Regulation review

G Developments in business regulation and its review

Appendix G
Developments in regulation and its review, 1993-94

Against a background of increasing business regulation, there have been several recent initiatives to reform the regulatory environment. There has been some progress towards implementing the recommendations of the Hilmer Review, although much remains to be done. The Commonwealth is strengthening its regulation review program and has introduced a Bill to ensure that subordinate regulation is better analysed. And mutual recognition is freeing up some aspects of interstate trade. However, while these reforms auger well for the economy, their full effects will not become apparent for some time.

Business regulation refers to government action which, either by direct control or financial inducement, encourages business entities to alter their commercial behaviour.

The Industry Commission takes an interest in regulation for two main reasons. First, under the general policy guidelines embodied in the *Industry Commission Act 1989*, the Commission is required, amongst other things, to seek "to reduce regulation of industry (including regulation by the States and Territories) where this is consistent with the social and economic goals of the Commonwealth Government." Second, the Office of Regulation Review (ORR) — operating within the Commission since 1989 — has administrative and advisory functions specified by Cabinet relating to the review of regulation. Amongst other things, the ORR is required to provide public advice to the Commonwealth Government on proposals for new and amended regulation and comment on overall regulatory trends.

The volume of business regulation continues to grow and, this year, governments at the State and Commonwealth levels have all announced reforms to their processes for developing and reviewing regulation. The ORR has had its role and resources expanded. This appendix discusses developments in business regulation and its review over the last year.

Aggregate changes in business regulation

Business is regulated through the creation and application of three main legal mechanisms: primary legislation, subordinate legislation, and administrative decisions and instruments.

Primary legislation consists of Acts of Parliament. In 1993–94, 193 Acts were passed by the Commonwealth. Of these, 14 were Acts relating to supply or appropriation, 67 were new Acts and 112 Acts were amendments to existing legislation. At least 57 of these Acts are estimated to relate mainly to business regulation. In quantitative terms, this is similar to the volume of primary business regulation introduced in the previous year. Many of these Acts deal with minor amendments or procedural matters, and some provide for reductions in the stringency of regulation. The Acts involving more substantive amendments or new regulation are listed in Table G1.

Subordinate legislation consists mainly of statutory rules and disallowable instruments. These have the force of law but are made by an authority to which Parliament has delegated its legislative power. In 1992–93, 408 statutory rules and 1244 disallowable instruments were made. As indicated in Table G2, this continues the upward trend in subordinate legislation which has occurred over the last decade, and also reinforces the trend towards the use of disallowable instruments within the subordinate regulation category.

Administrative decisions and instruments are generally made by public officials and involve the application of legislation to particular circumstances. No data on this form of regulatory activity are available.

Selected developments in business regulation

While the foregoing figures give an indication of the quantity of regulatory activity occurring, it is difficult to judge the merits of the aggregate level of regulation in the economy. The amount of regulation does not indicate the extent of its impact. In fact, the process of improving and streamlining regulation is itself likely to increase the quantity of regulations made in any given year. For example, while the establishment of the National Registration Scheme for Agricultural and Veterinary Chemicals (discussed below) replaced existing regulatory schemes, it nonetheless increased the volume of regulation made in the year it was enacted. Even if the size of the effects of regulation was known, this would not indicate whether it was desirable or not.

Judgments about the desirability or effects of regulation therefore need to be made at a more disaggregated level. This section describes and comments on changes in specific areas of regulation in Australia over the last year.

Table G1
Selected Commonwealth primary business legislation, 1993–94

Primary legislation	*Main features*
Agricultural and Veterinary Chemicals Act 1994	*Provides for the evaluation, registration and control of agvet chemicals and establishes NRA.*
Australian Meat and Live-stock (Quotas) Amendment Act 1993	*Extends the period for which quotas apply.*
Australian Wine and Brandy Corporation Amendment Act 1993	*Regulates the sale, export and import of wine.*
Australian Wool Research and Promotion Organisation Act 1993	*Gives one organisation responsibility for wool promotion and R&D.*
Automotive Industry Authority Repeal Act 1994	*Abolishes the AIA.*
Corporate Law Reform Act 1994	*Relates to information and prospectus requirements for securities and amends the* Australian Securities Commission Act 1989.
Domestic Meat Premises Charge Act 1993	*Imposes a charge on certain meat premises.*
Export Inspection Charges Laws Amendment Act 1993	*Provides for services under the* Meat Inspection Act 1983 *to be withdrawn if the domestic meat premises charge is not paid.*
Financial Corporations (Transfer of Assets & Liabilities) Act 1993	*Relates to the transfer of assets & liabilities from/to subsidiaries of eligible foreign banks.*
Industrial Relations Reform Act 1993	*Allows for enterprise flexibility provisions in awards and for the review of awards.*
Industry, Technology and Regional Development Legislation Amendment Act 1994	*Extends period for granting financial assistance to eligible companies for R&D.*
Moomba-Sydney Pipeline System Sale Act 1994	*Provides for access to the pipeline & restricts the business of the pipeline operators.*
Murray-Darling Basin Act 1993	*Relates to the use of water, land and other environmental resources in the Basin.*
Native Title Act 1993	*Recognises a form of native title in relation to land or waters, and provides for compensation when native title is extinguished.*

