# APPENDIX M
# DEVELOPMENTS IN REGULATION AND ITS REVIEW

*While various anti-competitive regulations continue to be dismantled, the focus of reform is shifting towards pro-competitive regulation. Following several far-reaching reforms in the previous year, in 1992–93 the Government modified mergers regulation and foreshadowed further changes to the corporations law. The Hilmer Review has also proposed wide-ranging changes and a national approach to competition law.*

*But while reform of existing regulation continues apace, the growth of new regulation is not being checked. Much new Commonwealth regulation receives limited public or parliamentary scrutiny, and the processes for making and reviewing new regulation are inadequate. As a result, new regulation can often be overly complex, costly and prescriptive. The Government therefore needs to adopt comprehensive procedures for vetting new regulation, such as those proposed by the Administrative Review Council.*

Microeconomic reform involves not only review of the existing stock of regulation but also measures to ensure that the flow of new regulation is justified and that new regulatory regimes are well designed. Whereas much of the Industry Commission's workload focuses on existing government intervention in the economy, the Office of Regulation Review (ORR) — incorporated into the Commission in 1989 — deals mainly with new Commonwealth business regulation.

In assessing new regulatory proposals, the ORR seeks to implement the Commonwealth Government's policy of 'minimum effective regulation'. Under this policy, regulation will be supported only where a well-defined social or economic problem exists, where other solutions such as self-

regulation or market-based measures are inappropriate, and where the likely benefits of the regulation exceed the likely costs. The policy does not seek 'deregulation' *per se*: rather, it seeks more selective, appropriate and better designed regulation.

As well as scrutinising particular regulatory proposals, the ORR seeks to encourage governments and their agencies to adopt sound regulation-making processes. This aspect of the ORR's work aims to influence the culture of regulation within government and the bureaucracy towards the 'minimum effective regulation' objective.

This appendix discusses major developments in regulation and its review over the last year.

## Aggregate changes in Commonwealth regulation

### Types of regulation

Business regulation refers to government actions which:

> ...whether by the use of fiat or inducement, persuade business entities to pursue their commercial interest in ways they might otherwise not have chosen. It seeks to modify or augment that body of common law which governs interactions in general and which constitutes the basis of a model free market economy (BRRU 1986, p.1).

Regulation can be classified into three groups — primary legislation, subordinate legislation and administrative decisions and instruments — on the basis of how it is made. *Primary legislation* consist of Acts of Parliament. *Subordinate legislation* comprises all rules or instruments which have the force of law but which have been made by an authority to whom Parliament has delegated part of its legislative power. There are three main types:

- statutory rules must be approved by the Governor General in Council and are subject to review by the Senate Standing Committee on Regulation and Ordinances (SSCRO) and disallowance by Parliament;
- disallowable instruments are made by Ministers or Departments and are subject to review by the SSCRO and disallowance by Parliament; and

- other subordinate legislation which is not subject to parliamentary scrutiny.

*Administrative decisions and instruments,* while not legislative in character, usually consist of the application of legislation to particular circumstances.

Regulation can also be classified according to the way it affects economic activity. *Pro-competitive regulation* establishes property rights, secures contractual obligations and keeps markets open and competitive. *Anti-competitive regulation* governs the entry of firms and individuals into markets, or controls prices or production levels. *Social regulation* directs firms' production and marketing activities generally to achieve social objectives.

## Trends in regulation

There are several problems involved in attempting to measure and make judgments about the aggregate level of business regulation in the economy. While a listing of primary legislation can be obtained, there is no consolidated listing of all subordinate or administrative regulation at the Commonwealth and State levels.[1] Even if there were, the amount of regulation in existence would not indicate its actual economic impact. A further problem is that determining whether any particular regulation meets with the 'minimum effective regulation' criterion involves several complex and, in some instances, contestable judgments.

Although these problems preclude useful comments about the desirability of existing Commonwealth business regulation at the aggregate level, several trends in new regulation are evident.

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1 188 Acts were passed by the Commonwealth in 1992–93. Of these, 32 were Acts relating to supply or appropriation, 51 were new Acts and the balance, 105 Acts, involved amendments to existing legislation. The ORR estimates that at least 54 Acts provided for mainly business regulation. Many of these deal with minor amendments or procedural matters. The Acts involving more substantive amendments or new regulation are listed in Table M1.

