriers who fail to provide this data from 1 July 2009. At present, under the *Migration Act 1958*, airlines are liable for financial penalties of $5000 for each passenger they carry into Australia without adequate documentation.

Under the infringement regime, airlines achieving a 99.8 per cent or higher reporting rate in one month will not be fined for any passengers or crew not reported through in the following month. This threshold is based on the current reporting average of the airline industry. Each offence carries a penalty of 10 points or $1100 and this could be levied in addition to the $5000 penalty for carrying passengers without adequate documentation (sub. 46).

Qantas (sub. 46) estimates that it could be facing fines of $4 million per year under the proposed infringement regime. To avoid these fines and ensure the requirements

of the legislation were met, Qantas would need to modify its operations resulting in increased costs and passenger inconvenience. For example, Qantas would have to intercept passengers checked in by partner airlines at United States domestic airports travelling to Australia at Los Angeles international airport to collect and transmit their APP details. BARA (sub. DR53, p. 3), in commenting on the draft report, notes that having to identify such passengers not captured by partner airlines to collect and transmit their APP data 'is labour intensive, costly and can compromise the scheduled departure of aircraft'.

BARA (sub. DR53) is also concerned that the system is not 'failsafe' and were a system failure to occur in any one month, an airline would be fined for each and every passenger and crew not reported on in the following month.

Qantas called for the APP regime to be reviewed to revise the compliance requirements in line with risk management principles (sub. 46). In responding to the draft report, Qantas (sub. DR61) again called for the regime to be reviewed due to the substantial burden it places on airlines.

Assessment

The APP system has provided a number of benefits. The ANAO (2006) in its report on the APP system noted that along with improved border security and passenger immigration processing, the APP had dramatically reduced the fines levied on airlines for carrying inadmissible or inadequately documented passengers into Australia from around $23 million in 2001-02 to around $3 million in 2006-07. Nevertheless, there are a number of concerns surrounding the recent introduction of infringement regime relating to APP reporting requirements. These are discussed below.

- *Compliance costs*. The reporting framework and systems are in place and have been used by airlines since the introduction of mandatory APP reporting in 2003. The preliminary regulation assessment undertaken by DIAC at the request of the Office of Best Practice Regulation determined that the compliance costs placed on business from the introduction of financial penalties would be low as airlines and ship operators already had the necessary reporting framework in place (DIAC 2009). The current average reporting compliance rate is 99.93 per cent which is in excess of the required reporting requirement and the level of compliance is expected to increase following the introduction of the infringement regime (information provided by DIAC).
- *Passengers checked in by partner airlines in other countries*. Airlines carrying passengers to Australia currently have systems in place to transmit the APP details of passengers checked in by partner airlines at overseas airports. Also, in

most cases the commercial arrangements in place between these airlines mean that any fine levied on the international carrier from the check-in procedures performed by the partner airline at an overseas domestic airport are passed back to the partner airline.

- *Fines for the same passenger for different offences.* The introduction of fines for the non-reporting of passengers means that an airline could be fined twice in relation to the same passenger — for the separate offences of failing to meet the APP reporting requirements and for carrying the passenger into Australia without adequate documentation. As use of the APP would indentify any inadequately documented passenger, an airline would had to have failed to meet APP reporting requirements for a passenger with inadequate or inadmissible documents for this to occur.
- *System failures*. The APP includes 'system down procedures' and were a system failure to occur it would not count negatively towards an airline's overall compliance (information provided by DIAC). To avoid receiving infringement notices in the event of the APP reporting systems becoming unavailable, airlines are required to notify the Australian Entry Operations centre and follow the appropriate procedures (DIAC 2008).
- *APP and risk management.* The APP of itself is not an instrument to target 'high risk' passengers travelling to Australia, rather it provides the information that assists border control agencies to assess which passengers present an immigration or security risk to Australia prior to their arrival.

Provided significant costs are not shifted on to airlines to maintain and operate the system and they are not fined twice in relation to the same passenger (for the separate offences of failing to meet APP reporting requirements and for carrying the passenger or crew into Australia with inadequate or inadmissible documents), the reporting of all passengers and crew entering Australia through the APP is appropriate in meeting the policy objective. Nevertheless, in keeping with good regulatory practice, the infringement regime applying to APP reporting should be reviewed after it has been in operation for a suitable period of time.

Security costs at regional airports

The Northern Territory Government (sub. 45) notes that implementing the airport security arrangements and the aviation rescue and fire fighting arrangements imposes large costs on regional airports. This cost is due to the combination of the large proportion of fixed costs of providing these services and the lower passenger volumes at regional airports. As a result, security charges at Darwin and Alice Springs airports are considerably higher than at other major airports.

It suggests the introduction of network pricing, to equalise costs, or direct funding assistance from the Australian Government to alleviate the cost of providing these services at airports such as Darwin and Alice Springs.

The Tourism and Transport forum (sub. DR76) suggests that, rather than network pricing, the Government should investigate the adoption of a direct support scheme to apply in cases where security costs are impeding airports as facilitators of regional development.

The funding arrangements for the provision of these services is a policy matter for the Australian Government and are outside the scope of this review.

The Tourism and Transport forum (sub. DR76) is concerned that including Alice Springs as Counter Terrorism First Response (CTFR) airport with the capital city and regional international airports is an anomaly given its low volume of passenger traffic. As such, it is inappropriate that Alice Springs Airport has to meet the costs of the CTFR obligations.

The Wheeler Review (2005) recommended that CTFR and non-CTFR airports be reviewed on a regular basis to determine whether their classification was appropriate. The categorisation of airports is being examined as part of the Government's Aviation Policy review.

Whether or not an airport should be designated as a CTFR airport is outside the scope of this review. However, the Commission understands that Alice Springs Airport is designated as a CTFR airport due to it proximity to the Joint Defence Facility at Pine Gap.

Reporting on slot compliance at Sydney Airport

Qantas (sub. 46) is concerned with the costs associated with its reporting requirement on slot usage at Sydney Airport. The Slot Management Scheme operated by Airport Co-ordination Australia (ACA) provides specified aircraft movement at a specified time on a specified day. This operates under the *Sydney Airport Demand Management Act 1997* to limit aircraft movements and balance the needs of airport users and the impact of aircraft operation on surrounding residential areas. To this end, it provides a cap of 80 aircraft movements per hour and a curfew for specific passenger aircraft between 11.00 pm and 6.00 am.

At present, the ACA monitors usage of the slots on a weekly basis and airlines are required to provide reasons to the Slot Compliance Committee, chaired by the Department, as to why services operated outside of their slot. The Committee then

determines whether the reasons provided by the airline for the inability or delay in meeting a specific slot were outside the control of the airline.

Qantas (sub. 46) notes that the standard of reporting required by the Committee requires a Qantas employee to spend 1.5 days per week preparing the reports. This requires the employee to review a considerable amount of data in a seven day turn around period. However, this process had no influence on Qantas's on-time performance and did not provide for penalties for those airlines that failed to meet their slot. It noted that no fines had been levied on an airline since the inception of the scheme (sub. 46).

The slot management scheme was recently reviewed by the ANAO (2007) in its audit report on the implementation of the *Sydney Airport Demand Management Act 1997*. The ANAO (2007) found that the slot compliance scheme was not operating as intended. It also noted that no infringement notices or other penalties had been applied since the inception of the scheme. A number of recommendations were made to improve the operation of the slot management scheme including changes to the collection and evaluation of movement data and a graduated system of penalties for off-slot movements including an increase in fines for persistent offenders (ANAO 2007).

In response to the ANAO report, the Department has indicated that changes to the arrangements are to be finalised by mid-2009. As such, it would be premature for the Commission to comment on these arrangements.

Passenger movement charge

The Northern Territory Government (sub. 45) notes that the passenger movement charge (PMC) had originally been intended as a cost recovery instrument for immigration, customs and quarantine services, but over time has transformed into a general revenue raising instrument (carriers can claim the administration costs associated with the collection and remittance of the PMC). It goes on to say that the PMC is a tax on tourism and a cost to the airlines and calls for the PMC to revert to a cost recovery charge and for timely annual statements of PMC collections to be provided to the aviation and tourism industries (sub. 45).

The Transport and Tourism Forum (sub. DR76) is also concerned about the impact the PMC has on inbound tourism and is opposed to any further increase in the PMC, particularly to fund additional biosecurity measures:

> Industry is united in the belief that the PMC is a flawed and ill-defined tax, having a negative impact on tourism demand with little clear relationship to any defined outcomes in relation to its stated purpose. (sub. DR76, p. 8)

It also points out that the PMC does not operate on a cost recovery basis:

> … it is widely understood that the PMC over-collects relative to the costs it is purported to recover, although this is difficult to verify because its receipts are not hypothecated or pegged against any specific, costed Government activities (as the Green Paper points out). (sub. DR76, p. 8)

Whether the PMC operates on a cost recovery basis or as a general revenue raising instrument is an issue for the Australian Government and outside the scope of this review.

6.5 Other transport issues

Public transport accessibility

The Government of South Australia (sub. 49) raises a number of concerns with the Disability Standards for Accessible Public Transport 2002 — as noted above these standards establish minimum accessibility requirements to be met by the providers and operators of public transport and public transport infrastructure.

These concerns focus on the difficulties faced by business in interpreting and complying with the Standards. The Government of South Australia points to the costs imposed on business in meeting the 100 per cent compliance in the time frames required by the Standards. For example, the level of lighting required in external public transport infrastructure is leading to a considerable increase in operating costs. Some other requirements were unrealistic, such as having disabled taxis meet the required response times of other taxis. Consequently, the implementation and compliance costs contained in the RIS undertaken prior to the introduction of the Standards appear to have been underestimated (sub. 49).

The Government of South Australia (sub. 49) continues that although the introduction of the Standards was meant to create certainty for both providers and users of public transport, it is still unclear in many cases as to what actually constitutes compliance:

> Ambiguity and confusion related to what constitutes compliance have slowed progress and with delays come increased costs. (sub. 49, p. 7)

To improve compliance with the Standards and provide greater certainty, the Government of South Australia suggested the development of a co-regulatory model under the DDA to give legislative force to a formally developed code of practice developed in conjunction with industry and the disability sector.

As noted above, the Disability Standards for Accessible Public Transport 2002 are currently under review. The draft report released in early 2008 noted that in regard to compliance there was a lack of authoritative sources of guidance for transport providers where requirements were ambiguous or where there was conflict with other regulations. Also, there was no 'sign-off' process to assure providers that what they were proposing would be compliant with the Standards prior to making any investment.

To address these concerns, the review put forward a number of options with the preferred approach being to develop mode specific guidelines under the Standards. Following comments from stakeholders, a final report was expected to be provided to the Minister in late 2008 (Allen Consulting Group 2008). A final report is yet to be delivered to the Government.

As these issues are being examined as part of a comprehensive review of the Standards they are not being addressed further in this report.

Security identity cards

The Government of South Australia (sub. 49) refers to the duplication of security clearances required by workers to obtain a Maritime Security Identification Card (MSIC) and an Aviation Security Identification Card (ASIC):

> Both cards require an extensive series of background checks and involve an extended timeframe from application to receiving the Card. In addition, where an operator may require access to both air and sea terminals, both security clearances are required including duplication of the background check. (sub. 49, p. 5)

To remove such duplication, the Government of South Australia (sub. 49) suggests a single transport security identification card. However, the Commission understands that given the different risk profiles of maritime facilities and airports and the different levels of checking required, the introduction of a single identification card is unlikely to be feasible.

In regard to the duplication of security clearances, the Australian Government has established a centralised background checking agency, Auscheck, in the Attorney-General's Department to undertake background checks of those applying for MSICs and ASICs and to reduce duplication and improve consistency in background checking (Attorney-General's Department 2009).

Carbon Pollution Reduction Scheme (CPRS) and fringe benefits tax

The Tourism and Transport Forum (sub. DR76) raises the issue of the proposed CPRS distorting the market for urban transport by increasing the cost for public transport users while protecting motorists from increased petrol prices.

It also raises the issue of the fringe benefits tax arrangements relating to salary packaged vehicles which provides the incentive to drive further to lower the fringe benefits tax payable. This also creates a distortion relative to public transport use.

The CPRS is yet to be implemented and it is unclear as to how it will be implemented. The issue of fringe benefits tax on salary packaged vehicles is outside the scope of this review and is being examined by the Review of Australia's Future Tax System.

NTC and passenger transport

The Tourism and Transport Forum (sub. DR76) proposes that the NTC be provided with additional funding to take on the additional task of regulatory reform in passenger transport.

Widening the role of the NTC is a policy matter for Government.

7 Education and training

Key points:

- The education and training sector is subject to heavy regulatory burdens, including excessive reporting requirements, slow accreditation processes (Vocational Education and Training (VET) sector), jurisdictional inconsistencies and overlaps, and regulatory frameworks which do not reflect developments in the structure of the education sector.
- The education and training sector is undergoing significant regulatory reform, which provides an opportunity to reassess and reduce these burdens:
  - in the higher education and VET sectors, the Bradley Review Report was released in late 2008, and the Government has recently responded by announcing its intention to implement major reforms to the regulatory architecture of the sectors
  - in the schools sector, work is ongoing to implement a nationally consistent National Education Agreement through COAG
  - in relation to non–government schools, a new funding agreement for 2009–2012 was introduced in late 2008, and work on its implementation continues
  - a review of international education and the Educational Services for Overseas Students legislation was announced in August 2009.
- Given the Australian Government's commitment to changes to the regulatory and institutional frameworks in the education and training sector, it is not appropriate for the Commission to recommend specific actions in response to many of the concerns that have been raised with this review.
- The Commission encourages state and territory authorities to work cooperatively with the Commonwealth to progress the necessary reforms to implement the proposed Tertiary Education Quality and Standards Agency. The Agency is intended to encourage best practice, streamline and simplify current regulatory arrangements to reduce duplication, and provide for national consistency.
- Reforms to the regulatory frameworks must in particular address the excessive reporting obligations imposed on business. The common languages and definitions introduced by Standard Business Reporting should be utilised as much as practicable and a supplementary taxonomy for other data required in the education and training sector should be developed. Electronic reporting and secure online sign–on to the agencies involved should also be introduced.

7.1 Industry background

The education and training industry in Australia accounted for around 4.5 per cent of Australia's GDP ($45 billion), 6 per cent of exports ($14.2 billion), and 7.5 per cent of employment (808 800 persons) in 2007–08 (ABS 2009a; 2009b; DFAT 2008). The strength of the sector as an exporter is particularly striking, with educational services the third largest export industry behind coal and iron ore. The industry is made up of four diverse sectors which constitute major activities in their own right – universities, vocational education and training (VET), schools and providers of English language intensive courses for overseas students (ELICOS).

Schools

The schools sector in Australia can be divided into government and non-government schools, the latter comprising Catholic and independent schools. In 2008, there were about 9500 schools in Australia, of which 70 per cent were government schools, and 30 per cent were non–government schools, with close to 3.5 million full time school students (ABS 2009c). The schools sector is a very large employer in the economy. In 2008, there were close to 250 000 full-time equivalent employees in Australian schools — 65 per cent in government schools and 35 per cent in non–government schools. It is also a rapidly growing sector. From 1998 to 2008, there was a nearly 20 per cent increase in the number of staff (ABS 2009c).