Table G1 (continued)

Primary legislation	*Main features*
Nuclear Safeguards (Producers of Uranium Ore Concentrates) Charge Act 1993	*Imposes a charge on certain persons producing uranium ore concentrates.*
Nursing Home Charge Imposition) Act 1994	*Imposes a nursing home charge.*
Occupational Health and Safety (Maritime Industry) Act 1993	*Replaces policy relating to the occupational health and safety of employees in the industry.*
Offshore Minerals Act 1994	*Relates to minerals exploration and recovery (other than petroleum).*
Petroleum (Submerged Lands) Fees Act 1994	*Levies some holders of exploration permits, retention leases and production licences.*
Pooled Development Funds Amendment Act 1994	*Amongst other things, removes restriction on PDF's investing in start-up businesses and alters the limits on shareholdings in a PDF.*
Primary Industries Legislation Amendment Act 199*3*	*Amends several primary industry Acts.*
Health Legislation (Professional Services Review) Amendment Act 1994	*Establishes a scheme to review professional health services.*
Protection of the Sea (Shipping Levy) Amendment Act 1993	*Imposes a levy on ships carrying oil that are present in Australian ports.*
Road Transport Reform (Vehicles & Traffic) Act 1993	*Regulates vehicle standards, driver standards, loading and securing loads, and record keeping.*
Superannuation (Financial Assistance Funding) Levy Act 1993	*Imposes levies on super and ADF funds to financially assist funds that have suffered losses through fraud or theft.*
Superannuation Industry (Supervision) Act 1993	*Provides for the Insurance and Superannuation Commission to supervise super & ADF funds.*
Telecommunications Amendment Act 1994	*Allows Austel to disallow anti-competitive tariffs.*
Training Guarantee (Suspension) Act 1994	*Training guarantee charge is not payable for the financial years 1994–95 and 1995–96.*

Table G1 (continued)

Primary legislation	*Main features*
Transport & Communications Legislation Amendment Act 1994	*Amongst other things, imposes restrictions on foreign interests in Qantas.*
Wool International Act 1993	*Relates to the disposal and management of the wool stockpile.*
Wool Legislation (Repeals and Consequential Provisions) Act 1993	*Repeals and amends various legislation relating to wool and the wool industry.*
Wet Tropics of Queensland World Heritage Area Conservation Act 1994	*Aims to protect and conserve the area.*

Source: ORR (derived from examination of original legislation)

Pro-competitive regulation

Implementation of the Hilmer Report

At the February and August 1994 meetings of the Council of Australian Governments (COAG), the Commonwealth, the States and the Territories agreed, in general, to the competition policy principles in the report of the Independent Committee of Inquiry into a National Competition Policy (the Hilmer Report).

At its August meeting, COAG agreed in general to a package of reforms comprising:

- the revision of the competitive conduct rules contained in the Trade Practices Act and their extension to cover State and local government business enterprises and unincorporated businesses;
- the application by individual jurisdictions of agreed principles on structural reform of monopolies, competitive neutrality between the public and private sector where they compete, and a program of review of regulations restricting competition;
- the establishment in each jurisdiction of a system to carry out surveillance of prices charged by utilities and other corporations with high levels of monopoly power; and a legislatively-based regime to provide access to essential facilities such as electricity grids, rail networks, postal delivery services, communications channels and seaports; the agreed approach will provide for participating State/Territory regimes to be taken as being effective if they meet agreed principles;