## Table M1
## Significant Commonwealth primary business legislation, 1992

| *Primary legislation* | *Main feature* |
|---|---|
| *Antarctic (Environment Protection) Legislation Amendment Act 1992* | Brings Australia into line with the Protocol on Environmental Protection to the Antarctic Treaty. |
| *Broadcasting Services Act 1992* | Regulates (less heavily than previously) radio and television broadcasting, and establishes the ABA. |
| *Broadcasting Services (Subscription Television Broadcasting) Amendment Act 1992* | Includes provisions relating to the issuing of subscription (Pay) television broadcasting services. |
| *Broadcasting Services Amendment Act 1993* | Effects cross-media ownership and MDS licenses. |
| *Broadcast. Services Amend. Act (No. 2) 1993* | Sets out deposit requirements for bidders for Pay TV. |
| *Charter of the United Nations Amendment Act 1993* | Provides for sanctions (including on trade) to give effect to certain decisions of the Security Council. |
| *Corporate Law Reform Act 1992* | Relates to winding up in insolvency, related party financial dealings and the securities clearing house. |
| *Endangered Species Protection Act 1992* | Aims to protect endangered species. |
| *Great Barrier Marine Park Amend. Act 1993* | Provides for environmental management charges. |
| *Health and Community Services Legislation Amendment (No. 2) Act 1992* | Changes the regulation of health insurance and nursing homes. |
| *H&CSL Amendment (No. 3) Act 1992* | Sets health standards and nursing home regulation. |
| *Health Insurance (Quality Assurance Confidentiality) Amendment Act 1992* | Relates to quality assurance activities and information disclosure for health services. |
| *Imported Food Control Act 1992* | Provides for inspection and control of food imports. |
| *Industrial Relations Legislation Amendment Act (No. 2) 1992* | Relates to the setting of national standards and codes of practice under the *National OHS Commission Act* . |
| *Industry, Technology and Commerce Legislation Amendment Act 1992* | Changes to industrial and intellectual property regulations. |
| *International Labour Organisation (Compliance with Conventions) Act 1992* | Gives effect to and ratifies certain international labour conventions. |
| *Law and Justice Legislation Amendment Act (No. 4) 1992* | Amends, among others, the *Bankruptcy Act 1966* . |
| *Mutual Recognition Act 1992* | Allows mutual recognition of goods and occupations. |
| *National Health Amendment Act 1992* | Regulates nursing homes. |
| *National Health Amendment Act 1993* | Sets up privacy guidelines. |
| *Natural Resources Management (Financial Assistance) Act 1992* | Establishes the Natural Resource Management Fund and the National Landcare Advisory Committee. |
| *Petroleum (Submerged Lands) Amendment Act 1992* | Promotes the occupational health and safety of persons employed in the designated areas. |
| *Radiocommunications Act 1992* | Regulates the radio frequency spectrum, including provision for price-based and tradeable licences. |
| *Seafarers Rehabilitation and Compensation Act 1992* | Covers rehabilitation and workers' compensation for seafarers, including compulsory insurance. |
| *Superannuation Guarantee Charge Act 1992* | Charges firms which fail to provide compulsory superannuation contributions for their employees. |
| *Telecommunications Amendment Act 1993* | Allows for the development of a Land Access Code. |
| *Tobacco Advertising Prohibition Act 1992* | Limits advertisements for tobacco products. |
| *Trade Practices Amendment Act 1992* | Provides for a new product liability regime. |
| *Trade Practices Legislation Amend. Act 1992* | Expands the concept of unconscionable conduct. |
| *Transport and Communications Legislation Amendment Act (No. 3) 1992* | Allows for codes of practice under the *Broadcasting Services Act 1992* and refines AUSTEL's functions. |

*Source*: ORR (derived from examination of original legislation)

**Table M2**
**Commonwealth statutory rules and disallowable instruments, 1982–83 to 1991–92**

| *Year* | *Statutory rules* | *Disallowable instruments* | *Total* |
|---|---|---|---|
| 1982–83 | 553 | 150 | 703 |
| 1984–85 | 445 | 276 | 721 |
| 1985–86 | 429 | 426 | 855 |
| 1986–87 | 322 | 335 | 657 |
| 1987–88 | 345 | 493 | 838 |
| 1988–89 | 398 | 779 | 1 177 |
| 1989–90 | 411 | 820 | 1 231 |
| 1990–91 | 484 | 1 161 | 1 645 |
| 1991–92 | 524 | 1 019 | 1 543 |

*Source:* SSCRO (1993)

First, as noted in last year's Annual Report (IC 1992d), the amount of anti-competitive regulation is declining, while there has been a revamping of pro-competitive regulation and an increase in social regulation. This can be seen in Table M1 which lists significant new primary Commonwealth legislation, including Acts which made significant changes to existing regulatory regimes. Anti-competitive legislation has been reduced in broadcasting and through the implementation of the Mutual Recognition Act. Pro-competitive regulation has been refined in product liability law, corporations law and intellectual property law. Most new primary legislation in 1992–93 provided for increased social regulation, such as in areas of the environment, occupational health and safety, and health services.

Second, available information suggests that the volume of new Commonwealth statutory rules and disallowable instruments has increased significantly over the last ten years. The SSCRO reports that 1543 instruments were added to the existing level of these types of regulation in 1991–92 (the latest year for which figures are available). Although this is slightly lower than the previous year's figure, it remains well above the level of a decade earlier (Table M2).

Third, within this trend, there is an increasing reliance on disallowable instruments. As these instruments do not receive Cabinet or effective parliamentary scrutiny, and their economic impact has not been addressed in most cases, the trend towards this type of instrument has the potential to reduce the quality of regulation.

## Changes in pro-competitive regulation

As previously stated, pro-competitive regulation refers to laws which establish private property rights and keep markets open, and is essential for the smooth functioning of market-based economies. It includes:

- companies and securities regulation;
- trade practices legislation;
- liability laws; and
- intellectual property laws.

Pro-competitive regulation has received greater emphasis in recent years, for two reasons:

- in the past, the impact of anti-competitive regulation and industry-specific regulation has diminished the role of less prescriptive and more general pro-competitive regulation. As anti-competitive and industry-specific regulation has been phased down during the late 1980s and early 1990s, pro-competitive regulation has had more impact; and
- as this has occurred, there has been an increased awareness of the costs of inappropriate pro-competitive regulation and the importance of 'getting it right'.

Following on from the already significant reform activity discussed in last year's report, in 1992–93 the Government launched major reviews of two of the most important areas of pro-competitive regulation: the corporations law and restrictive trade practices regulation. Both reviews question the scope and detail of the respective regulation.