Over the last ten years, there has been a trend in enrolment towards non-government schools, with 65 per cent of students enrolled in government schools in 2008, down from 70 per cent in 1998. While the number of students enrolled in government schools has grown only one per cent in this period, the non–government sector has experienced a 22 per cent increase (ABS 2009c).

The non–government schools sector is comprised of 40 per cent independent schools, with the Catholic sector making up the remaining 60 per cent. In 2008, there was just over 1000 independent schools, which accounted for nearly 15 per cent of Australian school enrolments (ISCA, sub. 26, p. 1).

Universities

In Australia there are 37 public and 2 private universities.[1] Australia's universities have an annual turnover of approximately $17 billion, one million students and

[1] There is also one approved branch of an overseas university.

96 000 full–time equivalent employees (sub. 31, p. 3; DEEWR 2008c). In 2007, just over 40 per cent ($9.3 billion) of funds for public universities came from government in the form of grants and other financial assistance. Another 13 per cent ($2.3 billion) of funding was from HECS–HELP and FEE–HELP funds, which are generally paid by Government in the first instance, but for which students are ultimately liable (DEEWR 2008d). Universities are also the major contributor to education services exports, accounting for 34 per cent of overseas student enrolments in 2008 (180 000 persons) (table 7.1).

Universities play a vital role in determining Australia's broader economic performance through the higher productivity of university–trained workers and returns from university research and innovation (sub. 31, p. 3).

Vocational education and training

Vocational education and training (VET) comprises public and private registered training organisations (RTOs). Australia has approximately 4400 RTOs, of which 3100 are private providers (NCVER 2007a). In 2003, approximately 2.2 million students undertook training with private RTOs, compared to 1.7 million at public institutions (primarily TAFE institutes) (Harris et al. 2006). The VET sector is second behind universities in the overseas student market, and it is the fastest growing sector in terms of overseas student enrolments and commencements (table 7.1).

The Australian VET system is characterised by its flexibility, offering courses and training in a manner responsive to students' circumstances and the needs of employers. In 2007, 11 per cent of the population between 15 and 64 participated in some form of VET, with 88 per cent of students studying part–time. (NCVER, 2007b). Further, VET competencies and qualifications cover around 80 per cent of occupations in Australia (Hoeckel et al. 2008). The VET system plays a vital role in enhancing productivity, through skills acquisition including in emerging and expanding industries such as 'green collar' industries, biotechnology, childhood education and aged care services (Gillard 2009b).

English language intensive courses for overseas students

The English language training sector serves only overseas students and does not have a domestic education presence. The English language intensive courses for overseas students (ELICOS) sector has grown considerably over the last 20 years to over 240 accredited providers by 2007 (English Australia 2009). English language

education accounts for about 10 percent ($1.5 billion) of the total education export market (sub. 14, p. 2).

In 2008, about 30 per cent of commencing overseas students holding student visas in Australia were undertaking English language courses (almost 100 000 students). A further estimated 60 000 students undertake English language courses on other visas, primarily visitor or working holiday visas (sub. 14, p. 2). The ELICOS sector ranks third behind universities and VET institutions in terms of overseas student enrolments, with about 125 000 enrolments in 2008 (table 7.1).

Table 7.1 International student enrolments and commencements by sector in 2008

	Enrolments			*Commencements*		
Sector	*Number*	*% of Total*	*Growth on 2007 (%)*	*Number*	*% of Total*	*Growth on 2007 (%)*
Higher Ed.	182 770	33.6	4.7	78 070	24.1	11.8
VET	175 461	32.3	46.4	106 180	32.7	46.1
ELICOS	125 727	23.1	23.4	99 312	30.6	22.8
Schools	28 798	5.3	7.1	14 537	4.5	6.6
Other	31 142	5.7	13.6	26 116	8.1	14.3
Total	**543 898**	**100**	**20.7**	**324 215**	**100**	**24.8**

Source: AEI (2009).

7.2 Overview of regulations

Independent schools

Independent schools operate in a complex regulatory environment, which encompasses educational standards, financial accountability, corporate accountability and professional accountability of teachers and administrators.

State and territory registration requirements provide the overarching regulatory framework applying to independent schools. They include operational, financial, educational and governance standards.

In addition, independent schools are subject to extensive educational and financial reporting requirements arising from schools' receipt of Commonwealth funding. These requirements are set out in the new *Schools Assistance Act 2008* ('the Act') which governs independent schools' funding relationship with the Australian Government for the 2009–2012 period. The Act includes a set of national school

performance requirements consistent with the National Education Agreement (NEA), a new funding agreement between the Australian Government and the state and territory governments, which came into effect on 1 January 2009. Under this agreement, schools are required to:

- participate in national student assessments comprising full cohort, annual literacy and numeracy testing and less frequent sample assessments
- participate in national reports on schooling outcomes, including to COAG
- provide nationally comparable individual school performance information which will be published by the Australian Curriculum, Assessment and Reporting Authority (ACARA)
- provide plain language reports to parents
- publish school annual reports for parents and the community (DEEWR, sub. DR88).

The new Act removes many of the conditions specified for Commonwealth funding under the *Schools Assistance Act (Learning Together — Achievement Through Choice and Opportunity) 2004*, for example a functioning flagpole with an Australian flag, two hours of physical activity per week for primary and junior secondary students and reporting to the Minister on expenditure on professional learning of teachers. Also, the Australian Government has provided a greater commitment to increased transparency, both in outcomes and outputs, and in school financial information. For example, the Government has committed to ranking schools by NAPLAN (National Assessment Program Literacy and Numeracy) results, and providing the background characteristics of the school and student body (Gillard 2009a).

Many independent schools are also corporate entities under the Corporations Act, and must meet the same standards of business operation and are subject to the same financial and governance accountabilities as corporations, for example, submitting financial reports to the Australian Securities and Investments Commission.

The reporting and compliance requirements may be disproportionately burdensome for independent schools, especially small independent schools, since they often do not have the support of centralised administration (such as Catholic dioceses) which are able to leverage economies of scale in managing the costs of regulation.[2]

[2] However centralised administrations may withhold some funding for administrative purposes.

Higher education

Nearly all universities have been established under state and territory legislation and must meet auditing and accountability requirements applying to public entities in their particular jurisdiction.[3] However, since 1973, public funding of universities has been primarily provided by the Commonwealth, which has attached conditions on that funding, including a range of reporting and accountability requirements under the *Higher Education Support Act 2003* (the Act) and associated guidelines and funding agreements made under the Act. Quality and accountability requirements include financial viability, quality, fairness, provision of information to students, tuition assurance and contribution and fee requirements.

Australian universities accredit their own courses (subject to professional accreditation where relevant) and bear primary responsibility for the quality and standards of the degrees they award. In addition to this institutional self-regulation, universities are subject to quality audit through the Australian Universities Quality Agency (AUQA). For other types of higher education providers the main elements of external quality assurance are the Australian Qualifications Framework (AQF) and the National Protocols for Higher Education Approval Processes. The protocols require that courses accredited to other higher education providers must be comparable in requirements and learning outcomes to a course at the same level in a similar field at an Australian university. A summary of the higher education quality assurance framework is provided in box 7.1.

VET/industry skills

In the VET sector, responsibility for registering, monitoring and auditing registered training organisations (RTOs) is primarily the responsibility of the states and territories, but they operate under nationally agreed standards and operating protocols within in the Australian Quality Training Framework (AQTF). In addition to these standards, state and territory Registering Bodies have agreed to a number of national guidelines covering audits, complaints handling, risk management, industry involvement and managing non-compliance.

The National Quality Council (NQC), which is a body of the Ministerial Council for Vocational and Technical Education (MCVTE), oversees national quality arrangements such as AQTF and participates in policy development.

[3] The Australian National University was established under its own Commonwealth legislation and the Australian Catholic University was established under Corporations Law.

Box 7.1 **Summary of Higher Education Quality Assurance Framework**

Qualifications: *Australian Qualifications Framework* (AQF) specifies qualification titles, their characteristic learning outcomes and pathways to those outcomes. Institutions refer to the AQF in developing courses. Institutions and professional bodies recognise and evaluate Australian and overseas credentials (with advice from the National Office of Overseas Skills Recognition).

Accreditation and approval: *National Protocols for Higher Education Approval Processes* set out criteria and processes for recognising universities and other types of higher education institutions. The *National Protocols for Higher Education Approval Processes* also set out procedures for the accreditation of higher education courses where the institution is not authorised for self–accreditation.

Education Services for Overseas Students Act 2000 governs the approval of courses and institutions offering courses to overseas students within Australia.

Institutions approved for Commonwealth funding and assistance must meet the requirements of the *Higher Education Support Act 2003*, undergo a regular quality audit and meet other quality requirements.

Professional bodies accredit courses on a compulsory or voluntary basis in some disciplines.

Institutional self-regulation: As bodies that are responsible for accrediting their own courses, universities and certain other institutions approve, monitor and review the courses they offer through internal peer review and quality assurance.

Other institutions apply internal quality assurance practices subject to having their courses accredited by state and territory governments under the *National Protocols*.

Institutions may follow voluntary codes of practice or collaborate to improve practice.

Independent quality audit: Australian Universities Quality Agency conducts regular quality audits of universities, some other institutions and government accreditation authorities.

Information provision: Official registers of approved institutions and courses.

- Collection of data for performance indicators, e.g. Graduate Destination Survey and Course Experience Questionnaire.
- Consumer information and websites (e.g. Study in Australia, Going to Uni) backed by requirements of the *Higher Education Support Act 2003*.

External monitoring: Various monitoring and annual or other reporting requirements associated with accreditation, approval or audit.

Source: Bradley et al. (2008).

The AQTF was revised in 2007 to make it more outcome focused. The changes aimed to streamline the regulatory system by adopting a risk–based approach to managing the quality of training and assessment, an outcomes-based auditing model, and nationally agreed quality indicators. However, a recent evaluation of the implementation of the new arrangements conducted by KPMG indicated that there was still some way to go to achieve national consistency in the application of the AQTF and identified the need to strengthen the risk–management approach and outcomes auditing model to enable greater efficiency and reduce regulatory burdens (KPMG 2008).

Although each state and territory registering body accepts the registration decisions made by registering bodies in any other jurisdiction, RTOs operating in multiple jurisdictions need to comply with different jurisdiction-specific requirements that apply in addition to the AQTF standards. To avoid multiple audits in different jurisdictions, training providers operating in more than one jurisdiction have the option of having their registration and audit arrangements managed by the National Audit and Registration Agency (NARA). However, to date, three jurisdictions have not delegated responsibility to NARA (TVET Australia, sub. 39, p. 6), so the potential for multiple audits across jurisdictions remains.

The regulation of Group Training Organisations (GTOs) — which are employers of Australian apprentices — is also the responsibility of states and territories. A national quality process for registration under the National Standards for Group Training Organisations 2006 allows governments to determine the capacity of GTOs to deliver Group Training services and their eligibility for Australian Government and state and territory government funding.

The Australian Government body, Trades Recognition Australia (TRA), provides skills recognition services, including domestic skills assessments for certain trades and pre migration skills assessments for potential migrants to Australia under the *Migration Act 1958*.

International education

In addition to these regulations applying generally to universities, VET and other providers, the provision of education services to overseas students is regulated through the Education Services for Overseas Students (ESOS) legislation. The ESOS legislation provides the sole framework governing providers of English language courses for overseas students, and acts alongside other quality assurance frameworks for universities, VET and schools.

The main components of the ESOS framework are the *Education Services for Overseas Students Act 2000* (ESOS Act); the ESOS Regulations 2001; and the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 (National Code). The ESOS Act regulates the provision of education services to overseas students including marketing and recruitment, student support and student visa management. It principally seeks to ensure that overseas students receive the tuition for which they have paid.

Providers intending to deliver courses to overseas students must obtain registration on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS). The National Code provides nationally consistent standards for the conduct of registered providers and the registration of their courses. Providers are obliged (under the *ESOS (Registration Charges) Act 2000*) to pay an annual fee to remain registered on the CRICOS and also to pay annual contributions and special levies (under the *ESOS (Assurance Fund Contribution) Act 2000*) to an Assurance Fund which provides protection for students if their provider, or a substitute provider, cannot teach the course they have paid for. Under the ESOS Act, the designated authorities of the states and territories are responsible for recommending approved providers to the Commonwealth for registration. Providers will only be recommended for registration where they comply with the requirements of the National Code. Subsequently, the Commonwealth undertakes additional compliance checks under the ESOS Act before granting ultimate approval for registration.

A review into international education and the ESOS Act was announced by the Minister for Education, Employment and Workplace Relations in August 2009 (see section 7.4).

7.3 Concerns — independent schools

Concerns are raised by the Independent Schools Council of Australia (ISCA, sub. 26) about various aspects of the regulatory arrangements for independent schools. These are:

- inconsistency and/or duplication of regulation between the Australian Government and state and territory governments
- duplicative and burdensome registration requirements and regulations governing overseas students
- redundancy of the Financial Questionnaire
- unnecessary collection of data on students' background characteristics.

Many of these concerns are not new, having been raised in ISCA's submission to the Taskforce on Reducing Regulatory Burdens on Business (Regulation Taskforce 2006).

Inconsistency and/or duplication of regulation between the Australian Government and state and territory governments

ISCA is concerned about the duplication between Australian Government reporting requirements and those of state and territory governments. This results from the states and territories introducing separate reporting and regulation regimes as a means of meeting the Commonwealth requirements under the regime which governed schools from 2005 to 2008 (sub. 26, p. 7).

Assessment

This issue was raised in the Report of the Taskforce on Reducing Regulatory Burdens on Business (Regulation Taskforce 2006), which recommended the rationalisation of Australian Government and state and territory government reporting requirements for independent schools (recommendation 4.37).

Work is underway as part of the National Education Agreement (NEA) to rationalise the reporting requirements for schools. The NEA sets out a nationally consistent performance reporting framework designed to measure achievement of objectives and outcomes. This framework is consistent with that under the Schools Assistance Act ensuring the reporting requirements apply equally to government and non-government schools.

In addition, funding and regulation across the government and non–government schooling sectors will be reviewed and bilateral agreements between the Australian Government and the state and territory governments developed.

There are also other reforms to the schools sector underway which have the potential to impact on the regulatory environment. In particular, the Australian Curriculum, Assessment and Reporting Authority (ACARA), has recently been established. ACARA is tasked with the development of national curriculum, assessment and reporting arrangements (DEEWR, sub. DR88).

These reforms should go some way to addressing duplication between the Australian, state and territory governments. It is therefore appropriate that an assessment of the regulatory burden imposed by inconsistencies between Australian

Government and state and territory regulation be left until after the new system is fully implemented.

Duplicative and burdensome regulations governing overseas students

ISCA states that the regulatory framework governing overseas students is burdensome and duplicative. In particular, ISCA submits that the requirement that providers wishing to enrol overseas students must have separate registration on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) — and comply with *The National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* (the National Code) — is redundant, since independent schools must already comply with strict state government registration processes. Further, complying with all requirements of the *Education Services for Overseas Students Act 2000* (ESOS Act) requires a dual system of student monitoring in areas such as attendance and monitoring of student progress (sub. 26, p. 6–7).