Table G2
Commonwealth subordinate legislation, 1983–84 to 1992–93

Year	*Statutory rules*	*Disallowable instruments*	*Total*
1983–84	*553*	*240*	*793*
1984–85	*581*	*501*	*1 082*
1985–86	*426*	*428*	*854*
1986–87	*322*	*510*	*832*
1987–88	*345*	*690*	*1 035*
1988–89	*398*	*954*	*1 352*
1989–90	*411*	*847*	*1 258*
1990–91	*484*	*1 161*	*1 645*
1991–92	*531*	*1 031*	*1 562*
1992–93	*408*	*1 244*	*1 652*

Source*:* *Senate Standing Committee on Regulations and Ordinances (various years).*

- the establishment of the National Competition Council to make recommendations in relation to the declaration of essential facilities and to advise on other competition policy matters referred to it by individual governments (in relation to its advisory program, the Commonwealth would ensure that there is no duplication of the Council's work by the Industry Commission); and
- the establishment of the Australian Competition Commission, by merging the Trade Practices Commission and the Prices Surveillance Authority, to provide advice on prices oversight and to undertake (compulsory) arbitration in circumstances where there is a failure in negotiations between the owners of essential facilities and parties seeking access to them.

COAG also agreed to a number of transitional arrangements including:

- two and three year phase-in periods for the extension of trade practices legislation with provisions for the States and Territories to provide exemptions, subject to the Commonwealth's ability to over-ride any such changes, for conduct that may otherwise breach competition laws;
- grandfathering contracts entered into by the States and their authorities and by local government under the shield of the Crown and by

unincorporated enterprises before 19 August 1994 which might have otherwise breached competition laws; and

- confirmation that State indentures legislated prior to 19 August 1994 which validly effect exceptions from the Trade Practices Act will continue to have the same effect.

COAG agreed to release for public comment the draft legislation on all proposed changes, including:

- the amended draft Intergovernmental Conduct Code agreement, which includes procedures for extension of the Trade Practices Act and appointments to the Australian Competition Commission; and
- the draft Intergovernmental Competition Principles Agreement, which includes procedures and principles for those elements of the national competition policy that do not require a statutory basis (structural reform of public monopolies, legislation review, competitive neutrality and prices oversight), and appointments to the National Competition Council.

COAG agreed that the Commonwealth will pay the States, Territories and local government a share of the expected revenue growth from Hilmer and related reforms to which they have contributed. COAG agreed to meet in Adelaide in February 1995 to discuss appropriate shares of this revenue and to finalise the legislation to implement the competition policy changes.

Success in establishing a national competition policy will clearly require extensive, possibly unprecedented, co-operation between the different levels of government. As Professor Hilmer has noted, COAG's endorsement of the principles of a national competition policy is not the same thing as successful implementation (Williamson 1994). Much is to be done that goes beyond extending the scope of the Trade Practices Act. This concerns unjustified regulatory restrictions on competition; the structural reform to public monopolies; the provision of third party access to essential facilities; and the fostering of competitive neutrality between businesses owned by governments and those in private hands.

Reform of the national gas market

The first practical change deriving from the new national approach to competition policy is the agreement of COAG to a national gas market. At its February 1994 meeting, COAG agreed that:

- there should be no regulatory barriers to int rastate and interstate trade in gas;

- third party access to networks both within and between States be provided on non-discriminatory commercial terms with provision for arbitration of disputes;
- uniform national pipeline construction standards be adopted;
- there be increased commercialisation of publicly-owned gas utilities;
- there be no restriction on the uses of gas; and
- gas franchise arrangements be consistent with free and fair competition in gas markets and adequate third party access.

The framework for a national gas market, which will be phased in over two years, replaces the Commonwealth's Inter-State Gas Pipelines Bill 1993. The Bill, had it been enacted, would have set up a regime to provide access to third parties with the TPC to arbitrate disputes, but would have only applied to inter-state pipelines.

Agricultural and veterinary chemicals regulation

Regulation of agricultural and veterinary chemicals in Australia is designed to meet multiple objectives including: an assessment of a product's efficacy, its public health implications, its environmental impact and occupational health and safety factors. The National Registration Authority for Agricultural and Veterinary Chemicals (NRA) began operation as an independent statutory authority in June 1993. It represents the latest development in the refinement of the regulatory regime for agricultural and veterinary ('agvet') chemicals in Australia which began in 1990.

In August 1991, the Government announced a National Registration Scheme (NRS) for 'agvet' chemicals (Crean 1991). This was a response to the Report of the Senate Select Committee on Agvet Chemicals (tabled in August 1990), and the 1990 Special Premiers' Conference which had identified the regulation of 'agvet' chemical products as an area where regulation should be reviewed.