Other areas of pro-competitive regulation being examined include intellectual property law and workers' compensation, while the product liability issue, after several years of dispute and review, now appears to be largely settled.

## Companies and securities regulation

Companies and securities regulation aims to ensure the free flow of information on the financial position and prospects of commercial organisations. It stipulates penalties for misrepresentation or financial misconduct by company directors and agents.

A new national companies and securities regime was brought into effect in January 1991. It replaced the previous separate State and Commonwealth laws and agencies with a national Corporations Law and a new and more independent Australian Securities Commission (ASC).

The Government then launched four waves of amendments and further reforms to the Corporations Law — some procedural, others more far-reaching. Many of the amendments were criticised by the legal profession and the business community as being too complex, intrusive and prescriptive.

In April 1993, the then Attorney-General, Mr Kerr, foreshadowed a comprehensive program of simplification of the Corporations Law:

> Now is the time to take the whole body of law inherited from the old co-operative scheme, and strip away all the unnecessary verbiage and complexity that has grown up during the century of company law development in this country (Kerr 1993, p.1).

The new Attorney-General, Mr Lavarch, has endorsed the review, suggesting that another goal would be to ensure that Australia's corporations legislation was compatible with New Zealand law and the laws of Australia's Asian trading partners (Davies 1993).

The Attorney-General is in the process of forming a Task Force to oversee the review of the Corporations Law. This Task Force will work in consultation with a part-time private sector consultative group. Mr Lavarch (1993) has stated that he sees the active participation of private sector representatives as an important element in making the Corporations Law simpler and cheaper for its users.

Business groups favour a more 'fuzzy law' approach to corporate governance. Fuzzy law refers to an approach to regulation that replaces prescriptive statutory 'black letter' rules with performance standards, by using general legal principles. These principles are applied by the courts to individual cases and, over time, a body of law based on actual commercial behaviour of firms is developed.

Critics argue that this approach reduces the certainty in the law, but the ORR notes that any problems with uncertainty can be dealt with by according 'deemed to comply' status on the prescriptive rules; thus allowing firms who prefer to adhere to the old-type rules to continue to do so with impunity. In any case, prescriptive rules do not avoid uncertainty because of the ongoing identification of 'loopholes' and subsequent amendments.

## Competition law

Competition law, also referred to as anti-trust law or restrictive trade practices regulation, aims to restrict the ability of firms with market power to engage in anti-competitive activities. The main developments in competition law during 1992–93 were the National Competition Policy Review (the Hilmer Review) and changes to the regulation of mergers.

### *Competition policy: the Hilmer review*

In October 1992, the Prime Minister, in consultation with the heads of State and Territory governments, established an independent inquiry into competition policy in Australia to be chaired by Professor Fred Hilmer. The Review was prompted by concern about the range of exemptions from the competition law provisions of the Trade Practices Act.

The Review's report (Hilmer 1993) was presented to the Prime Minister on 25 August, following circulation of a draft report and consultation between the Review committee and the Commonwealth, States and Territories.

The first part of the report is concerned with technical changes to existing competition law, and extending the application of this law to new areas, such as all government enterprises and unincorporated associations.

The second part deals with the new policy elements needed to regulate markets traditionally supplied by governments, particularly where there are natural or mandated monopolies. These new policy elements are:

- review of regulatory restrictions to competition on a national level;
- structural reform of public monopolies;
- determination of rights of access to 'essential facilities' (natural monopolies);

- determination of limits on monopoly pricing; and
- review of the extent that public provision of goods and services should be subject to the same rules as private provision of similar products (competitive neutrality).

The third part outlines institutional, legal, transitional and resource issues. In it, the Review recommends a new body, the National Competition Council (NCC), to "play a key role in policy decisions" relating to the new policy elements listed above. The NCC would be responsible for safeguarding State and Territory interests, and would also report on transitional issues.

The Review suggests that the Trade Practices Commission (TPC) and elements of the Prices Surveillance Authority (PSA) be combined to form the Australian Competition Commission (ACC). In addition to the current functions of the TPC, the ACC would:

- oversight adherence to access declarations for essential facilities, and provide an arbitration process for dispute settlement;
- administer the prices oversight mechanism for essential facilities; and
- expand its review of anti-competitive regulation to reflect the broader scope of the Trade Practices Act, and report on compliance with competitive neutrality issues and legislative exemptions from the Act.

The Review suggests that implementation of its recommendations should be negotiated between all governments with referrals of power to the Commonwealth where necessary. In so doing, it has suggested that the Commonwealth generally not act unilaterally, even though it believes that the Commonwealth could probably put in place most of its recommendations alone. This approach would involve testing the limits of Commonwealth constitutional powers and, in particular, the power to regulate corporations and their dealings with others.

The report of the Hilmer Review will be discussed at the next meeting of the Council of Australian Governments (COAG), probably in December.

### *Changes to mergers regulation*

In June 1992, the Government announced that it would accept the major recommendations of the Cooney Committee inquiry into Mergers, Monopolies and Acquisitions regarding the mergers provisions of the Trade

Practices Act. Part IV of the Trade Practices Act was subsequently amended to change the threshold test for mergers from the 'create or enhance a position of dominance' test to the 'substantial lessening of competition' test.

In November 1992, the TPC released draft guidelines to explain in detail how it will administer applications for authorisation of mergers under the new test.

In the last few years, the TPC's regulation of mergers has placed more emphasis on the competitive discipline of import competition. Indeed, Fels and Walker (1993) note that the TPC has not opposed a merger in the traded goods sector since at least July 1991.