Assessment

Overseas students are vulnerable in the education and training marketplace since they are subject to migration control, may not be able to evaluate services before enrolling, and if wronged, may not be able to pursue remedies through the Australian court system. The ESOS Act aims to protect the interests of overseas students and Australia's international reputation as a high quality, reliable education provider by ensuring that adequate consumer protection and support services exist. The ESOS Act also aims to ensure that education and training services for overseas students meet nationally consistent standards and that education and training providers behave in an appropriate manner.

The National Code and state and territory school registration requirements have different policy objectives and therefore contain different requirements. In particular, the National Code plays a consumer protection role for international students, stipulating dispute resolution and appeals processes, regulating advertising to overseas students, as well as supporting Commonwealth Government migration laws. These would not be adequately addressed by the state and territory schools registration process. The Commission considers that it is necessary to have a separate registration system for providers of education to international students due to overseas students' higher level of vulnerability as compared to local students.

Under the National Code, providers must systematically monitor students' course progress and attendance, and be proactive in notifying and counselling students who

are at risk of failing to meet 80 per cent attendance, or not making satisfactory course progress. These systems are in place to support the integrity of the Commonwealth Government's migration laws by ensuring students complete their course within its expected duration.

One method of addressing duplication that arises from the ESOS Act would be to bring National Code requirements for monitoring student attendance and course progress in line with state and territory requirements for domestic students. However, the state and territory attendance and course progress monitoring requirements for domestic students may not meet the standard needed to maintain the integrity of migration laws. Moreover, the Commission believes this would not be feasible in the short term due to the inconsistency in requirements across jurisdictions.

Nevertheless, much of the data collected for domestic purposes should go at least some way to meeting the needs for data in relation to overseas students. As part of its NEA forward work agenda, DEEWR should investigate streamlining the attendance reporting requirements between different jurisdictions, and between domestic and overseas students. In line with recommendation 7.1, this process should be consistent with the methodology and principles of the SBR initiative. The recently announced review into international education and the ESOS Act (see section 7.4) may be another forum through which these concerns can be addressed.

Redundant Financial Questionnaire

ISCA raises the concern that the Financial Questionnaire independent schools are required to complete is redundant, since the questionnaire is not required to prove a school's financial standing, or to account for the spending of government school funds on the agreed purpose (sub. 26).

Assessment

The Financial Questionnaire was introduced to collect school financial data for non–government schools with the purpose of determining the allocation of funding under a resources–based model, which took into account school income. Since 2001, the funding model has been 'needs–based', using socio–economic data from the ABS national census. From 2001–2008 therefore, the financial questionnaire was redundant — it was not used to determine funding for independent schools or for any other discernible purpose. The Regulation Taskforce (2006) could not find a sound basis for retaining the Financial Questionnaire and recommended that it be abolished (recommendation 4.39).

However under the *Schools Assistance Act 2008*, the Financial Questionnaire will be used to determine the financial health of schools. This is part of a newly introduced requirement which requires that schools be 'financially viable' to receive Government funding. DEEWR is currently reviewing and amending the Financial Questionnaire to include fields necessary to obtain the data required for the financial health assessment (box 7.2), as well as to streamline and reduce other reporting requirements.

In the draft report, the Commission questioned the efficacy of using the Financial Questionnaire to ensure that schools are financially viable, and recommended that the Financial Questionnaire be abolished.

However, in response to the draft report, Christian Schools Australia presented a differing view with that of ISCA, which supported the abolition of the financial questionnaire. Christian Schools Australia states (sub. DR76, pp. 3–4):

> Although most schools are required to prepare and lodge an annual audited financial statement this is by no means a requirement for all schools … [and there] can be significant differences in the presentation of these reports as a result of differing disclosure regimes … Despite the administrative burden that is imposed by the completion of the Financial Questionnaire we do not support its abolition at this time …

Moreover, DEEWR submits in response to the draft report (sub. DR88, section 7.1):

> The Financial Questionnaire is essential to enable the financial health assessments to be undertaken … There is currently no other source from which the data required for assessing the financial performance of schools, using the financial indicators noted in the review's draft report [box 7.2], can be obtained.

The Commission accepts that the current policy requires the collection of such financial information from schools, but urges DEEWR to use the data that are already reported by schools as much as possible, including the census of non-government schools.

In particular, DEEWR should ensure that any data already reported by schools should not be duplicated in the Financial Questionnaire and unnecessary items should be removed. Further, DEEWR should ensure that the reporting process in consistent with recommendation 7.1, namely that any data collection should be undertaken consistent with the principles and methodologies of Standard Business Reporting (SBR).

Box 7.2 **Financial health assessment indicators**

A new 'financial viability' requirement for independent schools was introduced with the *Schools Assistance Act 2008*. From 2011, independent schools will be assessed on the following financial health indicators:

1. Student–teacher ratio
2. Enrolment change on previous year
3. Percentage change in recurrent income compared to percentage change in Average Government School Recurrent Cost
4. Change in net tuition income per student
5. Salaries as a percentage of recurrent income
6. Total borrowings as a percentage of recurrent income
7. Interest cover – earnings before interest depreciation and amortisation as a percentage of interest expense
8. Principal and interest as a percentage of recurrent income
9. Cash surplus as a percentage of recurrent income
10. Recurrent income less recurrent expenditure as a percentage of recurrent income
11. Current assets as a percentage of current liabilities
12. Government grants as a percentage of recurrent income
13. Bad and doubtful debts as a percentage of gross fees

Source: DEEWR (2008b).

Collection of students' background characteristics

ISCA also raises an ongoing concern regarding the heavy burden of collecting data on student background characteristics, which they describe as 'unnecessary' (sub. 26). These data are collected for the Ministerial Council on Education, Employment, Training and Youth Affairs to enable nationally comparable reporting of the progress of students with particular background characteristics, on the achievement of national goals and targets at various points of schooling. These data consist of:

- gender
- indigenous status
- socioeconomic background
- language background
- geographic location
- disability.

The Commission's draft report noted that the issue was canvassed in the Report of the Taskforce on Reducing Regulatory Burdens on Business (Regulation Taskforce 2006), which recommended that DEEWR should implement sampling or better target data collections within the school system (recommendation 4.38 in Regulation Taskforce, 2006). The Commission therefore urged DEEWR to act on the Taskforce's recommendation or clearly explain to the stakeholders the reasons for not doing so.

In response to the Commission's draft report, DEEWR states (sub. DR88, pp. 4–5):

> This information is *more* important, not less, than under the previous funding arrangements [Commission's emphasis]. Student background information together with student attainment information provides the rich data which is needed for the government to target funding programs appropriately and assess the impact of these programs on particular groups of students … sampling is not an acceptable alternative, as this data is required for both individual diagnostic reporting and broader level reporting on literacy and numeracy outcomes of the full cohort of students.

The collection of individual–level student background characteristics is indeed consistent with the Government's commitment to increased transparency, including providing relevant data about school context (Gillard 2009a). However, the Commission cautions that such a rich level of data will be difficult to obtain and the integrity of the data difficult to verify without ensuring the efficiency and suitability of the systems in place for the collection of the data. For example, problems are likely to arise both in terms of response rates and data quality for data that are collected by a paper survey via forms taken home, to be answered by parents, and returned by students. The likelihood of problems in consistency of interpretation of questions, and reliability of responses on personal matters by parents appear to be significant. Errors in compiling and collating data from such a vast number of individual paper forms also seem very likely.

The Commission urges DEEWR to use existing sources of data wherever possible, for example socio–economic data from the ABS, and to prioritise the implementation of systems and processes which will facilitate the efficient collection of the data, for example by following the principles and practices of the SBR financial reporting taxonomy.

Other concerns

ISCA (sub. 26, pp. 4–5) also raise other concerns relating to new provisions in the *Schools Assistance Act 2008*:

- the new provision requiring non–government schools to be 'financially viable' in order to receive government funding inadvertently places excessive reporting and corrective actions[4] on the schools which can least afford it
- the unspecified reporting requirements relating to the 'funding sources' of non-government schools may lead to added administrative burden.

The Commission considers that since these provisions of the NEA have not yet been fully implemented, and work is still progressing on these issues by DEEWR, an assessment of these issues is best left for a later date.

7.4 Concerns — higher education, VET and international education

Submissions raise a large number of concerns about aspects of the regulation of higher education, VET and international education. A summary of concerns relating to these three broad areas is set out below. These individual concerns have not been assessed in this report because of the recent Bradley Review of Higher Education and major reforms being implemented by the Australian Government in response to that review (see below).

Higher education

Specific concerns include:

- overlap between Commonwealth and state/territory responsibilities and requirements, including quality assurance activities, and a lack of coordination by regulators across jurisdictions (Universities Australia, sub. 31; NSW Department of Education and Training, sub. 48)
- within jurisdictions there is a lack of coordination across different portfolios (Universities Australia, sub. 31)
- duplicative, inconsistent or unnecessary reporting obligations and a lack of standardisation in information requests (Universities Australia, sub. 31)

[4] Schools which are not able to show sufficient financial viability are required to engage the services of an independent auditor or certified practising accountant to conduct an assessment of the school's finances, governance structure and practices and develop a management plan, at the school's own cost.

- a lack of accountability of (non-university) publicly funded education providers (NSW Department of Education and Training, sub. 48)
- national protocol rules for use of the 'university' title are barriers to entry and some entities already granted the title may not meet the tests if being assessed as a new entrant (ACPET, sub. 32)
- a blurring of boundaries between higher level vocational qualifications and traditional bachelor degrees and the need for clearer and more flexible pathways between higher education and VET (Universities Australia, sub. 31; ACPET, sub. 32)
- new regulations that have major compliance cost implications have been introduced with little or no consultation (Universities Australia, sub. 31)
- concerns that the Bradley Review recommendations may increase the net compliance burden on universities (Universities Australia, sub. 31).

VET sector

Specific concerns include:

- complexity and a lack of transparency of regulatory requirements and clarity of responsibilities (TVET Australia, sub. 39; ACPET, sub. 32)
- regulations are not applied in an equitable and consistent way — public universities and TAFEs are exempt from having to comply with several areas of regulation, providing a competitive advantage relative to private providers (ACPET, sub. 32). On the other hand, the NSW Department of Education and Training (sub. 48) submits that the current requirement that publicly owned VET providers meet the same financial accountability and annual reporting requirements as private providers is unnecessary
- excessive prescriptiveness in rules and the way they are administered. For example, VET rules stop innovative providers from developing courses to meet changing needs and private providers, in particular, are slowed by training package strictures and accreditation rules (ACPET, sub. 32)
- multiplicity of audit and supervision requirements (ACPET, sub. 32)
- duplicative and increasing reporting obligations (NSW Department of Education and Training, sub. 48) and some data collections are of little benefit (ACPET, sub. 32)
- insufficient sharing of information between registering bodies (TVET Australia, sub. 39)

- inconsistencies and duplication across jurisdictions in requirements, including for registration, auditing and monitoring of provider performance (TVET Australia, sub. 39; NSW Department of Education and Training, sub. 48; ACPET, sub. 32; Service Skills Australia, sub. 21)
- lack of integration of auditing activities is resulting in duplication between AQTF audits and other VET-related audits and audit systems are too input focused (rather than focusing on performance/outcomes) (TVET Australia, sub. 39; ACPET, sub. 32)
- inefficiencies in administration of requirements, including lack of timeliness, inadequate staffing, inconsistent decision making, and a lack of technical expertise (ACPET, sub. 32)
- some types of entities do not have fair opportunities or representation in consultations (ACPET, sub. 32).

International education

Specific concerns include:

- lack of consistency in the implementation of the ESOS Act Framework across state and territory bodies and a lack of clarity in the shared responsibilities between the Commonwealth and states and territories (NSW Department of Education and Training, sub. 48)
- duplication and inconsistency between ESOS Act, Immigration Act and state and territory legislation (TVET Australia, sub. 39; English Australia, sub. 14; NSW Department of Education and Training, sub. 48)
- prescriptive regulations supporting the ESOS Act are undermining the outcomes focus that the AQTF Standards are trying to achieve (TVET Australia, sub. 39)
- some provisions of the ESOS Act are anti-competitive and contrary to the principle of competitive neutrality — universities and other public institutions are exempt from certain requirements that apply to private institutions (English Australia, sub. 14)
- compliance burden relating to assessing/reporting the visa status of international students and the management of appeals processes (Universities Australia, sub. 31)
- insufficient recognition and reward (by way of reduced regulatory obligations) for lower risk, quality providers, at the same time as there is insufficient targeting or enforcement in relation to high risk providers (South Australian Government, sub. 49; ACPET, sub. 32).

Recent reviews and current reform activity

There have been several reviews in recent years that have considered aspects of the regulatory arrangements for higher education, VET and international education, including the scope to streamline requirements and reduce red tape. Of most significance is the Bradley Review of Higher Education conducted in 2008. Other reviews have included, for example:

- an evaluation of the implementation of the Australian Quality Training Framework by KPMG (2008)
- the 2006 Regulation Taskforce Report
- the 2006 review of university reporting requirements by PhillipsKPA and Lifelong Learning Associates, commissioned by the Australian Vice-Chancellor's Committee
- an independent evaluation of the ESOS Act, including consideration of the effectiveness and efficiency of the regulatory framework, conducted in 2004 (a report was released in June 2005) (PhillipsKPA and Lifelong Learning Associates 2005).

A review into international education and the ESOS Act was announced by the Minister for Education, Employment and Workplace Relations in August 2009. The Review, to be headed by The Hon Bruce Baird, will consider the need for enhancements to the ESOS legal framework in four key areas:

- Supporting the interests of students
- Delivering quality as the cornerstone of Australian education
- Effective regulation
- Sustainability of the international education sector. (Gillard 2009e)

After consulting with stakeholder groups, including inviting submissions in response to an issues paper, an interim report will be presented to COAG in November 2009, with a final report expected in early 2010. In parallel with this review, COAG is developing a comprehensive national International Student Strategy (COAG 2009b).

The Department of Education, Employment and Workplace Relations (DEEWR) is currently undertaking the project *Future Directions for Quality Oversight of Tertiary Education Services in Australia*. This project is considering the impact on quality assurance arrangements of proposed reforms in VET directed at student and business centred funding and to develop models for national regulation of VET providers and national accreditation of VET qualifications and courses. A review of

existing VET provider approval processes (for those providers applying for VET FEE-HELP[5]) is also currently being undertaken.

The recommendations of another recently completed review — *Review of the Currency and Effectiveness of the National Standards for Group Training Organisations 2006* — were presented to the National Senior Officials Committee in May 2009 and are the subject of further consideration as part of broader consultations on national regulatory arrangements for VET (COAG 2009b). Amongst other matters, this review considered the need for the National Standards for Group Training Organisations (GTOs) to be brought into line with the current focus on outcomes-based quality frameworks and concerns that GTOs that also operated as registered training organisations were subject to unnecessary duplication of auditing requirements.