The NRS is designed to eliminate duplication between State and Commonwealth agencies and to increase the efficiency of the clearance and registration of chemicals. It replaced the previous system whereby the Commonwealth cleared 'agvet' chemicals, but the States were responsible for registering them. Under the new arrangements, which are expected to become fully operational on 1 January 1995, the Commonwealth assumes full responsibility up to point-of-sale, including registration, while the States maintain responsibility for 'control of use'. Commonwealth legislation is to be complemented by legislation in the States and Territories which adopt the provisions of the Commonwealth Act. The NRS also includes a program to handle registration of chemicals for minor uses and a program to review existing chemicals. Under the Scheme cost

recovery is to rise from 50 per cent to 100 per cent, phased in over a four year period.

The NRA was established to capture further gains associated with the Commonwealth's role in this area. According to the Minister for Primary Industry and Energy (Crean 1992), the NRA is to maintain safety standards while:

- delivering more effective and timely chemical registration;
- allowing greater opportunities for public input into registration processes; and
- improving public access to information about agricultural and veterinary chemicals.

The new charging system to be adopted by the NRA will be less reliant on an initial fee and depend more on a sales levy. The NRA is also responsible for co-ordinating a national compliance program and for encouraging the adoption of uniform State procedures for the control-of-use of 'agvet' chemical products.

The development of the new agvet chemicals regime is a significant reform demonstrating the benefits to be achieved through co-operation between State and Commonwealth bodies. The scheme should increase the efficiency of chemical registration, eliminating several layers of administration. It also embodies a review mechanism to ensure that registrations and uses of chemicals remain appropriate over time.

While legitimate health, safety and environmental objectives underpin the regulation of chemicals in Australia, one of the NRA's objectives is also to assess the efficacy of the product, or to ensure that it performs in the intended manner when used properly. Products which fail this test are not granted registration by the NRA. This is one way of seeking to ensure the efficacy of products. However, the extent to which such assessment is necessary for approval of a product is questionable. Sales of the product in the market arguably also provide a test as to the product's efficacy, as is the case in the United States where no such assessment takes place. The NRA could augment the market approach by supplying information, perhaps on product labels, about its assessment of the efficacy of the product. This should provide for more informed decisions by potential users of the chemicals — similar to the provision of information to medical practitioners on the efficacy of pharmaceuticals.

Smoking regulation

While tobacco products have traditionally been heavily regulated, there has been a significant increase recently in regulatory activity, with developments in five areas.

First, under the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994*, tobacco products have been subjected to more stringent labelling requirements since 1 April 1994, with the full provisions of the Act to apply by 1 January 1995. The main elements of these new labelling regulations are the requirement for warning messages to be made more extensive and for the messages to be printed in black on a white background.

Second, bans on smoking in particular venues have been extended in some States and Territories. For example, in the ACT, a new Occupational Health and Safety Code of Practice issued in May 1994 effectively bans smoking in enclosed workplaces in the ACT. The ACT is also considering a Smoke-Free Areas (Enclosed Public Places) Bill which would ban smoking in a wide range of venues including child-care centres, medical facilities, shopping centres and venues that serve both food and alcohol. In South Australia, smoke-free areas have been introduced in sporting venues that receive sponsorship from Foundation SA.

Third, by the end of 1994, all States except Tasmania will raise the legal age for purchase of cigarettes from 16 to 18 years. Many States will also introduce stiffer penalties for those breaching these regulations.

Fourth, a Bill has been introduced into the Senate which seeks to remove the Minister's authority to grant exemptions to some tobacco companies from the provisions of the *Tobacco Products (Advertising) Prohibition Act 1992*. This Act has banned, since July 1993, most forms of advertising of tobacco products with some exemptions granted by the Minister for sponsorship of events deemed to be of national or international significance.

Fifth, there have been increases in the Commonwealth excise rate and State franchise licence fees for tobacco products over the last year. Government taxes now account for approximately 60 per cent of the total price of each pack.

In addition to these changes in the regulation of tobacco products and smoking, a number of inquiries have recently been conducted or foreshadowed covering this area. The Commission has recently finalised a report on *The Tobacco Growing and Manufacturing Industries* (IC 1994e). The Senate Standing Committee on Community Affairs will commence an inquiry into the level of regulation affecting the tobacco industries later this year. And the Health Care Committee of the National Health and Medical Research Council is currently examining the health effects of possible regulation of passive smoking.