The new merger guidelines (TPC 1992a) appear to reinforce this trend: the focus of merger scrutiny will be the non-traded goods and services sectors. Such a shift in emphasis has already been endorsed by the Commission in its discussion paper on Pro-competitive Regulation (IC 1992f).

However, the ORR is concerned that the new market concentration thresholds in the new TPC guidelines are similar to those in the 1992 US Merger Guidelines. The US domestic market is so large that it may be a reasonable rule of thumb to assume that scale economies have been exhausted at modest market shares. When transferred to Australia, these thresholds may frustrate the formation of industrial units of an efficient size. An example of the large difference in minimum efficient scale, relative to market size, comes from the Commission's report on the automotive industry (IC 1990a). Annual assembly volumes of 200 000 per plant were generally regarded as necessary for efficient production. No Australian plant was then operating at more than 100 000 units a year for a market where new car registrations were about 440 000. The draft guidelines recognise that cost savings can flow from mergers, but only if they are likely to be passed on as lower prices to buyers (with some qualifications about exports and import replacement). Thus, in Australia, mergers to the minimum efficient scale immediately places a car manufacturer 'at risk' under the merger guidelines. This would not occur in the US because aggregate car production in 1989 was 6.8 million units.

While the TPC may confer authorisation on merging firms under these particular circumstances, this aspect of the merger procedures could create unnecessary uncertainty for businesses, particularly those competing in the

traded goods sector, where imports promote competitive outcomes in the domestic market.

## Product liability

Product liability laws specify the circumstances in which people who suffer product-related loss or injury are entitled to receive financial payment from the producers (or sellers) of the goods. They are essentially the legal means of compensating consumers for faulty products, and they affect the incentives for firms to increase the safety and quality of their goods, and for consumers to use goods carefully.

After a series of reviews, inquiries and reports on Australia's product liability laws and several drafts of new legislation, the Government last year enacted a new regime. The new regime — Part VA of the *Trade Practices Act 1974* — is based on the European Community Directive on Product Liability and follows the thrust of the recommendations from the Commission's report (IC 1990b).

When introducing the new regime, the Government referred three controversial issues to the Senate Committee on Legal and Constitutional Affairs for further consideration. The three matters related to the length of the 'statute of repose', whether overseas consumers of Australian products should be entitled to rights under the new Australian law, and whether consumers should face a reduced burden of proof.[2] The ORR (1992), in a submission to the Committee, supported abolition of the statute of repose and the extension of rights to consumers overseas, but argued that the onus of proof should not be tampered with unless experience shows significant problems with the new regime. The majority of the Committee (SSCLCA 1992) argued that there should be no change to the regime except in the case of the statute of repose, where it considered that a court ought to be able to extend the repose period under certain circumstances.[3]

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2 The 'statute of repose' refers to the time limit (after the purchase of the goods) for which a producer can be held liable for loss caused by its goods.

3 Specifically, while considering that the repose period should generally remain at 10 years, the committee recommended that a court should be able to extend the period if it is shown that, on or before the date a product was supplied, the manufacturer knew or ought to have known that it was defective ( SSCLCA 1992, p.xi).

While this may provide some time to 'settle down' the details of new regime, there remain problems in this general area of the law that warrant attention:

- product liability laws in Australia remain complex and overlapping, with remedies available under different parts of Commonwealth and State law. With the implementation of the new regime, these other laws are unnecessary and should be repealed; and
- the law of contract fails to attribute appropriate responsibility to consumers for their actions in product liability cases. If remedies to consumers are to remain available under that law, it should be modified to better reflect concepts of contributory negligence on the part of consumers.

There would also be merit in reviewing the new product liability regime in five years time to determine, amongst other things, whether in practice it provides appropriate access to remedies for consumers.

## Changes in anti-competitive regulation

Anti-competitive regulation includes: tariffs; quotas; statutory marketing arrangements; minimum accreditation standards (eg minimum qualifications to practice law); and legislated monopolies.

There has been considerable progress in recent years in the reform of anti-competitive regulation. This has included reducing tariffs, liberalising primary industry markets, and opening up transport and communications markets. During this year, there has been a further reduction in broadcasting regulation (for areas other than Pay TV) and the introduction of mutual recognition of regulation for goods and occupations has the potential to reduce the impact of State-based, anti-competitive regulation (see below).

However, substantial anti-competitive regulation prevails in some sectors and further reform may be warranted. Two examples are now discussed.

### The professions

The professions are exempt from the operation of the *Trade Practices Act 1974*. This allows them to undertake practices which would otherwise

contravene the Act including various forms of collusive dealing (especially price fixing agreements), exclusive dealing arrangements, and anti-competitive restrictions on entry and conduct. The regulation of professions is usually developed and enforced through self-regulatory codes although, in some instances, these codes have legislative backing.

Regulation of certain aspects of some professions may be justifiable. In the market for medical services, for example, the availability of subsidised health care, and the fact that doctors both advise patients of the need for treatment and supply the service, mean that some form of regulation may be necessary to ensure that doctors do not over-service their patients. The costs consumers face in selecting between practitioners may also justify regulation of entry into a profession through appropriate accreditation standards.

However, some regulation of the professions appears to have different motives. For example, bans on advertising professional services, as apply in the legal profession, appear to serve no purpose other than to restrict competition. Likewise, accreditation standards are often set at very high levels and have the potential to unduly exclude new entrants from the market.