Bradley Review of Higher Education

In March 2008, the Minister for Education, Employment, Workplace Relations and Social Inclusion initiated a Review of Australian Higher Education. The Review was led by an expert panel chaired by Emeritus Professor Denise Bradley. The Review Panel was asked to examine and report on the future direction of the higher education sector, its fitness for purpose in meeting the needs of the Australian community and economy and the options for reform, including changes to regulation.

One of the terms of reference for the review was to establish the place of higher education in the broader tertiary education system, especially in building an integrated relationship with VET. The definition of 'higher education' (as used by the Review) is based on levels of qualification and historically has essentially applied to universities. But increasingly there has been a blurring of boundaries, for example, between higher level qualifications offered by VET and bachelor degrees offered by universities. The Review recognised this and the need for closer links between VET and higher education. A key recommendation (see below) is to consolidate responsibility for regulation of the whole tertiary system at a national level to ensure that it is dealt with in a more integrated and streamlined way.

With the exception of English Australia (sub. 14), all the participants that made submissions to this review commenting on regulation of the higher education and VET sectors, also participated in the Bradley Review's consultation process.

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5 VET FEE-HELP is a Government loan scheme that assists eligible students undertaking certain VET courses of study with an approved VET provider, to pay for all or part of their tuition costs.

The Review Panel's Final Report was released in December 2008. The Government has accepted most of the Report's recommendations and, if fully implemented, these decisions will result in major changes to the regulatory and institutional framework impacting on tertiary education and training providers (see below).

Key findings and recommendations relating to institutional and regulatory reform

The Review Panel found the current regulatory arrangements for higher education to be complex, fragmented and inefficient (Bradley et al. 2008, p. 115). In particular:

- the quality assurance framework is too focused on inputs and processes and does not give sufficient weight to assuring and demonstrating outcomes and standards
- different and overlapping frameworks regulate the quality and accreditation of higher education institutions, the operation of VET providers, consumer protections for overseas students studying in Australia and institutional approval for the purposes of student loan assistance
- responsibility is divided between the Commonwealth and the states and territories, with different units of government responsible for various regulatory frameworks in each. Arrangements for mutual recognition of providers and courses operating across state and territory boundaries are inefficient and do not operate effectively
- within higher education the framework is applied unevenly so that not all providers are reaccredited on a regular basis
- reliable comparative information to underpin student choice of courses and institutions is limited.

The Review Panel recommended that the Australian Government, after consultation with the states and territories, assume full responsibility for the regulation of tertiary education and training in Australia by 2010 (recommendation 43) and adopt a framework for higher education accreditation, quality assurance and regulation featuring (recommendations 19, 20, 21, 23):

- accreditation of all providers (including universities) based on their capacity to deliver on core requirements including:
  - an Australian Qualifications Framework (AQF) with enhanced architecture and updated and more coherent descriptors of learning outcomes
  - strengthened requirements for universities to carry out research in the fields in which they teach

  - new quality assurance arrangements involving the development of standards and implementation of a transparent process for assuring the quality of learning outcomes across all providers of higher education (work on the development of the new arrangements to be commissioned and appropriately funded by the Australian Government)
- an independent national regulatory and quality assurance agency responsible for regulating all types of tertiary education (including VET and higher education).

In the higher education sector the regulatory agency would:

- accredit new providers, including new universities
- accredit courses where the provider is not authorised to do so
- periodically reaccredit all providers including the existing universities on a cycle of up to 10 years depending on an assessment of risk (with authority to impose conditions, require follow-up action or to remove a provider's right to operate)
- carry out shorter-cycle quality audits of all providers, focused on the institution's academic standards and the processes for setting, monitoring and maintaining them. This would include auditing the adoption of outcomes and standards-based arrangements for assuring the quality of higher education
- register and audit providers for the purpose of the *Education Services for Overseas Students (ESOS) Act 2000* protecting overseas students studying in Australia and assuring the quality of their education
- provide advice to government on quality, effectiveness and efficiency and higher education issues referred to it or on its own initiative
- supervise price capping arrangements in courses offered only on a full-fee basis where public subsidies do not apply.

Other specific recommendations relating to the regulatory framework, included:

- that more rigorous criteria be developed for accrediting universities and other higher education providers based around strengthening the link between teaching and research as a defining characteristic of university accreditation and reaccreditation (recommendation 22)
- that the AQF be reviewed to improve and clarify its structure and qualifications descriptors and the ongoing responsibility for a revised framework should rest with the national regulatory body (recommendation 24)
- a single ministerial council be established with responsibility for all tertiary education and training (recommendation 46)

- all accredited higher education providers be required to administer the Graduate Destination Survey, Course Experience Questionnaire and the Australasian Survey of Student Engagement from 2009 and report annually on the findings (recommendation 7)
- the regulatory and other functions of Australian Education International (AEI) be separated, with the regulatory functions becoming the responsibility of the independent national regulatory body (recommendation 11) and that the industry development responsibilities of AEI be revised and be undertaken by an independent agency which is accountable to Commonwealth and state and territory governments and education providers (recommendation 12).

The Review Panel also suggested that:

- higher education providers should be required to provide annual data on student numbers and characteristics as a condition of their accreditation
- VET and higher education providers should continue to enhance pathways for students through the development and implementation of common terminology and graded assessment in the upper levels of vocational education and training
- the Australian Government should commission, by 2012, an independent review of the implementation of the amendments made in 2007 to the *Education Services for Overseas Students Act 2000*.

In the regulatory and institutional model proposed by the Bradley Review, Commonwealth Government departments would remain responsible for direct policy advice on funding, program, quality and regulation issues. This would include advice to Minister(s) on legislation, allocation of funds, the performance of the regulatory body and appointments to it and guidelines within which the regulatory body would operate. The states and territories would continue to have a considerable role in the tertiary sector, including by way of their continuing legislative responsibility for almost all universities, and as the owners of TAFE and other public VET providers. They would also play a major role in the coordination and setting of broad policy directions for the tertiary education and training system, through COAG and relevant ministerial councils.

Australian Government's response to Bradley Review

The Australian Government has announced a number of high level responses to the Bradley Review, firstly in a series of speeches in March by the Minister for Education, Employment and Workplace Relations (Gillard 2009b, 2009c, 2009d) and subsequently, and more fully, in the 2009 Federal Budget in May (Australian Government 2009b). The Government has largely supported the recommendations

of the Review Panel. The reforms, or broad policy intentions, announced by the Government that are of particular relevance to regulation and institutional frameworks are outlined in box 7.3.

Assessment

In its response to the Bradley Review the Government has acknowledged a number of the regulatory concerns raised with this review. The Commission welcomes the Government's stated intention that the new Tertiary Education Quality and Standards Agency (TEQSA) will encourage best practice, and streamline and simplify current regulatory arrangements to reduce duplication and provide for national consistency.

The Government has indicated that it will:

> … be consulting extensively with states and territories and the sector to ensure that TEQSA is able to cut through some of the regulatory complexity and red tape that currently exists. (Australian Government 2009b, p. 32)

The Commission is encouraged by the commitment to the establishment of TEQSA by 2010 and urges state and territory authorities to work cooperatively with the Commonwealth to progress the necessary reforms. In regard to regulation of the VET sector, the Commission notes that COAG has endorsed the need for stronger and more cohesive national regulatory arrangements for VET, 'including in-principle support for a national regulatory body to oversee registration of providers and accreditation of VET qualifications and courses' (COAG 2009a, p. 6). A report on operational models, including for a national regulatory body, is to be provided to COAG by September 2009.

Whilst the Government has clearly stated its intention to reduce the regulatory burden associated with some existing arrangements, the Commission is concerned that some of the announced reforms and the increased focus on quality assurance have the potential to add to regulatory burdens, if not designed and implemented in an efficient manner. There would appear to be particular risks associated with:

- more rigorous criteria for accrediting/reaccrediting higher education providers, including universities
- new qualification standards
- increased reporting obligations
  - mission-based compacts could create new obligations for universities

Box 7.3 The Government's response to the Bradley Review

A new standards-based quality assurance framework will establish minimum standards that higher education providers are required to meet in order to be registered and accredited, as well as academic standards.

A national regulatory body, to be called the Tertiary Education Quality and Standards Agency (TEQSA), is to be established in 2010. In line with the recommendations of the Bradley Review Panel, this body will accredit providers, carry out audits of standards and performance of institutions and programs, and protect and quality assure international education. TEQSA will focus initially on regulation and quality assurance for higher education and from 2013 its role will expand to encompass VET organisations.

TEQSA will evaluate the performance of universities and other higher education providers every five years, or whenever there is evidence that standards are not being met or an evaluation is considered necessary to address an unacceptably high level of risk to quality or viability. A range of sanctions, proportionate to identified deficiencies, will be available for higher education providers that do not measure up against standards. As well as institution-specific audits, the new agency will also carry out audits that focus on particular areas of risk for the higher education system.

The Australian Qualifications Framework Council has commenced work on reviewing the Australian Qualifications Framework to improve and clarify its structure and qualifications descriptions. The Government announced that further work is to be progressed through TEQSA. The Australian Qualifications Framework Council will be commissioned to improve the articulation and connectivity between higher education and VET.

The Government agreed that the regulatory and other functions of Australian Education International should be separated. This is to be progressed in conjunction with arrangements for TEQSA. A response on the recommendation that the industry development responsibilities of Australian Education International be revised and be undertaken by an independent agency has been deferred pending further consideration.

Mission-based compacts will be introduced that outline the relationship between the Commonwealth and each university. Compacts will be used to define clear and consistent performance targets for each institution in relation to quality, attainment and participation by students from under-represented groups. Achievement of targets will trigger reward payments.

A new Ministerial Council for Tertiary Education and Employment will be established, with responsibility for higher education, VET, international education, adult and community education, the Australian Qualifications Framework, employment and broader youth policy.

Source: Australian Government (2009b).

  - TEQSA will collect 'richer data' to monitor performance in areas such as student selection, retention and exit standards, and graduate employment. Institutions will be required to demonstrate students' academic performance and 'document what students learn, know and can do' (Australian Government 2009b, p. 31)
- the Government's in principle support (currently the subject of further consideration) for a requirement that all accredited higher education providers administer the Graduate Destination Survey, Course Experience Questionnaire and the Australasian Survey of Student Engagement and report annually on findings.

The Government has specifically recognised 'the anxiety some will have of more red tape and managerial control' and expressly stated 'that is not the intention and it will not be the effect' (Gillard 2009b). Further, the Government has signalled its intention to consult extensively with the institutions and other experts in the sector, including, for example, in relation to mission-based compacts and appropriate tools and indicators to measure performance at an institutional level.

It is understandable, given the track-record of regulatory burdens in this sector, that higher education institutions remain sceptical of assurances around controls on the regulatory burden emanating from recent review activity. Universities Australia submits:

> … it is likely that a side-effect of the macro-level Bradley Review reforms (and related reforms to research policy) will be even further increases in micro-level compliance obligations. (sub. DR87, p. 1)
>
> Universities are worried that a new propensity not to consider the regulatory or administrative burden resulting from reform initiatives is appearing. Three recent examples include:
>
> - Broad-ranging standard provisions in Government contracts that place the onus of proof on those who would seek to vary these provisions (e.g. on denial of moral rights for authors). The onus should be reversed, which is to say basic rights should only be waived where a case can made by the relevant Government agency.
> - In the Students Services and Amenities Bill currently before Parliament, a new HECS-style arrangement is proposed to implement a $250 student fee. No public case has been made as to why the fee could not be incorporated into existing HECS arrangements, resulting in the saving of extensive separate handling costs.
> - Under the Education Investment Fund, various cumbersome regulatory provisions such as Government approval of sub-contractors were to have been required of grant recipients. Fortunately, in this instance, representations by Universities Australia were able to see the worst instances of micro-regulation removed. (sub. DR87, p. 2)

The Commission considers that it is not appropriate at this time to recommend actions in response to the concerns that have been raised given the recent major review and the Government's intention to implement substantial reforms to the regulatory and framework for higher education and training. Reforms to address inconsistency, duplication, overlap and unnecessary red tape are best considered in conjunction with the development and implementation of the new regulatory arrangements and the creation of the TEQSA. While the Bradley Review has informed the Government's determinations on the broad architecture for regulation of higher education and VET, a series of in-depth examinations will now need to be carried out to resolve detailed aspects of the new arrangements. The current DEEWR project on Future Directions for Quality Oversight of Tertiary Education Services in Australia and the review of the qualifications framework are just two such examples.

In addition to taking account of all the specific concerns that have been raised with this review, the Government and the new national agency must ensure that any regulatory reforms:

- are subjected to best practice regulatory process, including wide consultation and rigorous regulatory impact analysis
- are consistent with national competition policy and competitive neutrality principles, including ensuring that requirements are applied equivalently across providers, whether public or independent
- do not discriminate between institutions on the basis of the type of courses/qualifications offered, rather any differentiation in obligations should reflect actual differences in risks or performance.

The Commission notes that the sector's concerns in relation to reporting obligations are taking far too long to address. The Report of the Taskforce on Reducing Regulatory Burdens on Business (Regulation Taskforce 2006) recommended that the relevant agencies '… should work with the Australian Vice-Chancellors' Committee to address issues identified in the PhillipsKPA and Lifelong Learning Associates (2006) report to reduce red tape for universities' (recommendation 4.36). The Government agreed in principle to the recommendation and supported 'measures that reduce unnecessary reporting or regulation where they are of an administrative nature' (Australian Government, 2006).

It is vital that the development of specific reforms to streamline reporting obligations is undertaken as soon as possible and in a manner consistent with the implementation of the standard business reporting (SBR) initiative, which will be available from 31 March 2010 (appendix B). All existing and proposed reporting obligations must be examined, taking into account the following principles:

- data requests from all levels of government should use the SBR financial reporting taxonomy wherever possible
- additional data requests should begin by looking at data the business already collects, so that existing business data can be utilised wherever possible
- where additional data is required, common language and definitions must be used to prevent any duplication and overlap. The data requirements should then be developed as a taxonomy to supplement to the existing SBR taxonomy
- electronic reporting and secure on-line sign-on to the agencies involved should be introduced
- the benefits derived from the data collected should always outweigh the total costs, including business compliance and government administration costs, of generating and processing that data.

In response to the Commission's draft report, DEEWR drew out the practical implications and benefits, in relation to VET programs, of streamlining reporting, consistent with SBR (box 7.4)

Box 7.4 **Some benefits of adopting SBR for VET programs**

With respect to DEEWR's VET programs, [the Commission's draft recommendation 7.2] will mean, as required, the ongoing adoption and implementation of common data definitions and standards in DEEWR systems that comply with the Standard Business Reporting initiative and the Australian Vocational Education and Training Management Information Statistical Standard (AVETMISS).

Rationalising the training information collected from business organisations may reduce duplication, and the number of forms and interfaces to DEEWR's VET systems that VET providers and business partners are required to manage.

Payments to contracted providers vary across programs and rely on multiple factors that include registrations, commencements, claims, milestone payments, quarterly estimates and reconciliation processes. Consistent claims and payment processing across DEEWR's VET programs may reduce the administrative burden on those businesses engaged in multiple contracted arrangements.