As the Commission found in its report, there are sound economic reasons for government regulation of tobacco and its use, particularly given the adverse health affects associated with smoking and exposure to it. However, while strong regulation is justified, each new regulation, or change to an existing regulation, needs to be fully evaluated.

Mutual recognition

A national scheme for mutual recognition of regulation commenced in March 1993. It ensures that most goods initially produced or imported into one State or Territory under the prevailing laws of that jurisdiction can be sold freely throughout the country. In addition, members of regulated occupations can now enter an equivalent occupation in other States or Territories.

There are several potential gains from mutual recognition. Broadly it can eliminate the costs created by having different approaches to similar regulatory problems. Firms benefit from economies of scale through product standardisation. Consumers can benefit through greater competition and enhanced product choice. It increases labour market flexibility, with gains resulting from greater labour mobility. It can also reduce duplication and administrative costs by encouraging the use of rules used in other jurisdictions. Importantly, it provides incentives for regulators to harmonise standards or regulations in different jurisdictions where it is appropriate to do so.

Institutional arrangements

The national scheme of mutual recognition is embodied in the *Mutual Recognition Act 1992*, and the accompanying State and Territory legislation that implements this Commonwealth Act. All States and Territories now participate in the scheme, with the exception of Western Australia which has not yet passed legislation. New Zealand currently has observer status. Discussions have commenced with New Zealand over its inclusion in the scheme and the New Zealand Government has solicited the views of State Premiers regarding its future involvement.

The Commonwealth-State Committee on Regulatory Reform (CORR) plays an important role in overseeing this scheme. This Committee is currently chaired by the Director-General of the NSW Cabinet Office and provides a formal linkage between the Commonwealth and the States. In February 1994, the Committee prepared a progress report on mutual recognition for COAG (CORR 1994). The report focused primarily on NSW and concluded that the scheme was operating effectively, resulting in increased labour mobility. It noted that there had been less activity in the goods area.

Ministerial Councils also oversee the mutual recognition scheme in specific areas such as consumer and environmental regulation. For example, the Consumer Products Advisory Committee which reports to the Ministerial Council of Consumer Affairs has been monitoring the effects of mutual recognition on product safety laws.

Heads of Government have agreed to conduct a comprehensive review of mutual recognition within five years of implementation. In the meantime, the Heads of

Government will monitor the scheme through Ministerial Councils and the Vocational Education, Employment and Training Advisory Committee (VEETAC).

Implementation and impact

Information about the implementation of mutual recognition of goods and occupations since March 1993 is limited for three main reasons:

- as the scheme was only implemented in March 1993, it is too early to comprehensively assess its implementation and impact;
- the scheme places the onus on regulators in different jurisdictions to inform themselves about the scheme and recognise goods and occupations from other jurisdictions so that much of the experience of mutual recognition is thus known only to the parties involved; and
- since March 1993 there does not appear to have been a broad and detailed investigation of the implementation of the scheme.

Effects on regulators

Some jurisdictions have reported that the scheme has resulted in greater cooperation between regulatory agencies — such as the NSW and Queensland Coal Mining Qualifications Boards — in harmonising regulatory requirements and exchanging information (Sturgess 1994a).

Regulatory agencies' awareness of mutual recognition will increase over time. Indeed, given the rules governing mutual recognition it is likely that in the future more regulators will be confronted for the first time with goods or occupations valid in other jurisdictions which do not comply with local rules and regulations.

Effects on movement of goods

Notwithstanding the lack of detailed data, the evidence is encouraging.

Mutual recognition has resulted in greater consumer choice. Bread consumers in NSW are now able to purchase non-standard half loaves produced in Queensland. Tasmanian oysters and game meats are now sold on the mainland. Mutual recognition has also enhanced competition and resulted in changes to the structure of various markets. For instance, six months after implementation, egg producers in northern NSW claimed that they had secured 20 per cent of Queensland's egg market, while Victorian meat can apparently be sold more freely in NSW (Wilkins 1993).

Mutual recognition appears to have particularly benefitted small businesses which previously faced obstacles to the sale of goods in other jurisdictions. For instance, it has helped break down barriers to trade in dried fruits — such as grading requirements — by accelerating negotiations for national standards.

There appear to be no difficulties to date relating to product safety as no complaints have been reported to the Consumer Products Advisory Committee. In the meantime, this Committee is developing national standards for product safety.