The TPC has been undertaking a series of reviews of the professions. It has already released studies on architects (TPC 1992c) and accountants (TPC 1992b) which found that, while these professions had some unjustifiable regulation (eg an hourly rate fee schedule for insolvency practitioners), they were generally competitive and not significantly constrained by regulation. The TPC is due to release a draft study on the legal profession in early October 1993. In a submission to the TPC, the Attorney-General's Department criticised barriers to entry and restrictive trade practices in the legal profession.

There have been some reforms to regulation of professions in recent years. For example, since 1991, all States other than Queensland that had banned the advertising of legal services have lifted those bans. In NSW, property conveyancing, previously restricted to lawyers, has been opened up to para-professionals and the Government has announced that it will no longer appoint Queen's Counsels (although the extent to which these NSW reforms will increase competition is unclear). Further, mutual recognition

of entry standards has reduced some previous State barriers to competition within professions.

The Hilmer Review has recommended that the Trade Practices Act be extended to apply to the professions. If accepted, this recommendation should increase competition in the market for professional services, thereby providing consumers with access to services at lower cost and potentially improving equity in terms of the remuneration received by different groups within the workforce. This reform alone will not remove those anti-competitive practices which have State legislative backing. However, as noted above, some anti-competitive practices may be justified in certain circumstances. The Hilmer review envisaged that such issues would receive scrutiny under the auspices of the NCC to determine whether the benefits of such practices exceed their costs.

## Pay TV

During the past year, the Government put in place the regulatory framework for the introduction of Pay TV services to Australia. The main legislation is the *Broadcasting Services (Subscription Television Broadcasting) Amendment Act 1992*.

The framework is highly prescriptive, involving regulation of the number of stations, ownership, local content and transmission technology. Industry development criteria are also included in the licensing requirements for Pay TV providers. As such, the regulatory regime involves aspects of both social and anti-competitive regulation.

In its paper on Pay TV regulation, the ORR (1991) found little justification for the detailed regulation of Pay TV services, and that common arguments for regulating the technological means of providing Pay TV services were invalid.

Some of the problems associated with this type of regulation have been highlighted by recent developments. In particular, the unexpected threat posed to satellite provision — the Government's chosen transmission technology — by potentially more competitive microwave multi-point distribution services (MDS) demonstrates the problems governments face in attempting to pick 'technological winners'.

Overall, in the ORR's view, the regulatory framework developed for Pay TV is likely to inhibit competition and limit the benefits to consumers from the new services.

## Changes in social regulation

Social regulation directs firms' production and marketing activities, generally, to achieve social objectives. Examples of social regulation include: environmental controls; food standards; product safety regulations; occupational health and safety (OHS) standards; and broadcasting content requirements.

Social regulation is often used as a response to forms of 'market failure', such as the problem that polluters do not bear the full costs to society of their activities. Some forms of social regulation, such as emissions standards, seek to over-ride market processes and prescribe desired outcomes. Alternatives to achieve these social goals include the use of economic instruments, such as pollution taxes, which seek to augment market processes by integrating the costs of pollution into firms' and individuals' production and consumption decisions.

### Environmental regulation

#### *National strategies*

As discussed in last year's Annual Report, several national strategies to deal with environmental problems have been developed during the last few years. These include strategies dealing with waste and recycling, used motor vehicle tyres and waste lubricating oil, bio-diversity, ozone depletion, greenhouse emissions and ecologically sustainable development (ESD).

Progress in implementing the strategies has been mixed. For example, many elements of the National Waste Minimisation and Recycling Strategy have been or are being implemented by the Commonwealth, including the compilation of a national data base on waste disposal and work on the feasibility of using waste pricing to overcome disposal problems (BIE 1993d). Meanwhile, various States (particularly Victoria) have pushed ahead with their own actions. However, other measures included in

the strategy have not been progressed (eg targets for recycling and packaging reductions). The ORR also understands that there has been only limited progress in implementing the recommendations of the Australia and New Zealand Environment and Conservation Council report on waste lubricating oil and used motor vehicle tyres (ANZEC 1991).

During the year, further revisions and updates were made to the Strategy for Ozone Protection (ANZECC 1993). This strategy represents an amalgam of the measures to reduce production and use of CFCs and certain other controlled substances, endorsed by the Australian Environmental Council (the predecessor to ANZECC) in July 1989. The strategy's measures, and associated State-based initiatives, include bans on certain products and manufacturing processes, controls on the purchase and sale of specified products, the accreditation of mechanics who use CFCs, and the implementation of industry codes of practice. These measures are in addition to the tradeable permits scheme for CFCs, and licenses for the production, import and export of CFCs, provided for under the Commonwealth's *Ozone Protection Act 1989*. The strategy's measures have been modified, tightened and supplemented over time.

In the ORR's view, some of these approaches may be overly prescriptive, costly and complex to administer and comply with. In particular, the overlaying of complex product, sale and end-use controls at the State level on the Commonwealth's tradeable permit scheme is an unnecessary process, as the reduction in CFCs could have been obtained more efficiently, and with less cost, using an appropriate tradeable permits scheme alone. As the complete phase-out of all remaining CFCs (except for essential uses) is scheduled for the end of 1995, it may not now be sensible to attempt to overhaul this regime. However, in developing a regime for reducing HCFCs — the next step in ozone protection — State and Commonwealth environmental agencies should seek to avoid the complexity and inefficiencies inherent in the current approach.