A number of DEEWR's VET programs process and verify the documentation provided from providers as part the provider approval and review process. Increased use of data standards in the collection and processing of this information may facilitate online verification of these documents by the issuing authorities (eg banks, local governments and insurance companies).

Source: DEEWR (sub. DR 90, pp. 8-9).

RECOMMENDATION 7.1

The Department of Education, Employment and Workplace Relations, in consultation with state and territory authorities, should ensure that reforms to streamline reporting obligations in the education sector, including for schools and in response to recommendations from the Bradley Report, are undertaken consistent with the methodology and principles of the Standard Business Reporting initiative. Electronic reporting and secure on-line sign-on to the agencies involved should be introduced.

8 Other concerns

Specific concerns raised by participants, which did not fall within the broad areas covered previously are addressed in this chapter.

8.1 Medical services

The administrative requirements placed on general practitioners (GPs) and their practices by the Australian Government have been an ongoing concern to the medical profession. Moreover, these issues have been examined in detail by previous reviews and studies. In 2003, the Productivity Commission (PC 2003), at the request of the Australian Government, undertook a study into the administrative and compliance costs placed on GPs and their practices (box 8.1). Many of these issues were again raised by the Regulation Taskforce in 2006 (Regulation Taskforce 2006).

There are also reviews currently underway in this area. In December 2008, the Minister for Health and Ageing (Roxon 2008a) announced a review of Medicare items on the Medical Benefits Schedule (MBS) to reduce the complexity of the system and reduce red tape for GPs with a number of changes to the schedule to take effect from 1, July 2009. A National Primary Health Care Strategy, which is to consider a range of issues affecting GPs, is also being developed. A draft Strategy is expected to be available for the Minister's consideration by mid-2009 (Roxon 2008b).

Concerns raised by participants

The main concern of the Australian Medical Association (AMA) is that the 'red tape' placed on medical practitioners reduces the time available to deal with patients:

> Red tape restricts patient access to care with some estimates suggesting that general practitioners, for example, spend up to nine hours per week complying with red tape obligations. Every hour a GP spends doing paperwork equates to around four patients who are denied access to a GP. (sub. 33, p. 1)

The AMA recognises that a significant amount of the 'red tape' placed on medical practitioners is to enable government to assess and measure the impact of health initiatives, but considers there is little regard as to the compliance impact on medical practitioners (sub. 33).

Box 8.1 **Research study into general practice administrative and compliance costs**

In 2003, the Australian Government asked the Productivity Commission to report on the nature and magnitude of the administrative and compliance costs placed on GPs and their practices.

It found that three programs, Practice Incentives Program (PIP), Vocational Registration and Enhanced Primary Care accounted for over 75 per cent of measurable costs. For many programs, GPs actually received government payments for administration that exceeded the measurable administrative and compliance costs. Although there was no explicit payment for preparing information for Centrelink (unlike for the Department of Veterans Affairs), GPs could claim under a standard Medicare consultation. Nevertheless, there was confusion among some GPs as to their eligibility to claim payment under Medicare for such work.

Form filling accounted for a small share of measurable costs, but was a significant source of stress-related and other intangible costs. To reduce both tangible and intangible administrative and compliance costs the Commission put forward a number of recommendations. These included:

- program evaluations should include administrative costs of GPs associated with involvement in the program
- the Practice Incentives Program, Vocational Registration and Enhanced Primary Care should be evaluated and include the costs placed on GPs in administering these programs
- where the Australian Government chooses to remunerate GPs for medical information, the relevant department should fund the payments out of its own budget
- consistent principles, and not identical payment schedules, for remunerating GPs should be adopted between and across agencies
- GPs administrative costs should be monitored through a departmental coordination group over time and these costs should be reported on publicly
- guidelines should be developed, when appropriate, to standardise information collection and form design across government departments and agencies
- the use of information technology in reporting by GPs should be accelerated, including integrating forms into computer software and allowing more forms to be submitted electronically.

Source: PC (2003).

However, the AMA is concerned that Australian Government regulation is being used as a rationing mechanism to discourage medical practitioners from providing more services and, in some cases, to limit the number of services a medical practitioner could provide to a patient in an effort to contain costs. For example, it comments that the funding of new services on the Medicare Benefits Schedule (MBS) came with prescriptive guidelines and rules stipulating how many times a service can be delivered, when it can be delivered, who it can be delivered to and what records were required to be kept (sub. 33).

There is also concern in regard to the use of overly prescriptive regulation, an example being the rebate for GP referred services to allied health services (for example, physiotherapy). Under these arrangements the GP is required to implement specific management plans, communications and documentation to enable the patient access to the allied health service. This is in contrast to the simple processes in place when a patient is referred by a GP for specialist services through a letter of referral (sub. 33).

The current review of the MBS to simplify the schedule and reduce the compliance cost to medical practitioners, while welcomed as a 'step in the right direction', is not seen by the AMA as demonstrating a commitment to ease the compliance burden of the MBS on medical practitioners (sub. 33).

The AMA also notes the success of the streamlined authorities program introduced in 2007. Under the streamlined authorities program, medical practitioners are no longer required to contact Medicare to obtain authority to prescribe around 200 of the 450 items on the Pharmaceutical Benefits Scheme (PBS). However, the AMA calls for the authority system to be removed for all items to further reduce unnecessary red tape (sub. 33).

The issue of the administrative costs surrounding the Practice Incentive Program (PIP) and the provision of medical reports and other 'form filling' for Centrelink, Veterans Affairs and other Government agencies was also raised by the AMA, because little progress had been made in these areas since the Commission's 2003 study into GP administrative and compliance costs (PC 2003). The AMA also notes that many of the recommendations contained in both the Commission's study and the Regulation Task Force report have not been implemented (sub. 33).

Assessment

Clearly, much of the regulation of concern to the AMA is in place to contain costs due to the significant amount of Government funding underpinning Medicare and

the PBS. Also, information is required to monitor and assess broader health outcomes and the effectiveness of Government funds in achieving these outcomes.

In a number of areas the Government has been hesitant to make changes due to concerns that without such regulation the costs of funding health care would increase. For example, in responding to the Regulation Taskforce (2006), which recommended that all the remaining recommendations of the Commission's review (PC 2003) be implemented, the Government (Australian Government 2006) made it clear that it wanted to retain measures such as locational provider numbers and the PBS approval authority.

A similar response was provided to the Regulation Taskforce (2006) recommendation that the Australian Government should consider removing the PBS authority approval requirements or allow GPs to re-use an authority number for a repeat prescription where a patient's condition was unlikely to change. The rationale was that such measures were required to limit the costs to the Government and the taxpayer as well as maintain the overall integrity of the health system (Australian Government 2006).

However, the Australia Government also commented that it would simplify a number of programs identified as incurring considerable compliance costs on medical practitioners, such as the PIP, but it would not support GPs being remunerated for providing medical information (Australian Government 2006). The Department of Health and Ageing has subsequently consulted with the medical profession to simplify and make a number of administrative changes to the PIP (sub. DR96). The preparation of information for Centrelink and other government agencies and the remuneration for such services has been an ongoing issue for GPs and was examined in detail by the Commission (PC 2003) in its previous review (box 8.1).

There has been some progress in reducing the red tape placed on GPs. For example, there is the current review of Medicare items and the introduction of the streamlined authority program in respect of approval for some PBS medicines. The streamlined authority arrangements are limited to those authority required medicines that treat chronic and stable long term conditions, with stable dosage requirements and those that are less at risk of misuse and over prescription (sub. DR96). However, a number of the 'red tape' issues impacting on GPs addressed in the previous reviews remain in place.

The Australian Government should implement the remaining recommendations from the Productivity Commission's 2003 Review of General Practice Administrative and Compliance Costs and the recommendations from the Regulation Taskforce's 2006 review relating to general practice which include:

- ***introducing a single provider number for each general practitioner***
- ***removing the Pharmaceutical Benefits Scheme authority approval requirement or allowing GPs to re-use an authority number for a repeat prescription where a patient's condition is unlikely to change***
- ***rationalising the incentive programs for GPs.***

8.2 Construction

Concerns raised by participants

The Northern Territory Government (sub. 45) is concerned that the accreditation required for contractors to tender for Australian Government funded projects under the National Code of Practice for the Construction Industry and the Australian Government Safety Accreditation scheme disadvantages contractors in the Northern Territory:

> The National Code of Practice for the Construction Industry threshold on federally funded works ($5m) and the Federal Safety Accreditation threshold on federally funded works ($3m) disadvantaged Territory based contractors. (sub. 45, p. 1)

In particular, the Northern Territory Government states that these requirements have an adverse impact on the development of training and business opportunities in remote Indigenous communities. Many of the small contracting businesses tendering for work in remote communities are not accredited and as the Australian Government tends to 'bundle up' up construction work across communities into larger contracts in excess of the threshold these businesses are unable to tender for the work. However, the Office of the Federal Safety Commissioner, responsible for improving OHS in the building and construction sector, says it is unaware that this is occurring (sub. DR90).

To ensure the generally smaller contracting businesses operating in the Northern Territory are able to tender for Australian Government funded projects, the Northern Territory Government suggests adjustments to the thresholds or a delay in their implementation in the Northern Territory.

> The Northern Territory Government supports adjustment of the relevant thresholds, or delay in their implementation in the Territory, having regard to our unique business environment and the need to provide development opportunities for small and medium sized construction companies. (sub. 45, p. 2)

The Federal Safety Commissioner's view is that accreditation has not disadvantaged Northern Territory builders:

> There has been no suggestion that Northern Territory-based builders are unable to compete for tenders for building work due to difficultly in applying for, and attaining, accreditation in the Territory. …
>
> There are a total of 29 accredited construction companies with offices in the Northern Territory, including nine accredited local builders. There are also a number of Territory-based companies in the process of seeking accreditation. (sub. DR90, p. 12)

Assessment

The National Code of Practice for the Construction Industry establishes minimum standards — covering workplace relations, OHS, security of payment and procurement — head contractors must meet to be eligible to tender for Australian Government funded work. The assessment of a contracting firm's workplace relations can initially be conducted on line through the Department of Education, Employment and Workplace Relations. The scheme does not apply to subcontractors.

The Australian Government Safety Accreditation scheme requires head contractors to have a suitable OHS management system in place and meet specified performance standards. Accreditation comprises a desk top assessment and on-site audit.

The arrangements surrounding the eligibility to contract for Australian Government funded construction work ensure that the standards required by the Australian Government in relation to workplace relations and safety are met. Also, it is not clear that there are any significant barriers to smaller contractors gaining accreditation. The issue for unaccredited smaller contractors and businesses tendering for work in remote Indigenous communities appears to be the 'bundling up' of construction work across a number of communities into a single contract which exceeds the threshold.

In this case, it is the contract management arrangements that impede smaller businesses from competing for Australian Government funded construction work, not their accreditation status.

Changing contract management arrangements in remote Indigenous communities, or adjusting the threshold to develop business and training opportunities in remote Indigenous communities and assist smaller contractors in the Northern Territory are policy related issues. As such, they are matters for the Australian and Northern Territory Governments and outside the scope of this review.

8.3 Public administration and safety

Reporting requirements for local governments administering Australian Government funded programs

The Northern Territory Government (sub. 45) is concerned as to the multiple reporting requirements placed on local governments in the Northern Territory administering Australian Government funded programs:

> Councils in the Northern Territory, especially Shires servicing remote Indigenous communities, administer a number of Commonwealth funded programs. The effective administration of these programs is viewed as beneficial not only to the Northern Territory as a whole, but as providing significant benefits for disadvantaged Indigenous people.
>
> Councils are accountable for the delivery of these programs and are subject to regular and complex financial and non-financial reporting requirements, in addition to statutory reporting compliance frameworks. The additional accountabilities require a considerable degree of human, system and financial resources to ensure that funding programs are met. (sub. 45, p. 4)

The Northern Territory Government considers that the packaging of multiple grants under a single consolidated reporting regime would alleviate the administrative burden placed on local government. To this end, the Northern Territory Government suggests the use of cooperative agreements between funding agencies to streamline or reduce reporting formats against grant programs (sub. 45).

Assessment

These reporting requirements are likely to place an administrative burden on local government, particularly given the limited resources of the many small local government bodies operating in the Northern Territory. The consolidation of reporting requirements, as proposed by the Northern Territory Government, may reduce this burden on local government bodies in the Northern Territory. Where possible, Australian Government funding agencies should consolidate reporting

requirements for these smaller local governments that meet the necessary accountability and outcome requirements.

Australian Government five-year leases under the Northern Territory emergency response legislation

The Northern Territory Government (sub. 45) points out that under the Australian Government's Northern Territory emergency response legislation the Australian Government has implemented compulsory five-year leases of specific communities in the Northern Territory. These leases provide the Australian Government with ownership of the infrastructure in these communities. Consequently, local governments in these communities are unable to sub-lease previously rented properties and use that income to support the operational cost of managing these properties. This legislation underpinning these arrangements was granted an exemption from the RIS process under the exceptional circumstances provisions. The RIS process is discussed further in chapter 9.

Assessment

The details of the compulsory leasing arrangements and the ownership of infrastructure assets under the Australian Government's Northern Territory Emergency Response is a policy decision for the Australian Government and outside the scope of this review.

8.4 Other issues

Land access negotiations

The Government of South Australia (sub. 49) notes that case-by-case negotiations with the Australian Government to access large areas of land in South Australia owned or regulated by the Australian Government for defence purposes can cause delays and uncertainty in the development of economic infrastructure. The infrastructure projects traversing these areas included gas pipelines, freight transport networks and infrastructure supporting mining operations.

To avoid these delays and provide greater certainty and well-balanced outcomes, it calls for the Australian Government to develop principles to guide land access negotiations (sub. 45).

Assessment

To the extent that protracted land access negotiations impact on how and when infrastructure services are provided, they do impose a regulatory burden. The development of principles to guide negotiations may be beneficial in providing access to Australian Government owned land. However, the development and use of such principles in these negotiations have wider policy ramifications that are outside the scope of this review.

Comments on the *Environmental Protection and Biodiversity Conservation (EPBC) Act 1991*

The Government of South Australia (sub. 49) is concerned with unnecessary delays and uncertainty facing major infrastructure projects in dealing with the EPBC Act.

The Government of South Australia (sub. 49) points out that it has raised these issues in its submission to the Senate Standing Committee on the Environment, Communication and the Art's inquiry into the operation of the Act and to the Independent Review of the EPBC Act. The independent review released an interim report for public comment in June 2009 and a final report will be provided to the Minister by the end of October 2009. The Senate Standing Committee will release its second report during 2009.

Assessment

The operations and outcomes of the EPBC Act are currently being reviewed by the Independent Review and the Senate inquiry. As such, the concerns surrounding delays and uncertainty resulting from the operations of the EPBC Act would be better addressed through these broader processes. The Terms of Reference for the Independent Review of the EBPC Act require the review be guided by Australian Government Policy objectives, including simplifying the regulatory burden on people, businesses and organisations while maintaining appropriate and efficient environmental standards. Clearly, delays and uncertainty in the development of major infrastructure should be given adequate attention by these reviews.