While temporary and permanent exemptions are available from the scheme, generally on 'public interest' grounds, there is a risk that exemptions could in practice impede trade between jurisdictions. The Director-General of the NSW Cabinet Office (Wilkins 1993) expressed concern that too many exemptions are allowed under the existing regime, particularly relating to occupational health and safety. This was exempt on the basis that uniform occupation health and safety laws have been introduced by all jurisdictions. However, in NSW, the Workcover Authority has excluded 'pressure vehicles' by demanding different standards (Sturgess 1994a).

Effects on occupations

The effect of mutual recognition on occupations is easier to monitor than that on goods. As expected, mutual recognition has resulted in greater labour market mobility. For instance, in the first six months of the scheme 800 medical professionals, lawyers, builders and tradespeople registered in NSW as a result of mutual recognition (Wilkins 1993). In the ACT in the first year, approximately 690 occupations were registered under the provisions of mutual recognition. In addition, national registration systems for medical practitioners and lawyers are now being established.

However, there are cases where the transition to mutual recognition of occupations has not been smooth. For example, the NSW Coal Mining Qualifications Board refused to register a qualified applicant from Queensland, unless the applicant passed a written and oral examination about NSW mining legislation. In such cases, appeals can be made to the Administrative Appeals Tribunal (AAT) for arbitration. Indeed, in this case the AAT gave the opinion that the Board had no right to reject the application and the Board would be unsuccessful if it decided to take legal proceedings on health and safety grounds.

Conclusion

Mutual recognition represents a major change to the regulatory environment within Australia. Limited data are available on its impact and it may take some time before all parties adjust to the new regime. Many regulatory agencies are not aware of their obligations under mutual recognition and there have been some examples of regulatory agencies seeking to circumvent mutual recognition.

While some problems have arisen, these do not appear to be substantial and have not been a major impediment to greater competition or occupational mobility. Overall, the scheme is bringing greater competition, consumer choice and labour

market mobility. Negotiations to include New Zealand should see these benefits further widened.

Developments in regulation review

Over the last year there has been renewed interest in the review of business regulation within Commonwealth and State jurisdictions as well as nationally. As noted earlier, COAG has adopted, in principle, the major recommendations of the Hilmer Report. Amongst other things, these recommendations require that all new regulatory proposals be assessed for their impact using public processes and, for existing regulations, governments are to undertake systematic reviews to ensure that there is no restriction on competition, without a clear demonstration that any such restriction is in the public interest.

This section describes and comments on these developments.

Working Nation — business regulation reform

In its *Working Nation* White Paper (Keating 1994c), the Commonwealth Government announced a Business Regulation Reform Package. Key proposals are:

- to introduce a Legislative Instruments Bill aimed at improving the quality of subordinate regulation (see below);
- to expand the ORR (see below);
- to improve the Business Licence Information System, including undertaking studies to extend the System to local government licensing requirements, and ways to ease the burden of excessive paperwork;
- to expand and accelerate the Corporations Law Simplification Program to increase the capacity for high quality and timely improvements to the Corporations Law;
- to establish a Tax Law Improvement Program to reduce the complexity of the Income Tax Law;
- to provide assistance to ensure 'best practice' in local government business regulation, including approval processes; and
- to establish a committee of inquiry into an efficient national infrastructure for standards setting and compliance testing.

As well as these new proposals, the Government referred to decisions made at the February meeting of COAG. These decisions focussed on the development of a comprehensive impact assessment framework for the setting of national standards, and the development of a draft trans-Tasman mutual recognition agreement with New Zealand for consideration at the next COAG meeting.

The Legislative Instruments Bill

The Government introduced a Legislative Instruments Bill into the Parliament on 30 June 1994.

The Bill was a response to concerns about the inadequacies in Commonwealth regulation-making expressed by the States, business groups, professional organisations and the Industry Commission.

The Bill is modelled on similar legislation existing in some of the States, and takes up many of the recommendations of the Administrative Review Council (ARC 1992) Report, *Rule Making by Commonwealth Agencies* (Saunders Review). Among other things, the Bill provides for mandatory and formal public consultation on all regulatory proposals made under Commonwealth legislation that impact on business. Public consultation is to include impact assessment, which must ensure that:

- objectives of regulations are clearly stated;
- alternative measures have been identified and considered; and
- a broad indication of relative costs and benefits is made.

The results of public consultation are to be included in a 'Legislative Instrument Proposal' which will be tabled in the Parliament with the final regulation.

The Bill also establishes a Federal Register of Legislative Instruments, which is to be computer-based and widely accessible. Regulatory agencies will be required to 'back capture' (that is, identify and register) all old regulations in a phased program over the period 1 September 1995 to 1 March 1997.