### *Institutional arrangements*

The Intergovernmental Agreement on the Environment (IGAE) — signed by the Commonwealth, the States and the Local Government Association in May 1992 — provides for the establishment of a Ministerial Council to be known as the National Environment Protection Agency (NEPA). NEPA will be charged with developing national environment protection

measures. Despite delays in giving effect to this aspect of the agreement, the establishment of NEPA brings potential benefits insofar as it may reduce unnecessary discrepancies between State environmental standards, while enhancing environmental regulation-making.

To fulfil this potential, NEPA will need to adopt a rigorous approach to assessing proposals. It will need to identify the objectives, evaluate the alternatives and assess the benefits and costs of proposals before it. The ORR considers that the approach taken by the National Road Transport Commission may provide a useful analytical model for NEPA.

It is also important that any measures endorsed by NEPA be subject to external scrutiny to ensure that the cross-portfolio effects and economy-wide benefits and costs of decisions are properly considered. A proposal for subjecting standards developed by national agencies to regulation review procedures is discussed later in this appendix.

NEPA decisions will also need to recognise that the costs and benefits of environmental protection measures often vary across states and across regions, so nationally uniform standards will not always be appropriate. For example, factory airborne emissions standards will generally need to be tighter in metropolitan areas than in country areas. This means that NEPA standards will need to incorporate a degree of flexibility to account for such differences. That said, for some substances such as CFCs which affect the environment more at the global rather than the local level, a uniform regulatory approach will be appropriate.

## Food standards

The year saw an advance in the reform of the regulatory environment of the processed food industry. The establishment of the National Food Authority (NFA) is now complete and it has:

- increased its throughput of decisions, reducing the large backlog of outstanding applications;
- completed the comprehensive policy review ordered by Cabinet; and
- adopted a five year program for the total review of the individual standards in the Food Standards Code.

However, these positive developments were offset by:

- the adverse nature of some of the decisions on new standards (eg the proposal to limit the vitamin and mineral fortification of products, which was made on questionable nutritional grounds, will require some popular brands of breakfast foods to be reformulated and greatly limit producers' future ability to service markets for functional foods); and
- the implementation, after a delay, of the expanded Commonwealth imported food inspection program, announced in 1992.

The ORR also considers that the final report of the policy review (NFA 1993) does not provide a sound basis for the future formulation of food standards. While the report endorses the analysis of the problems of food regulation identified in earlier reviews, it makes no significant recommendations for improvement. In particular, it fails to recommend careful economic evaluation of applications (as is required by the regulation review policies of the Commonwealth and most State governments), minimum standards of technical information on scientific and consumer concerns, and the development of base-line standards for risk acceptability. Consequently, many of the arbitrary 'rules of thumb' that have characterised food standard setting in the past will continue.

Moreover, the NFA has yet to establish effective mechanisms for the coordination of food regulation enforcement by the many agencies involved. Indeed, its first enforcement proposal was to expand the Commonwealth Government's imported food inspection program beyond a targetted risk-based approach to include inspection for compliance with the full requirements of Australia's highly prescriptive, unique and changing food standards. This simply imposes an additional layer of regulation on imports without addressing the underlying issue of rationalisation of Australia's un-coordinated and arbitrary State and local government inspection programs.

## Occupational health and safety

Reflecting its concern about the slow progress in the development of national OHS standards, the National Occupational Health and Safety Commission (Worksafe Australia) has been directed to complete a program of national uniform OHS regulation by the end of this year. The programs main priorities include the development of uniform regulations relating to:

- plant;
- certified users and operators of industrial equipment;
- workplace hazardous substances;
- manual handling;
- noise;
- storage and handling of dangerous goods; and
- major hazardous installations (Emmett 1993, pp.6-7).

The approach taken by Worksafe in developing national standards has been to replace State-based prescriptive rules with performance standards and codes of practice which focus on formal programs of hazard identification, risk assessment and abatement by a hierarchy of measures.

This hierarchy creates a preference for particular forms of abatement. For example, in the case of noisy equipment, redesign to reduce noise is preferred to adding sound deadening material, which in turn is preferred to issuing protective equipment to employees. Such a hierarchy can be sensible; many OHS problems can be remedied by a simple and cheap redesign, and Worksafe may have expertise it can bring to bear.

However, there is a problem if mandating a hierarchical approach involves high cost thresholds before alternative approaches can be used. Firms should be allowed to choose the most cost-effective solutions to OHS problems. This should allow larger reductions in the frequency and severity of accidents for a given amount of resources spent on OHS.

While the ORR considers that the approach adopted by Worksafe represents an improvement on past practices, full adoption of a cost-effectiveness approach is desirable to maximise the benefits from OHS regulation.

## Regulation-making processes

### Mutual recognition

National arrangements for the mutual recognition of regulation commenced in March 1993, two months behind the introduction of similar arrangements into the European Community.

Heads of government agreed to the Australian scheme in May 1992. It allows most goods that are first produced in or imported into one State or Territory under the laws of that jurisdiction to be sold freely throughout the country. In addition, members of regulated occupations, once registered in any one State or Territory, will be able enter the practice of an equivalent occupation anywhere in Australia.

Legislation giving effect to the agreement has been passed by the Commonwealth government and in all States and Territories other than South Australia and Western Australia. Legislation had not (at 10 September) been introduced into the Western Australian Parliament. In South Australia, the enabling Bill was initially rejected by the Legislative Council, but the legislation was finally passed on 9 September 1993.

By and large the scheme creates a common market for goods within Australia. Firms are now able to gain the advantages of economies of scale by avoiding the need to produce and stock variants of the same product required in the past to meet different State requirements, particularly for labelling. Consumers gain from an intensification of competition and a wider choice of some products previously not available in some States, such as game meats.