Inconsistencies in project and environmental approval processes

The Minerals Council of Australia (sub. 9) is concerned about inconsistencies across jurisdictions in project approval processes and environmental assessments and approvals. Similar concerns were addressed in the Commission's *Annual*

Review of Regulatory Burdens: Primary Sector (PC 2007) and have also been examined in the Commission's recent *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (PC 2009). Moreover, development approvals and environmental assessments and approvals have been identified as a COAG 'Hot Spot' for regulatory reform.

Assessment

COAG has made significant progress in addressing duplication and inefficiency in environmental assessment processes, particularly through the implementation of environmental assessment bilateral agreements between the Australian and state and territory governments. COAG has also agreed that the Australian and state and territory governments, 'will work expeditiously to develop bilateral agreements, where efficiencies can be achieved in meeting the requirements of the EPBC Act' (Australian Government 2008a).

With respect to development assessment processes and approvals, the Commission notes that progress is being made by the states and territories, through the Local Government and Planning Ministers' Council, in streamlining processes through, for example, increasing the use of 'complying' development to speed up approvals, reforming intergovernmental referral processes and encouraging greater use of electronic processing.

The Commission encourages COAG to continue to assign a high priority to achieving further harmonisation and efficiencies in project development and environmental assessment and approval systems.

Duplication of Indigenous heritage protection legislation in the development of oil and gas projects

The Government of South Australia (sub. 49) refers to the finding in the Productivity Commission's Review of the Regulatory Burdens on the Upstream Petroleum Sector draft report that the duplication of Australian and state and territory government's Indigenous heritage legislation protecting Indigenous heritage sites appeared to be a source of delays and uncertainty in the development of oil and gas projects.

The Government of South Australia (sub. 46) suggests that the review examine the degree to which this duplication impacts on economic infrastructure projects and identify measures to streamline approval processes for development while ensuring Indigenous heritage is not compromised. It also notes that the South Australian

Indigenous heritage legislation is currently under review with the aim of seeking greater consistency with the Australian Government's legislation.

Assessment

In its final report, the Productivity Commission (2009) in its *Review of the Regulatory Burdens on the Upstream Petroleum (Oil and Gas) Sector* made a number of recommendations to overcome delays and uncertainty in respect of the duplication of Indigenous heritage protection legislation. The Commission recommended:

- that the Australian Government, in considering applications for a heritage protection 'declaration' under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984,* should take into account previous state and territory government's assessments and decisions about the same heritage site
- the Australian Government legislation be amended to accredit state and territory Indigenous heritage regimes that comply with a set of minimum standards
- the transferability of heritage agreements when title ownership changes, provided the new owner was willing to adhere to the original work program and the conditions of the original heritage approval.

Native Title regulation

The Minerals Council of Australia raises concerns about complexity and inefficiency in the native title system, in particular:

> … the effectiveness of Indigenous Representative organisations (including Native Title Representative Bodies and Prescribed Bodies Corporate) is being hampered by inadequate resourcing and overly restrictive operating parameters. (sub. 9, p. 28).

Assessment

The Commission examined these issues in the 2007 Primary Sector Review and recommended that 'recent Australian Government reforms to the native title system — aimed at building capacity for Native Title Representative Bodies (NTRBs) and encouraging agreements … be given time to take effect and then be subject to independent evaluation within five years of implementation' (PC 2007, p. 196). The Australian Government (Australian Government 2008a) accepted this recommendation 'in principle' and noted:

> Some or all aspects of the recent reforms may be reviewed through other means within the next five years. … AGD [The Attorney-General's Department] is continuing to monitor the implementation and impact of the reforms. (p. 38)

Specific concerns about native title were also examined in the Commission's recent *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (PC 2009).

9 Improving regulatory impact analysis

9.1 Regulatory impact analysis requirements

The Australian Government and COAG endeavour to improve the quality of regulation through the undertaking of regulatory impact analysis. The Australian Government requires a Regulation Impact Statement (RIS) for Commonwealth regulatory proposals 'that are likely to have a significant impact on business and individuals or the economy' (Australian Government 2007a, p. 15). In a similar manner, COAG requires a RIS for regulatory proposals put forward by ministerial councils and national standard-setting bodies that 'would encourage or force businesses or individuals to pursue their interests in ways they would not otherwise have done' (COAG 2007b, p. 3).

RIS processes follow a formalised sequence of steps that provide a basis for informed decision making and establish whether particular regulatory proposals would be in the community's interest by demonstrating a net benefit. A RIS identifies the problem the regulation seeks to address, outlines the objectives of government action, and assesses the impacts of a range of feasible options for addressing the problem. The RIS then documents community consultation, proposes a recommended option and outlines implementation and review mechanisms.

A well designed and implemented RIS process can improve the quality of new regulations, and thereby enhance the productivity of the economy in a number of ways, including:

- where it leads to a decision not to proceed with a relatively costly regulatory action — by demonstrating that a non-regulatory option is a better solution to the problem (or that the status quo is preferable)
- where regulation is found to be justified — by identifying the most effective and efficient design elements to build into it, thereby increasing the benefits and/or reducing the costs
- by building stakeholder support for proposals — through effective consultation processes and/or by allaying fears of unintended adverse regulatory impacts

- by reducing the risk of over-regulation — through clearly specifying the nature, size and scope of the problem and indicating the extent to which government action is necessary and beneficial
- by influencing over time the regulatory culture within government agencies to be supportive of good evidence-based processes.

Regulatory processes and the quality of regulation are, in many respects, considerably better than 20 years ago when governments were first embracing the concept of regulatory impact analysis. That said, concerns raised during this review suggest that there remains scope for the Australian Government to do more to improve regulatory outcomes, through:

- more systematic and rigorous application of existing regulatory best practice processes
- refinements and enhancements to aspects of the design and implementation of these processes
- increasing the transparency and accountability of current regulatory processes.

The Office of Best Practice Regulation (OBPR), within the Department of Finance and Deregulation, administers both the Australian Government and COAG regulation-making requirements. For a RIS to be assessed as 'adequate' by the OBPR, the detail and depth of analysis should be commensurate with the magnitude of the problem and the size of the potential impacts of the proposal. Subject to this overriding principle, the OBPR uses a number of 'adequacy criteria' to assess whether a RIS contains an appropriate level of information and analysis for it to be assessed as 'adequate'. The criteria are broadly similar under both RIS processes (Australian Government 2007a, COAG 2007b).

Recent enhancements to Australian Government and COAG regulatory processes

In recent years both the Australian Government (2006) and COAG (2007c) have taken initiatives to strengthen their respective RIS processes by:

- 'raising the bar' on the standard of analysis considered adequate for a RIS to be approved
- making it harder for a regulatory proposal to proceed to a decision if the requirements of good process have not been adequately discharged.

Australian Government processes

The Regulation Taskforce (2006) identified some deficiencies with the Australian Government's RIS process and made a number of recommendations. In response, the Government strengthened the regulatory framework on 20 November 2006. Some of the more substantial changes were requirements for:

- 'preliminary assessments' for all regulatory proposals to determine the level of regulatory impact analysis required
- a formal assessment of business compliance costs, using the Business Cost Calculator (or an approved equivalent), and greater use of cost-benefit analysis generally
- a clear statement in the RIS adequacy criteria that the RIS should demonstrate that:
  - the benefits of the proposal to the community outweigh the costs
  - the preferred option has the greatest net benefit for the community, taking into account all the impacts
- a whole-of-government consultation policy
- strengthened gate-keeping arrangements. In the absence of exceptional circumstances (as determined by the Prime Minister), a regulatory proposal with 'medium' business compliance costs or 'significant' impacts on business and individuals or the economy, should not proceed to Cabinet or other decision makers unless it has complied with the Australian Government regulatory impact analysis requirements. Post-implementation reviews are required — within one to two years of implementation — when a proposal proceeds to the decision maker without an adequate RIS or a report assessing business compliance costs[1] (OBPR 2008a).

Under the previous processes, when the former Office of Regulation Review (ORR) — which had responsibility for administering the RIS process prior to the establishment of the OBPR — assessed regulatory proposals as non-compliant, these proposals were still able to be implemented by the Government. Under the stronger gate-keeping arrangements now in place, this should no longer eventuate without a formal and transparent exemption. However, this requires gate-keeping arrangements to be administered and enforced effectively by the Cabinet Secretariat (for proposals proceeding to Cabinet) and other decision-makers such as ministers, agency heads and boards (for non-Cabinet proposals).

[1] Such reviews are required regardless of whether or not exceptional circumstances are granted.

According to the OBPR, in 2007-08 around 75 per cent of regulatory decisions requiring a RIS or report on compliance costs were made by a decision maker other than Cabinet (OBPR 2008a). Given that a majority of recent regulatory proposals are being subject to less formal gate-keeping processes (than those applied to proposals proceeding to Cabinet) the Government needs to have 'checks and balances' in place to ensure adherence to the regulatory processes. As is discussed in section 9.2, a post-implementation review is not a substitute for undertaking a RIS before a decision is made.

Council of Australian Governments processes

In April 2007 COAG agreed to strengthen its regulatory framework for national regulation making and for similar arrangements in the states and territories. These were outlined in the COAG *Best Practice Regulation Guide:*

> COAG has agreed that all governments will establish and maintain effective arrangements at each level of government that maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition by:
>
> - establishing and maintaining 'gate keeping mechanisms' as part of the decision-making process to ensure that the regulatory impact of proposed regulatory instruments are made fully transparent to decision makers in advance of decisions being made and to the public as soon as possible
> - improving the quality of regulation impact analysis through the use, where appropriate, of cost-benefit analysis
> - better measurement of compliance costs flowing from new and amended regulation, such as through the use of the Commonwealth Office of Small Business' costing model
> - broadening the scope of regulation impact analysis, where appropriate, to recognise the effect of regulation on individuals and the cumulative burden on business and, as part of the consideration of alternatives to new regulation, have regard to whether the existing regulatory regimes of other jurisdictions might offer a viable alternative
> - applying these arrangements to Ministerial Councils. (COAG 2007b, p. 1)

9.2 Business concerns about processes followed for recent regulatory proposals

Notwithstanding these developments, at the roundtable meetings and during discussion with participants in this review, frustrations with the RIS process were regularly voiced. Many participants were concerned that RIS processes were often less than comprehensive (even for major policy proposals), did not allow for

adequate consultation, and that RIS documents were neither readily available nor easily accessible.

Some concerns raised by business in submissions to this review point to deficiencies in the RIS process as a whole. For example, according to UnitingCare Australia:

> … there remains a systemic issue around the development and implementation of regulation by government agencies … UnitingCare Australia believes that further work must be done to strengthen scrutiny of the Regulation Impact Statement process. (UnitingCare Australia, sub. DR70, p. 1)

Similarly, the Property Council of Australia (sub. DR83, p. 1) commented on 'the ongoing failure of governments to properly assess the risks, costs, and benefits of regulation across all sectors of industry' and urged the Commission to use its final report to 'examine the process by which regulation is developed and reviewed, rather than merely examining specific regulations.' In its view:

> To achieve a competitive economy, greater emphasis needs to be placed on both the collaborative processes of COAG and a more effective approach to regulatory impact assessment. (Property Council of Australia, sub. DR83, p. 1)

The vast majority of Commonwealth regulations recently tabled by the Australian Government underwent no more than a preliminary self-assessment by the departments and agencies responsible for the regulation.

> In 2007-08, only around two per cent of regulatory proposals tabled required regulatory impact analysis. (OBPR 2008a, p. 15)

For the regulatory decisions made on or after 20 November 2006 (when the Australian Government's best practice regulation requirements came into effect) and tabled in 2007-08, 51 RISs were required and five were assessed as 'inadequate' by the OBPR — giving a compliance rate of around 90 per cent under the current process. In addition, seven regulatory proposals were assessed by the OBPR as requiring a report on business compliance costs. These were prepared and certified by the OBPR as meeting the best practice regulation requirements (OBPR 2008a).

Departments and agencies are strongly encouraged to contact the OBPR to confirm their preliminary assessments. Where they do not, they are still accountable for the decisions they make, since the OBPR reviews all regulation made by departments and agencies (in six month cycles) to ensure that the appropriate level of analysis was undertaken. Where the OBPR finds that a regulation was introduced without the appropriate level of analysis, it informs the responsible department/agency that

it will be reported as non-compliant and is required to undertake a post-implementation review (Australian Government 2007a).

In 2007-08, Australian government departments and agencies reported to the OBPR that they had undertaken 753 'preliminary assessments' for proposals which they found required no further analysis and the OBPR agreed with these assessments (OBPR 2008a).

Regulation relating to strengthening of police checks and the reporting of missing residents in the aged care industry are two recent examples of regulations that were assessed by departments as requiring no further analysis, and endorsed by the OBPR, because of 'no or low impacts'. Regulations relating to the original introduction of police checks and the reporting of alleged assaults in aged care and the reporting of vacancies in child care, are similar examples under the previous regulatory regime. These were each given an exemption from the previous RIS requirements by the ORR because they were assessed as being 'minor or machinery in nature and did not substantially alter existing arrangements.'

However, in submissions to this review, business participants considered that the impacts of these measures were not of 'low or no impact' or 'minor or machinery in nature' — and there is substance to their position.

Regulation relating to the screening of liquids, aerosols and gels on international flights and the Australian Government's intervention in the Northern Territory are also examples of regulatory proposals which raised concerns in submissions to this review. In these cases, exceptional circumstances (as determined by the Prime Minister) were granted prior to the regulation being implemented. For these regulations analysis was not required prior to implementation. Post-implementation reviews for these regulations are due in the second half of 2009.

Departments and agencies are expected to consult with stakeholders when undertaking post-implementation reviews. However, a post-implementation review is not equivalent to an 'ex-post' RIS because there is no requirement to follow all the steps required in a RIS. Instead, according to the Best Practice Regulation Handbook, the post-implementation review should:

> … focus on the way the policy was implemented, whether the implementation is proving effective in meeting the policy objectives, and whether implementation or ongoing delivery methods might be adjusted to manage the policy's ongoing delivery more efficiently and/or effectively. (Australian Government 2007a, p. 37)

As a consequence, a post-implementation review 'is not a substitute for undertaking adequate analysis before a decision is made' (Australian Government 2007a, p. 37). Moreover, there is no requirement for the post-implementation review findings and

recommendations to be made public in a transparent manner. And while the OBPR is expected to 'monitor the status and adequacy of post-implementation reviews' (Australian Government 2007a, p. 38) it is not explicitly required to make its assessment of post-implementation reviews public under current arrangements.

9.3 Suggestions for improving the processes

While a policy issue potentially requiring government action will often be first acknowledged at the political level, the RIS process is based on a 'bottom up' and sequential approach to the development of any subsequent regulation, with problem and objectives identified, options weighed, impacts analysed, recommendations made and outcomes then determined. There are on occasion influences in practice that can see this process being turned on its head – with a decision to regulate coming first, and the justification and implementation to quickly follow (Regulation Taskforce 2006).