While the Bill should improve the quality of Commonwealth subordinate regulation, it does not implement all the main recommendations of the Saunders Review (ARC 1992). The success of the Bill in achieving better regulatory practice will depend on the ability and willingness of regulatory agencies to carefully assess the economic and social impact of their proposals. Further, the Bill provides several ways in which the consultation requirements can be avoided. The sanction for non-compliance with the Bill is also weak — it is, in effect, an increased risk that Parliament will disallow the regulation. Whether the Parliament will be prepared to exercise this sanction in cases where analysis of proposals is inadequate (or not done) remains to be seen. The Bill introduces a requirement for a greater level of analytical information to accompany regulation than is currently necessary for principal legislation.

In regard to existing regulation, the Government has decided to commence a comprehensive and formal program of reviews to be conducted by all portfolios with regulatory functions. This contrasts with the Saunder's Review recommendation that it introduce a program of planned repeal as recommended. If pursued vigorously, the Government's program has considerable potential to

broaden and quicken the pace of microeconomic reform. The ORR will have the dual roles of assisting regulatory agencies to comply with the provisions of the proposed Legislative Instruments Act in assessing new regulation and in conducting, with the assistance of the Council of Business Representatives, the program of review of existing regulations within portfolios.

Expansion of the Office of Regulation Review

The ORR's expansion is to concentrate on four areas:

- establishment of a Council of Business Representatives;
- provision of advice to portfolios in relation to programs of review of existing legislation;
- provision of advice in relation to access to delega ted legislative instruments (discussed above); and
- more effective enforcement of existing Cabinet requirements for regulation impact statements.

To facilitate its expansion into these areas, the Industry Commission was allocated an additional $0.6 million a year in the 1994–95 Budget.

Council of Business Representatives

A council, comprising business interests representing those sectors affected by Commonwealth regulation, is to be established. The Council is to provide input and advice to the Structural Adjustment and Trade Committee of Cabinet in relation to existing regulation. The ORR is to provide secretariat support for the Council.

Programs of review of existing legislation

Ministers are to bring forward programs of review of existing regulation in their portfolios to the Structural Adjustment and Trade Committee of Cabinet.

The ORR will provide advice to portfolios of possible areas of review. That advice may be drawn from any relevant findings that emerge from meetings of the Council of Business Representatives.

Cabinet requirement for regulation impact statements

Cabinet's requirement that regulatory proposals with significant effects on business include a Regulation Impact Statement has been in operation since 1985. Under the requirements, the agency proposing a regulation is required to identify an economic or social problem which the regulation is meant to address, specify the objective of the regulation, identify the likely benefits and costs that

would result, and compare the proposal with alternative measures for solving the problem.

The ORR will be helping to ensure the more effective enforcement of this Cabinet requirement.

State reform — the NSW Sturgess report

In August 1993, the NSW government announced a Commission of Inquiry into removing government regulatory impediments — such as duplication, unnecessary delay and uncertainty — which inhibit investment and employment opportunities (Fahey 1993). The inquiry was also to give consideration to the merits of a regulatory budget and other possible systemic reforms. Mr Gary Sturgess was appointed to head the inquiry.

The report, released in January 1994, is entitled *Thirty Different Governments* to reflect the perception of many inquiry participants that different regulatory agencies pursue separate and often conflicting goals (Sturgess 1994b).

The inquiry focussed not on whether particular regulations were desirable or not, but on the regulatory process itself — the form of regulation rather than its substance. Given its terms of reference, the main emphasis was on impediments and unnecessary costs to business. It identified areas of 'red tape' or "excessive formalism and complexity in the regulatory process" (p.v).

Of major concern to business within NSW was the planning approvals process. While the report accepted that there are legitimate concerns underpinning State Environment Planning Policies, it documented many cases of duplication, delays and uncertainty caused by a lack of integration between different functions of government.

In assessing the extent of the problem in NSW, the report found that while inefficient regulatory processes have an impact on investment in the State, they are not the most significant determinant of investment, or the lack of it, and are not a threat to the economic health of the State. The report pointed out, however, that encouraging more efficient regulatory processes provides an opportunity for NSW to acquire a competitive advantage over other governments and is one of the few factors affecting investment that government can control.

The report made over 40 recommendations, the most important of which relate to a significant expansion of the regulation review effort. The review found that the key to taking a whole-of-government approach lies with the Cabinet. It stated (p. viii):

> If government is to take a fundamental reappraisal of its regulatory processes there must be sustained top-down support from Cabinet.