Moreover, governments now have increased incentives and easier collective means to agree on national standards where it is important to do so. For instance, in the absence of a national standard for the lead content in automotive fuel, petroleum retailers are free to sell fuel produced to any of the widely varying current State standards. But, unlike in the past when a unanimous decision would have been required, a binding national standard can be set now by a majority vote in the relevant Ministerial Council.

The reduction in the barriers to entry for regulated occupations will increase the flexibility of some important labour markets, particularly those for professional services. That said, two problems remain. First, significant legislative entry barriers remain for many occupations in all States, and individual States continue to regulate the practice of similar occupations differently, without cogent reason. This problem has been to some extent addressed by the Hilmer Review. As noted above, the Review recommended that the Trade Practices Act be extended to cover the professions and that other anti-competitive regulation be examined under the auspices of the NCC. The second problem is that entry to some 300

individual occupational groupings is regulated by only some States or Territories. A working group of officials has recommended to Commonwealth and State labour ministers lists of those occupations in this class which should be regulated nationally and those where entry requirements should be broadened or dropped. In the event that these recommendations are accepted, individual governments will need to enact separate legislation.

Negotiations are well advanced for the Australian mutual recognition agreement to include New Zealand, and a future extension to the countries of the Asia Pacific Economic Cooperation grouping is under examination. While expansion of mutual recognition arrangements to other countries raises questions of national sovereignty, considerable benefits for Australia arise from the ensuing increase in trade. Not the least of these is the avoidance of the protracted negotiations involved in trying to achieve detailed harmonisation of product regulatory standards. The essence of mutual recognition arrangements is the willingness of communities to tolerate and benefit from the differences which arise inevitably when separate approaches are applied to similar regulatory problems.

## Self-regulation

Broadly defined, self-regulation is the acceptance of mutual obligations by firms in an industry or by members of a profession. These obligations are usually embodied in an industry 'code of practice' or a professional 'code of conduct'. While adopted and administered as an industry initiative, these codes usually complement both Commonwealth and State laws and regulations.

Self-regulatory codes currently deal with a range of matters. According to the TPC (1988, p.4), self-regulation can cover:

- *membership* eligibility criteria, for example, for professional qualifications or type of business activities;
- *geographic coverage*—national, state or local;
- *standards* prescribed for business premises, equipment, training and qualifications, terms and conditions of trading, industrial and consumer safety;

- *complaint-handling procedures* which specify how complaints are to be dealt with and what avenues of appeal are available;
- *product recall procedures* which specify the circumstances in which products should be recalled and the procedures to be followed;
- *representation of industry views* on all matters of concern to the industry or profession; and
- *pricing and costing assistance.*

While many industries and professions have established self-regulatory codes on their own initiative, in some instances they establish them to reduce the political pressure on government to regulate. Indeed, governments have recently encouraged certain industry groups to develop self-regulatory codes to overcome particular problems in the market-place rather than have the government itself regulate to attempt to solve the problem. For example, the television industry has been encouraged to develop a self-regulatory code relating to advertising time limits, although the *Broadcasting Services Act 1992* provides the Australian Broadcasting Authority (ABA) with the power to overturn the industry code if "there is convincing evidence that a code of practice ... is not operating to provide appropriate community safeguards."

This raises the question of when government should regulate and when it should defer to industry to devise its own codes.

Self-regulation can be a less costly alternative to regulation for addressing problems in the marketplace. While regulation has legislative authority, regulatory agencies often have insufficient information to devise appropriate regulation, and government regulation can be costly to enforce and slow to change. Self-regulation lacks legal backing, but can be developed and monitored through existing industry channels and is relatively easily tailored to suit specific geographical or other needs.

The market problems which best suit self-regulation relate to inadequate information. Information may be inadequate where it is misleading, where consumers are unable to evaluate it, where the cost of misinformation is high, or where it is very costly for firms (or professional members) to provide. To overcome these problems, firms (or professional members) may co-operate by, for example, agreeing to information disclosure standards, having their products or qualifications independently certified, or offering low-cost arbitration of disputes.

However, self-regulatory codes will not always be appropriate, particularly where:

- enforcement mechanisms are inadequate. Self-regulation is difficult to enforce because it lacks the backing of legislation. For this reason, self-regulation is most effective in mature, concentrated markets or in markets where consumers largely make repeat purchases. In a concentrated industry, it is easier for other firms to highlight breaches of the industry code. In addition, if the market largely consists of repeat purchases, customers can penalise firms for any divergences from the code.
- self-regulatory codes have the potential to be used as an anti-competitive tool. This anti-competitive effect will be evident in a number of ways: entry restrictions, restricted supply, restricted range of products, increased prices and promotion of the cartelisation of the industry.

In such cases, regulation by government will tend to be preferable to self-regulation by industry.

## Regulation review procedures and policy

### The ORR review

As foreshadowed in last year's Annual Report, the Industry Commission established a Review of the ORR in early 1993. It was conducted by an external reviewer with staff support from the Commission. The terms of reference required the Review to:

- identify the functions currently performed by the ORR;
- determine the extent to which the ORR's performance helps achieve the Government's regulation review objectives and other objectives embodied in the Industry Commission Act;
- assess whether the ORR uses its resources efficiently and effectively; and
- identify options to improve the regulation review process.

While the Review was conducted against a background of increasing calls on Government to strengthen its regulation review policies and procedures (see below), the Review did not examine these issues; and instead framed its report on the basis that these policies would remain unchanged.