The traditional 'regulate first, ask questions later' approach to policy development was a key reason why RIS processes were established, to impose a discipline on departments and agencies to undertake adequate analysis before resorting to a regulatory response to a policy concern. In this way, any regulatory action can be clearly justified and options and design principles thoroughly explored so that compliance costs are reduced and unintended consequences are given sufficient consideration. It is also why enhancement of the RIS process was seen as a priority by the Regulation Taskforce (2006) and reflected in the Australian Government's best practice regulation requirements (Australian Government 2007a).

It may have been inevitable that the new arrangements would take some time to become effective, particularly given the need for cultural change within government. Nevertheless, in light of the ongoing concerns and complaints from business, there are some practical measures that should be applied to improve and strengthen the current Australian Government process. The first of these involves providing greater transparency and accountability with the regulatory impact analysis process. The second involves providing greater scope for business consultation at various stages of that process. In addition, the Government should commission an independent public review of the current best practice regulation requirements no later than five years after the requirements came into effect.

Develop a central register of regulatory impact analysis

Under existing arrangements, where a regulation is *tabled* in Parliament, the RIS (or report on business compliance costs) prepared for the decision maker must be included in the explanatory memorandum (for primary legislation) or the explanatory statement (for legislative instruments). Publication of the regulatory impact analysis can potentially occur months after a decision to proceed has been made by government. To find a RIS, interested parties must then navigate the Parliamentary website to locate the specific regulation (and associated regulatory impact analysis) of interest. Stakeholders have indicated difficulty in accessing this information.

On the other hand, under the current arrangements for regulation that is *not* tabled (for example, other non-legislative instruments and new or amended quasi-regulation), RISs (or reports on business compliance costs) 'should be made public when the regulation is made or announced' (Australian Government 2007a, p. 32). In the Commission's view, there is no compelling reason why regulatory impact analysis for all regulation, whether or not it will be tabled, cannot be made public at the time the government decision to regulate or amend existing regulation is announced.

The difficulties in obtaining copies of RISs are illustrated by this review. To better inform the Commission's deliberations it sought copies of past RISs on some issues. Some were available on Departmental web sites or through explanatory memoranda tabled with bills. Others were in time provided by agencies in response to specific requests by the Commission. But there was no central point of access for copies of RIS documents. The OBPR advised that it was unable to assist in this regard, as RIS documentation remains the property of the government department or agency that prepares it (OBPR, pers. comm., 4 August 2009).

To further increase transparency, once government decisions have been taken on regulatory proposals that have required a RIS or a report on business compliance costs, the regulatory assessment documents, along with the OBPR's adequacy assessment, should be posted at a central register on the OBPR's website. Alternatively, the regulatory impact analysis could be accessible via direct links in a central register on the OBPR's website — though this would be less effective, because there would be a reliance on all departments and agencies releasing their regulatory impact analysis in a timely manner and it would also require them to maintain these links. The information should be posted at the time the government decision is publicly announced. This would allow the community to access the information easily and in a timely manner.

A central register, that the public could freely access on the internet, would increase scrutiny of the performance of departments and agencies in producing regulatory impact analysis, and also the OBPR, in assessing the quality (or adequacy) of such analysis. This enhanced transparency would encourage agencies to undertake better quality analysis. It would also allow regulatory impact analysis to be more easily compared both within and between agencies. This would in turn encourage knowledge transfer, greater consistency in approach to identifying and measuring specific impacts, and promote a more informed understanding of the quality of analysis applied to regulatory proposals under the Australian Government's best practice regulation requirements.

Victoria's Competition and Efficiency Commission already maintains such a register (www.vcec.vic.gov.au), as does the New Zealand Treasury (www.treasury.govt.nz), and the United Kingdom's Department for Business Enterprise and Regulatory Reform (www.ialibrary.berr.gov.uk).

Provide greater scope for consultation with business on regulatory impact analysis

Discussions with business throughout this review have identified a number of concerns with consultative processes under the Australian Government's regulatory framework. The Government has recently announced its intention to appoint a Small Business Advisory Committee (SBAC) to provide advice on regulatory proposals that have a significant impact on small business, including through commenting on any RIS that is developed.

The advantage of such arrangements is that SBAC members could be asked to pass security checks and sign confidentiality agreements. This would enable them to see proposals much earlier than might be possible in the usual public consultation process, overcoming some of the concerns that consultation often happens 'too late' under current arrangements to have any meaningful impact.

The role of the SBAC could potentially be extended to include consideration of preliminary assessments, where departments bring these to the attention of the OBPR because of some uncertainty as to their expected business impacts. Allowing business to be directly consulted at a very early stage would provide a more systematic and consultative approach to determining what level of analysis is required.

If the SBAC was evaluated as effective after a sufficient period of operation, such arrangements could be extended beyond small business to also include other businesses in a broader Business Advisory Committee.

In addition, the existing annual regulatory plan process could be improved by making it mandatory for departments and agencies to update their plans as preliminary assessments are completed. This would improve the information value of annual regulatory plans by informing business not only about what regulation is proposed but also what level of regulatory impact analysis will actually be undertaken (i.e. no regulatory analysis beyond the preliminary assessment, a report on business compliance costs, or a RIS). At present, departments and agencies are only required to publish a regulatory plan each July on the internet and they have discretion as to when and how many times they update these plans within the financial year. Moreover, there is currently no requirement to specify the level of regulatory impact analysis to be undertaken (OBPR 2008b).

Finally, to improve the quality of analysis used to inform government decisions, where a preliminary assessment has indicated a RIS is required, the Australian Government regulatory requirements should provide for a 'consultation RIS' in a similar fashion to the arrangements outlined in the COAG *Best Practice Regulation Guide*. Strengthening consultation requirements in the Australian Government RIS process, by following the approach taken by COAG, was previously suggested by the Regulation Taskforce which stated:

> Where a RIS is required, a draft version should be made available for comment (as is required by COAG for making national regulations and standards). The draft should have sufficient detail to enable meaningful feedback. (Regulation Taskforce 2006, p. 155)

The consultation RIS could then form the centrepiece of the consultation process and be helpful in identifying further impacts and refining the existing estimates of impacts. Under the COAG arrangements, the consultation RIS must be first cleared by the OBPR. This adds to time and cost, and may not bring commensurate benefits in terms of the quality of the initial analysis. Public scrutiny should encourage departments and agencies to undertake an appropriate level of analysis without OBPR clearance.

After incorporating relevant community input, the consultation RIS would be developed into a 'decision RIS', and assessed by the OBPR, before being provided to the decision maker. In this way stakeholders would be provided with tangible evidence of the extent to which their views were incorporated when the decision RIS is made public.

While there is currently no requirement under the Australian Government's regulatory process for a consultation RIS, the current arrangements do require a 'green paper' for proposals of 'major significance'. A green paper is a policy options paper released as a basis for consultation. If done thoroughly a green paper

should closely replicate a consultation RIS (Australian Government 2007a) — and may be more extensive.

According to the OBPR, no green papers were required for proposals tabled in 2007-08 (OBPR 2008a). A small number have been developed since then, including for Financial Services and Credit Reform, the National Aviation Policy and the Carbon Pollution Reduction Scheme.

As outlined in the Best Practice Regulation Handbook:

> … a green paper … should contain most of the elements of a Regulation Impact Statement (RIS) such as:
>
> - the problem
> - objectives
> - some options (including a preferred option)
> - identify the main groups affected by the options
> - include a preliminary impact analysis (Australian Government 2007a, p. 44).

Irrespective of whether Australian Government green papers replicate consultation RISs for regulatory proposals of 'major significance' (only), it is not clear why a consultation RIS is not part of the Australian Government's best practice regulation process more generally for proposals that are likely to have significant impacts on business and individuals or the economy.

Greater transparency, via a consultation RIS, could improve the quality of analysis used to inform government decisions. More importantly, the regulation resulting from a more transparent process should improve the design of regulation, lessen business compliance costs, reduce unintended consequences and lower the cumulative burden of regulation on business. At the very least, the regulatory proposal would go forward with a greater understanding and acceptance by all stakeholders of its full impact.

That said, it is recognised that for a minority of regulatory proposals a public consultation RIS may not be appropriate. For example, where there is a need for Cabinet confidentiality, such as for national security or commercial-in-confidence matters, or for proposed tax regulation to deal with tax avoidance, a consultation RIS may be prepared for consideration by the Business Advisory Committee proposed above — where security clearances and confidentiality agreements would apply.

RECOMMENDATION 9.1

The Australian Government should improve the transparency and accountability of its best practice regulation assessment processes by:

- ***developing a central register of regulatory impact analysis. The register would include:***
  - ***Regulation Impact Statements (and the Office of Best Practice Regulation's adequacy assessments) at the time government decisions are made public, and***
  - ***post-implementation reviews (and the Office of Best Practice Regulation's adequacy assessments) at the time these reviews are made public***
- ***subject to review of the new Small Business Advisory Committee's effectiveness, considering the extension of this model beyond small business to include other businesses within a broader Business Advisory Committee***
- ***improving the existing annual regulatory plan process, by making it mandatory for departments and agencies to update their plans as preliminary assessments are completed***
- ***incorporating a 'consultation' Regulation Impact Statement in the regulation making process (in a similar manner to the COAG requirements) for use in public consultations where possible, or as part of confidential consultation with the Small Business Advisory Committee (or Business Advisory Committee should the concept be broadened beyond the small business sector).***

RECOMMENDATION 9.2

The Australian Government should commission an independent public review of the current best practice regulation requirements no later than five years after the requirements came into effect (that is, 20 November 2011).

APPENDIXES

A Consultation

A.1 Introduction

In accordance with the terms of reference, an initial circular for the 2009 study was distributed in late November 2008. In December 2008 the Commission placed advertisements in national and metropolitan newspapers inviting public participation in the review and released an issues paper shortly after.

The Commission has held informal consultations with government departments and agencies, peak industry groups, businesses and individuals. Roundtables were held in Canberra after release of the draft report in late June 2009. A list of the meetings and informal discussions undertaken is provided below.

The Commission received 101 submissions as listed below. Public submissions are available on the Commission's website.

The Commission would like to thank all those who contributed to the study.

A.2 Submissions

Table A.1 **Submissions received**

Participant	*Submission no.*
Aged and Community Care Victoria	34
Aged & Community Services Australia	38
Aged Care Association Australia	DR68
Aged Care Standards and Accreditation Agency Ltd	DR65
Attorney-General's Department	DR86
Australasian Railway Association	22

(Continued next page)

Table A.1 (continued)

Participant	*Submission no.*
Australian Association of National Advertisers	DR57
Australian Communications and Media Authority	DR73, DR99
Australian Communications Consumer Action Network	DR92
Australian Community Children's Services	7
Australian Council for Private Education & Training	32, DR64
Australian Direct Marketing Association	DR93
Australian Medical Association	33
Australian Mobile Telecommunications Association	5, DR62
Australian Pipeline Industry Association	12
Australian Rail Track Corporation Ltd	15, DR77
Australian Shipowners Association	10
Australian Subscription Television & Radio Association	37, DR82, DR101
Australian Trucking Association	3, DR59
Babcock & Brown Power	DR100
Baptist Community Services — NSW & ACT	DR84
Baptistcare	DR63
Board of Airline Representatives of Australia	DR53
Catholic Health Australia	18, DR98
Child Care NSW	20
Christian Schools Australia	DR75
CMA Eco Cycle	24
Commercial Radio Australia Ltd	6
Communications Alliance Ltd	29
Community Child Care	27, DR80
Consumers' Telecommunications Network	50
COTA National	DR94
Department of Broadband, Communications and the Digital Economy	DR54
Department of Climate Change	DR81
Department of Education, Employment and Workplace Relations	42, DR88, DR90
Department of Families, Housing, Community Services and Indigenous Affairs	DR60
Department of Health and Ageing	44,DR96
Department of Immigration and Citizenship	DR52

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Table A.1 (continued)

Participant	*Submission no.*
Department of Infrastructure, Transport, Regional Development and Local Government	40
Dinah Humphries, Monash University Family and Child Care	28
Energy Industry (Joint Submission)	23
Energy Networks Association	43
Energy Retailers Association of Australia	19
Energy Supply Association of Australia	DR79
English Australia	14
Envestra Ltd	13
Family Day Care Australia	DR72
Federal Chamber of Automotive Industries	35
Mr Ian Flatley	DR67
Free TV Australia Ltd	41, DR97
Government of South Australia	49
Illawarra Retirement Trust	DR71
Independent Schools Council of Australia	26
Minerals Council of Australia	9
National Childcare Accreditation Council	DR69
National Seniors Australia	DR95
National Transport Commission	DR58
Northern Territory Government	45
NSW Department of Education and Training	48
Ms Carol O'Donnell	1,2
Office of the Privacy Commissioner	DR55
Optus	30, DR66
Origin Energy	DR89
Packaging Council of Australia	17
Perth Airport	DR85
Pilbara Development Commission	DR91
Property Council of Australia	DR83
Qantas Airways Ltd	46, DR61
Queensland Recycling, Alex Fraser Group	25
Service Skills Australia	21

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Table A.1 (continued)

Participant	*Submission no.*
Shipping Australia	11
St Andrew's Village Ballina Ltd	36
Sydney Airport Corporation Ltd	DR56
Telstra Corporation Ltd	16, DR74
Tourism & Transport Forum	DR76
TVET Australia Ltd	39, DR78
UnitingCare Australia	DR70
Universities Australia	31, DR87
Victorian Freight and Logistics Council	8
Virgin Blue Group	51
Vodafone Australia Ltd	47
Waste Contractors and Recyclers Association of NSW	4

A.3 Other consultation

Adelaide Airport

Aged & Community Services Australia

Aged Care Association Australia

Aged Care Standards and Accreditation Agency

Allied Health Professions Australia

Australasian Railway Association

Australian Airports Association

Australian Communications and Media Authority

Australian Community Children's Services

Australian Council for Private Education and Training

Australian Direct Marketing Association

Australian Energy Market Commission

Australian Government

- Australian Competition and Consumer Commission — Australian Energy Regulator
- Department of Broadband, Communications and the Digital Economy
- Department of Education, Employment and Workplace Relations
- Department of Finance and Deregulation
- Department of Health and Ageing

Department of Infrastructure, Transport, Regional Development and Local Government

Department of Resources, Energy and Tourism

Department of the Environment, Water, Heritage and the Arts

Australian Logistics Council

Australian Medical Association

Australian Private Hospitals Association

Australian Shipowners Association

Australian Subscription Television & Radio Association

Australian Trucking Association

Catholic Health Australia

Childcare Associations Australia

Churches of Christ Care

CMA Eco Cycle

Commercial Radio Australia

Communications Alliance

Energy Networks Association

Energy Retailers Association of Australia

Energy Supply Association of Australia

Free TV Australia

Griffith University

Housing Industry Association

Independent Schools Council of Australia

Internet Industry Association

Macquarie Bank

Major Mail Users

Master Builders Australia

Monash University Family and Child Care

National Childcare Accreditation Council

National Seniors Australia

National Transport Commission

Packaging Council of Australia

Qantas

Singapore Airlines

TAFE Directors Australia

Telstra

TriCare

Universities Australia

Virgin Blue
Vodafone Australia
Waste Management Association of Australia

List of roundtable attendees

Aged Care regulation

Aged and Community Care Victoria
Aged & Community Services Australia
Aged Care Standards and Accreditation Agency
Anglicare
Baptistcare
Baptist Community Services — NSW & ACT
Blue Care
Catholic Health Australia
Department of Health and Ageing
Grant Thornton Australia
Tricare
UnitingCare Australia

Broadcasting regulation

Austar
Australian Communications and Media Authority
Australian Subscription Television & Radio Association
Commercial Radio Australia
Department of Broadband, Communications and the Digital Economy
Foxtel
Free TV Australia
Network Ten
PBL Media
Premier Media Group

B Standard Business Reporting

B.1 Background

In July 2008, a COAG communiqué signalled support for Standard Business Reporting (SBR) as a mechanism for reducing the regulatory burden on business. A commitment has been made to implement SBR by 31 March 2010. The commitment to SBR arose from recommendation 6.3 of the Regulation Taskforce (2006):

> The Australian Government should develop and adopt a business reporting standard within the Australian Government sphere by 2008, based on the Netherlands model and work undertaken by the ATO (p. 142).