The report recommended that a senior Minster be nominated as Minister for Regulatory Review, supported by a Cabinet Committee on Regulatory Reform to undertake a three year period of 'regulatory reengineering'. A permanent Regulatory Review Unit would also be established. This approach follows the report's finding that there are no easy solutions to problems associated with inefficient regulatory processes; rather, a painstaking examination and redesign of related regulation is necessary. The approach also recognised that the constant demands on Ministers mean they cannot be expected to constantly focus on regulatory reform — hence the recommendation for a sustained three year effort.

The NSW Government has subsequently committed itself to implementing the major thrusts of the report, including the re-establishment of the Business Regulation Review Unit and the formation of a cabinet sub-committee to systematically review regulation that impedes investment.

The recommendations of the review to some extent parallel the Commonwealth Government's announcement in *Working Nation* of a business reform package. The broad approach to reform identified in the report is consistent with the greater emphasis the Commonwealth, through the ORR, will be giving to ensuring new and existing regulation provides net benefits to the community.

While the report concentrated on the regulatory process and not on the content of regulations, it nevertheless demonstrated how the regulatory structure can affect competitiveness. One case was cited where a company located a new operation in Queensland after attempting to establish in NSW but finding the approval process too difficult to negotiate. Similarly, if regulation is inefficient at the national level, firms may choose to invest overseas.

National regulatory standard setting

Increasingly, business regulation is being made nationally and co-operatively through national agencies and Ministerial Council mechanisms. In recognition of this, COAG has before it proposals to adopt a set of principles and processes to apply to the activities of these bodies. These principles and processes echo the requirements of both State legislation and the Commonwealth's new Legislative Instruments Bill. They are designed to avoid past difficulties where some regulations have been made by national bodies without adequate analysis or public processes.

Administration of the request and response facility

During the last year, the ORR received four requests from firms to initiate action under the Government's request and response (R&R) complaint procedures.

The R&R procedures provide firms with an avenue to have regulations or regulatory regimes reviewed. For the ORR to invoke the procedure, the applicant must first make a well documented case to show that, amongst other things, the regulation is likely to have adverse effects — not just for the applicant but for the economy in aggregate (that is, taking into account any benefits that might arise from the regulation as well as the costs it causes). Substantive requests to review inefficiencies in regulatory processes receive prompt attention.

The nature and results of the four R&R applications received during the year are described briefly below.

Extended use of aspartame

Nutrasweet Australia applied for a review of the actions of the National Food Authority (NFA) in relation to aspartame. Although aspartame is an approved artificial sweetener, the NFA initially indicated that it would require a full technical assessment before its extended use in baked applications was allowed.

Following Nutrasweet's application under the R&R guidelines, the ORR initiated discussions between the parties. It was agreed that the NFA should give priority consideration to extended use of aspartame.

Export control of abalone

Dover Fisheries, a South Australian abalone exporting company, sought a review of the procedures currently in use to prevent the entry of stolen abalone to the supply lines of exporting firms. Dover Fisheries' exports had been halted by a decision by Australian Quarantine and Inspection Service (AQIS) inspectors.

Following Dover Fisheries' R&R application, the ORR held discussions with the Department of Primary Industries and Energy. The Department responded by initiating a joint review with Victorian Fisheries of the AQIS procedures for tracing legal abalone collected under licensed quota.

Cigarette labelling requirements

WD & HO Wills Pty Ltd applied for a review of aspects of recently announced labelling requirements for cigarette packages and, in particular, the requirement that health warnings be printed on a black-on-white panel. After receiving this request, the ORR sought information on the process used for making this regulation from the Department of Human Services and Health. However, the ORR terminated its involvement in the matter after Wills publicly released the contents of correspondence between the ORR and the Department.

Pharmaceutical Benefits Advisory Committee processes

Schering-Plough, a manufacturer of therapeutic drugs, sought a review of the Pharmaceutical Benefits Advisory Committee's (PBAC) consideration of the company's application to have its drug, Intron-A, listed under Section 100 of the Pharmaceutical Benefits Scheme (PBS) for the treatment of patients with Chronic Hepatitis-C. The company also sought a review of the broader process by which highly-specialised or breakthrough drugs are considered by the PBAC.

The ORR undertook discussions with the Department of Human Services and Health (under which the PBAC operates). During this period, the PBAC approved PBS listing for Intron-A. The ORR is still examining, in consultation with both the PBAC and the industry, the case for a review of the process by which highly-specialised drugs are considered by the PBAC.