In commenting on the ORR's role, the Review (IC 1993b) stated:

> The ORR fulfils a useful function in encouraging regulatory agencies to pursue an objective of 'minimum effective regulation' and in advising Ministers of the regulatory impact of proposed measures. It also contributes to a wider understanding of regulatory issues, including the economic cost of inappropriate regulation, through its contributions to Industry Commission inquiries and the publication of papers.

However, the Review pointed to several constraints on the ORR's effectiveness:

> ... the ORR's effectiveness is constrained by deficiencies in the existing policy and procedural framework. In practice, the ORR is only able to comment on a small proportion of the total volume of new and amended business regulation. And in many cases, the ORR is consulted too late in the process for its comments to have a significant impact on the adoption or design of the proposed regulatory measure. The ORR's effectiveness is also constrained by the propensity of other Government objectives to take priority over regulation review objectives.

The Review also found that the task presented to the ORR exceeded its capabilities:

> The ORR's charter is an ambitious one and the resources allocated to it have been relatively modest. Inevitably, it has not been able to fulfil comprehensively all the functions ascribed to it...

However, the Review did not consider that this necessarily justified an increase in the ORR's resources.

Subject to the constraints the ORR works under, the Review considered that it was operating well:

> ...the ORR has worked with commitment and vigour. It has developed extensive expertise on regulatory issues, and developed an analytical framework which allows the impact of regulation to be assessed from an economy-wide perspective. Consistent with the ORR's underlying charter, and in contrast with the more narrowly focused approach of most regulatory agencies, this framework allows analysis of broad equity, economic efficiency and community welfare considerations. The ORR has been active in identifying key regulatory issues...and has initiated and facilitated reform in several important areas...In addition, it has made an increasingly valuable contribution to the Industry Commission's on-going work, monitored major trends in domestic and international

> regulation review, and maintained a good working relationship with State regulation review units.

The Review's main concern about the ORR was that it devoted too many resources to its Cabinet role relative to its other functions.

In suggesting ways to increase the ORR's effectiveness within the existing policy and procedural framework, the Review made recommendations in three main areas:

- re-weighting the ORR's work priorities to place greater emphasis on its educative and research role and to adopt a more focused and selective approach to its Cabinet role;
- measures to increase awareness and understanding of regulation review policies within the bureaucracy; and
- measures to raise the public profile of the ORR and regulation review policy.

A copy of the report is available from the Industry Commission.

## Proposals for strengthening the regulation review function

### *Review of national regulatory standards*

Intergovernmental co-operation on various social and economic issues is increasing. Governments at all levels have long acknowledged the cost of market fragmentation caused by excessive duplication and overlap of regulation in a federal system. However, effective political means to deal with the problem have been established only in the last few years, the COAG arrangements being the most prominent. This increased co-operation between Australian governments has resulted in the Commonwealth Government being given an increased role in the regulation of firms for a wide range of social and economic purposes — a role which the Constitution and past practice left with the States.

This trend has seen the creation of a number of institutions charged with developing national regulatory standards and, to a lesser extent, strategies for enforcing these standards. The more important national institutions established under Commonwealth/State agreements to rationalise regulation include the National Occupational Health and Safety Commission (Worksafe Australia), the Australian Securities Commission, the NFA, the

Therapeutic Goods Administration and the National Registration Authority for Agricultural and Veterinary Chemicals. Negotiations are proceeding with the States to establish an agency to regulate the release of genetically modified organisms and, as mentioned, to establish the NEPA.

A range of legislative and administrative models have been used in establishing the agencies, but they share the common feature that Commonwealth and all State governments are parties to the arrangements. While the agencies have a national character, the Commonwealth Government has a prime role.

However, these developments have occurred ahead of the Commonwealth Government's adoption of comprehensive procedures for vetting new regulatory proposals, of the type used by some States.

This problem will be overcome, should the Commonwealth Government adopt the recommendations of the ARC (1992) report on rule making by Commonwealth agencies (see below), and apply them to national agencies. The issue of the need for nationally uniform standards for the assessment of regulation has been referred by the Victorian government to the COAG committee on regulatory reform.

### *Review of subordinate regulation*

The ARC completed its review of Commonwealth regulation-making and presented its report to the Attorney General on 26 March 1992. The Council recommended the enactment of a new statute, to be known as the Legislative Instruments Act, to control the assessment, making and retiring of all subordinate legislation. It is proposed that the new regime contain the following elements:

- better guidance on matters appropriate for inclusion in Acts of Parliament and matters which can be included in delegated legislation;
- improved practices to ensure high-quality drafting for all Commonwealth rules;
- mandatory consultation with the community prior to the making of important rules;
- 'sunsetting' of all rules on a ten-year rotating basis;

- establishment of a Legislative Instruments Registrar in which all rules should be published (rules would not be enforceable if they were not published in this way); and
- special adaptation of these general procedures for rules of court and rules made under intergovernmental schemes for nationally uniform regulations.

The ARC's proposals extend the Commonwealth guidelines for internal governmental scrutiny of new major regulatory proposals to all subordinate legislation, and they introduce standardised and enhanced public consultation processes. Importantly, the ARC recommended that, should agencies avoid the use of these processes, the regulation should be liable to disallowance by the Senate.

During the development of the 1993–94 budget, the Commonwealth Government decided to postpone for twelve months consideration of the ARC's recommendations, largely because of uncertainty about the cost to regulatory agencies of the implementation of the proposals.