SBR is a multi-agency program that is estimated to save Australian businesses $800 million per annum on an ongoing basis when fully implemented. SBR will reduce the regulatory reporting burden for business by:

- removing unnecessary and duplicated information from government forms
- utilising business software to automatically pre-fill government forms
- adopting a common reporting language, based on international standards and best practice
- making financial reporting to government a by-product of natural business processes
- providing an electronic interface to enable business to report to government agencies directly from their accounting software, which will provide validation and confirm receipt of reports
- providing business with a single secure online sign-on to the agencies involved.

SBR is being co-designed by Australian and state and territory government agencies in partnership with business, software developers, accountants, bookkeepers and other business intermediaries from across Australia.

Led by the Australian Treasury, the agencies participating in SBR are the Australian Bureau of Statistics, Australian Prudential Regulation Authority, Australian

Securities and Investments Commission, Australian Taxation Office and all state and territory government revenue offices.

B.2 Standard Business Reporting in practice

The development of SBR for financial reporting involved consideration of the data that business already collects, the data that agencies require, and the way that data is collected from business and reported to agencies.

As a first step, the agencies looked at the information fields on the 95 forms that are in scope for SBR reporting. By looking at each individual data field, agencies were able to identify where data was collected more than once across agencies and where similar data was requested but described in different ways. The first scan of this information also saw some forms being combined and some others taken out of scope.

It was then possible to standardise the definitions used to collect data and to link the definitions to existing data already held by business wherever possible – to develop a taxonomy, which is like a dictionary of terms. As a result, the 9648 information fields currently collected could be reduced to 2838 – a reduction of over 70 per cent in the number of data fields requested. Further, by linking the data requests to information that is already collected by business, the compliance burden in responding to this much reduced list of data fields is to be further reduced.

The way that the SBR process works is that, having identified the data business collects, it can be 'tagged' using the SBR taxonomy. This tagging process can operate 'behind the scenes' with software that is SBR enabled (using XBRL – eXtensible business reporting language). In essence, the business simply collects and records the data it needs, and the SBR enabled software collates and reports that data as required for business reporting purposes.

The reports, once prefilled in the businesses software can then be sent directly from the software package to the agency using a single secure sign-on. Businesses only record data once, and with the help of SBR can use this for several reporting services.

B.3 The benefits of Standard Business Reporting

The major drivers for increased reporting efficiency for businesses and accountants include:

- less time and effort (based on reduction in time spent by businesses and accountants in the assembly and analysis of information) required to report to government
- an ability to satisfy their reporting requirements directly from the system that they use to keep their accounts/records
- a single sign-on to secure government on-line services
- reduced barriers to adopting more sophisticated accounting and management systems
- access to more up to date financial performance information
- certainty that the reporting obligation has been dealt with and received by government.

As well as the efficiency benefits which have been measured, there is also a range of effectiveness benefits for both businesses and accountants. These include improvements that provide:

- up to date financial information and analysis
- better informed financial decisions
- greater transparency in governance processes
- better access to investor markets on the basis of financial statements that can be more readily compared
- potential improvements in the sustainability of the accounting industry in Australia
- alignment with reporting processes internationally
- convenience for companies reporting across jurisdictional (eg national) boundaries.

A small business case study highlighting the benefits of SBR is presented in box B.1

SBR is currently focussed on developing a taxonomy and lodgement regime for financial reporting. However, once this taxonomy is established and operational there is wide scope to apply the SBR methodology to a much broader range of business reporting requirements.

Box B.1 **Standard Business Reporting: A small business case study**

Before SBR

Joe provides a trade service to households in his town of Wagga Wagga. He wants to expand his business, employ some apprentices and take on a business partner. He is struggling to meet demand due to a national skills shortage in his line of work and is therefore reluctant to take on more work due to the additional paperwork he would have to complete or have to pay someone else to complete on his behalf.

Currently, Joe has to complete a yearly income tax return, relevant business schedules and quarterly BAS. Joe's records are a combination of a cheque book, invoice/receipt book, bank statements and an envelope containing his receipts for work related expenses. Around November each year, Joe takes his records to his accountant who prepares Joe's income tax return and payment summary.

After SBR

Joe has spoken to his accountant about his record keeping and paperwork concerns surrounding the hiring of more staff and apprentices. Joe's accountant shows him an SBR compliant software product that sits on his desktop that has all the information and schedules for government reporting embedded as a module within it. Joe realises that even with the additional reporting obligations due as a result of taking on staff, this software would make life easier than it is today. This new software will help Joe run his business by keeping track of the businesses incomings, outgoings, payroll and any other incidental financial items.

Joe could also complete his own BAS, as well as any other reporting obligations and submit them electronically. The software will also remind him when each form is due, and for additional assurance he has the option of sending some of his forms to his accountant for review, before submitting them. Joe will pay his accountant less than he does today, as the once a year visit to complete his tax return and other government obligations will take only a few hours as opposed to the day or two it takes now.

The software will also allow Joe to know how well his business is tracking, whether it is turning a profit or a loss, where his money is being spent, what type of work brings in the most money for the least amount of effort and so on. This level of analysis will allow Joe to become more astute about the types of jobs he accepts, and how much he should charge for different types of work without waiting until the end of the year when he sees his accountant. Also, Joe can easily transmit his electronic records to his accountant whenever he wants, so his accountant can provide him with more value added advice around business planning without Joe having to go and visit him.

Source: SBR (2009).

The value of extending SBR to other fields is likely to be of most benefit where there is a wide array of data collected by multiple agencies across a number of jurisdictions. Education, aged care, child care and the energy sector are all areas covered in this review that have those characteristics. A taxonomy could be

developed for each of these areas to streamline the reporting burden and provide more transparency and rigour to the data collected. In developing a taxonomy, agencies would also need to consider the data that are already available to them through the SBR financial reporting taxonomy, and that alone should reduce the additional data requests in these sectors. Indeed, the Dutch, who are around four years ahead of Australia in SBR reporting, have indicated that health and education will be the next sectors to use the SBR approach in the Netherlands.

The use of standard definitions and language not only reduces the reporting burden by standardising what is collected, SBR gives greater rigour and confidence in the data that is produced. As a result, agencies may be prepared to collect less data, knowing that what they have collected can be trusted and relied on for policy making and regulatory purposes. Better quality data at the business level should also assist in better designed, more risk-related compliance programs, which will in turn further reduce reporting burdens – especially for highly compliant businesses.

C Reviews of regulation

Table C.1 **A selection of reviews in the social and economic infrastructure services sector**

Sector/Industry	*Intergovernmental/COAG Agreements*	*Productivity Commission*	*National reviews*
Social and economic infrastructure services			
Electricity, gas, water and waste services	National water initiative.	Inquiry into waste generation and resource efficiency (2006).	Australian Energy Market Commission (AEMC) review of energy market frameworks in light of climate change policies (current).
	Australian Energy Market Agreement 2004 (as amended), including: • Establishment of an Australian Energy Market Operator by July 2009. • Transfer of non–price retail regulation to the national framework. • Removal of retail price caps where there is effective retail competition.	Inquiry into the gas access regime (2004). Commissioned study of the regulatory burden on the upstream petroleum (oil and gas) sector (2009).	Senate inquiry into the Management of Australia's Waste Streams (2008).

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Table C.1 **(continued)**

Sector/Industry	*Intergovernmental/COAG Agreements*	*Productivity Commission*	*National Reviews*
Construction	Ensuring best practice regulation making and review processes apply to the Building Code of Australia and removal of state–based variations to the code.	Commissioned study into reform of building regulation (2004).	Australian Building Codes Board review of the Building Code of Australia (current).
Transport, postal and warehousing	Implementation of national rail safety legislation and a nationally consistent rail safety regulatory framework.	Inquiry into road and rail freight infrastructure pricing (2007).	National aviation white paper (current).
	Implementation of a maritime safety system.	Inquiry into Tasmanian freight subsidy arrangements (2007).	Department of Infrastructure, Transport, Regional Development and Local Government review of quality of service monitoring of airports (current).
	The establishment of a national system for the prevention and management of marine pest incursions.	Inquiry into the price of regulation of air services, and subsequent review (2002 and 2007).	House of Representatives inquiry into coastal shipping policy and regulation (2008).
		Inquiry into part X of the Trade Practices Act 1974: international liner cargo shipping (2004).	DITR consultation regulatory impact statement into a national framework for regulation, registration and licensing for heavy vehicles (current).
		Inquiry into economic regulation of harbour towage and related services (2003).	Senate Committee inquiry into investment of Commonwealth and state funds in public passenger transport infrastructure services (current).

(continued on next page)

Table C.1 (continued)

Sector/Industry	*Intergovernmental/COAG Agreements*	*Productivity Commission*	*National reviews*
Transport, postal and warehousing (continued)			House of Representatives standing committee on infrastructure, transport, regional development and local government inquiry into the integration of regional rail and road networks and their interface with ports (2008).
			Exports and infrastructure taskforce report (2005).
			Review of Safeguards for Airports and the Communities Around Them (current).
Information media and telecommunications		Inquiry into telecommunication competition regulation (2001).	National Broadband Network discussion paper: Regulatory Reform for 21st Century Broadband (current).
		Inquiry into broadcasting (2000).	House of Representatives standing committee on communications inquiry into international mobile roaming (current).
			Crawford review of Australian Sport, including the impact of anti–siphoning restrictions on sporting organisations (current).
			Senate inquiry into the reporting of sports news and the emergence of digital media (current).

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Table C.1 (continued)

Sector/Industry	*Intergovernmental/COAG Agreements*	*Productivity Commission*	*National reviews*
Information media and telecommunications (continued)			House of Representatives standing committee on communications, information, technology and the arts inquiry into community broadcasting (2007).
			Department of Broadband, Communications and Digital Economy review of universal service obligations (2007).
			Sport on Television: A review of the anti-siphoning scheme in the contemporary digital environment (current).
Education and training	A workplan for further reforms to vocational education and training (VET), including developing models for a national regulatory body for VET.		Bradley review into Australian higher education (2008).
	Development of a comprehensive national International Student Strategy.		Senate Standing Committee on Education, Employment and Workplace Relations inquiry into Schools Assistance Bill 2008 & the Education Legislation Amendment Bill 2008 (2008).
			Senate Education, Employment and Workplace Relations Committee inquiry into Higher Education Support Amendment (2009 Budget Measures) Bill 2009 (current).

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Table C.1 (continued)

Sector/Industry	*Intergovernmental/COAG Agreements*	*Productivity Commission*	*National reviews*
Education and training (continued)			Senate Education, Employment and Workplace Relations Committee inquiry into the welfare of international students (current). National numeracy review report (2008). DEEWR review of future directions for quality oversight of tertiary education services in Australia (current). PhillipsKPA evaluation of the Educational Services for Overseas Student Act 2000 (2005). Baird Review into the Education Services for Overseas Students Act 2000 (current). KPMG review of university reporting requirements (current). Escalier Consulting Review of the currency and effectiveness of the National Group Training Standards (current). House of Representatives standing committee on Industry, Science and Innovation inquiry into research training and research workforce issues in Australian Universities (2008).

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Table C.1 (continued)

Sector/Industry	*Intergovernmental/COAG Agreements*	*Productivity Commission*	*National reviews*
Health care and social assistance	A national registration and accreditation scheme for the health professions.	Commissioned study into general practice compliance costs (2006).	National Health and Hospitals Reform Commission report (current).
	Development of a national quality agenda for early childhood education and care.	Commissioned study into the performance of private and public hospitals (current).	Senate community affairs committee inquiry into mental health services in Australia (2008).
	National action plan for mental health 2006-2011.	Commissioned study into the health workforce (2006).	Senate select committee inquiry mental health (2005).
	A jointly governed unified national system to replace current licensing and quality assurance processes for early childhood education and care.		Review of the approach to setting national standards and assuring the quality of care in Australian childcare services (2006).
	Establishment of a national health workforce taskforce (2006).		Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the provision of childcare (current)
Public administration and safety			Australian Public Service Commission report on reducing red tape in the Australian Public Service (2007).
Generic Issues			
OHS	Proposed national consistency in occupational health and safety (OHS) laws by mid 2012.	Performance benchmarking of Australian business regulation – OHS (current).	Workplace Relations Ministerial Council review into model OHS laws (current).
		Inquiry into national worker's compensation and OHS frameworks (2004).	

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Table C.1 (continued)

Sector/Industry	*Intergovernmental/COAG Agreements*	*Productivity Commission*	*National reviews*
Mutual recognition		Commissioned study into mutual recognition schemes (2003 and 2009).	
Business regulation and taxation	A national system of registration for Australian Business Numbers and business names.	Performance benchmarking of Australian business regulation – quantity and quality and cost of business registration (2008).	Henry review of Australia's tax system (current).
	Standard Business Reporting (see appendix B).		Board of Taxation study of small business tax compliance costs (2007).
			Report of the Regulation Taskforce on reducing regulatory burdens on business (2006).
Environmental regulation	A plan for achieving the national mandatory renewable energy target is due by 2009.	Submission to the Garnaut climate change review (2008).	Senate select committee inquiry into fuel and energy (current).
	A National Partnership on Energy Efficiency, which aims to deliver a nationally–consistent and cooperative approach to energy efficiency.	Inquiry into the cost effectiveness of energy efficiency (2005).	Garnaut climate change review (2008).
			Wilkins review of climate change policies (2008).
			Review of National Pollution Inventory (2005).
			Hawke Review of the EBPC Act (current).

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Table C.1 (continued)

Sector/Industry	*Intergovernmental/COAG Agreements*	*Productivity Commission*	*National reviews*
Other	Establishment of a new consumer policy framework.	Commissioned study into public support for science and innovation (2007). Inquiry into Australia's Consumer Policy Framework (2005). Inquiry into National Competition Policy arrangements (2005).	ANAO audit of the Australian Research Council's management of research grants (2006). DITR review into the national innovation system (2008).

a This is not an exhaustive list of reviews undertaken by Australian governments and associated agencies, it contains a selection of current, recent and announced reviews relevant to the social and economic infrastructure services sectors.

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