Australian Government
Productivity Commission

Annual Review of Regulatory Burdens on Business:
Business and Consumer Services

Productivity Commission Draft Research Report

June 2010

This is a draft research report prepared for further public consultation and input.

The Commission will finalise its report after these processes have taken place.

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The Productivity Commission

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

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

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Opportunity for further comment

You are invited to examine this Draft Report and provide written comments to the Productivity Commission. If possible, these should be provided by email and accompanied by a submission cover sheet. See *How to Make a Submission* on the web page listed below.

Written comments should reach the Commission by **30 July 2010**.

The final report will be prepared after comments have been received and discussions with interested parties have been held.

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Terms of reference

ANNUAL REVIEW OF REGULATORY BURDENS ON BUSINESS

Productivity Commission Act 1998

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

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

Background

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

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

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

Scope of the annual review

In undertaking the annual reviews, the Commission should:

1. identify specific areas of Australian Government regulation that:

    a) are unnecessarily burdensome, complex or redundant; or

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

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

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

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

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

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

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

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

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

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

PETER COSTELLO

[received 28 February 2007]

Contents

Abbreviations

ABA	Australian Bankers' Association
ABCB	Australian Building Codes Board
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ADI	Approved Deposit-taking Institution
AFSL	Australian Financial Services Licence
AFTS	Australia's Future Tax System Review (Henry Tax Review)
AGD	Attorney-General's Department
AHA	Australian Hotels Association
AIA	Australian Institute of Architects
AML/CTF	Anti-Money Laundering/Counter-Terrorism Financing
ANAO	Australian National Audit Office
ANZSIC	Australian and New Zealand Standard Industrial Classification
APRA	Australian Prudential Regulation Authority
AQIS	Australian Quarantine and Inspection Service
ASFA	Association of Superannuation Funds of Australia
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
AUASB	Auditing and Assurance Standards Board
AUSTRAC	Australian Transaction Reports and Analysis Centre
BCA	Building Code of Australia
CITES	Convention on International Trade in Endangered Species and Wild Fauna and Flora

COAG	Council of Australian Governments
COPO	Commonwealth Own Purpose Outlays
CPD	Continuing Professional Development
CRA	Commercial Radio Australia
DAFF	Department of Agriculture, Fisheries and Forestry
DASP	Departing Australia Superannuation Payment
DEEWR	Department of Employment, Education and Workplace Relations
DEWHA	Department of the Environment, Water, Heritage and the Arts
DFAT	Department of Foreign Affairs and Trade
DIAC	Department of Immigration and Citizenship
DRET	Department of Resources, Energy and Tourism
EPA	Environmental Protection Authority
EPBC Act	*Environmental Protection and Biodiversity Conversation Act 1999*
FHSA	First Home Saver Account
FMA	Financial Management Authority
GFC	Global Financial Crisis
IAASB	International Auditing and Assurance Standards Board
ICAA	Institute of Chartered Accountants in Australia
IFSA	Investment & Financial Services Association
IFAC	International Federation of Accountants
IFRS	International Financial Reporting Standards
IPA	Insolvency Practitioners Association
IRA	Import Risk Analysis
ITSA	Insolvency and Trustee Service Australia
KPIs	Key Performance Indicators
LCA	Law Council of Australia
MARA	Migration Agents' Registration Authority (Office of the)
MCA	Music Council of Australia

MCEETYA	Ministerial Council on Education, Employment, Training and Youth Affairs
MCVTE	Ministerial Council for Vocational and Technical Education
MFFA	Mortgage and Finance Association of Australia
MRA	Mutual Recognition Arrangement
MSDS	Material Safety Data Sheet
NCP	National Competition Policy
NIBA	National Insurance Brokers Association
NICNAS	National Industrial Chemicals Notification and Assessment Scheme
NVPC	National Vertebrate Pest Committee
OBPR	Office of Best Practice Regulation
OECD	Organisation of Economic Co-operation and Development
OGTR	Office of the Gene Technology Regulator
OHS	Occupational Health and Safety
PC	Productivity Commission
PCA	Property Council of Australia
PDS	Product Disclosure Statement
RCA	Registered Company Auditor
REIA	Real Estate Institute of Australia
RIS	Regulation Impact Statement
RITC	Reduced input tax credit
RTOs	Registered Training Organisations
RBA	Reserve Bank of Australia
SBR	Standard Business Reporting
SCAG	Standing Committee of Attorneys-General
SCFPA	Standing Committee on Finance and Public Administration
SCRGSP	Standing Committee for the Review of Government Services Provision
SELC	Senate Economics Legislation Committee
SIA	Science Industry Australia

SMRs	Suspicious Matter Reports
TCF	Travel Compensation Fund
TPA	Trade Practices Act
TRA	Trades Recognition Australia
TTF	Tourism & Transport Forum
UCCC	Uniform Consumer Credit Code
VCEC	Victorian Competition & Efficiency Commission
VET	Vocational Education and Training

OVERVIEW

Key points

- Despite long established (and reviewed) consultation processes used in developing regulations, industry still finds these processes lacking in several respects. Finance and property industry groups consider the most significant regulatory failings are a lack of transparency and continuity in consultation processes, short consultation timeframes and a lack of credible evidence in the current regulation-making process.
- These failings of regulatory process are of particular concern given the significant and wide reaching regulatory reforms of the finance sector currently being developed internationally in response to the Global Financial Crisis. It is important that any reform proposals are subject to transparent and rigorous processes that take into account all of the impacts on the finance sector and local conditions.
- To improve the transparency and accountability of its consultation processes the Australian Government should:
  - incorporate a 'consultation' RIS in the regulation-making process
  - require the Office of Best Practice Regulation to extend its monitoring and reporting role to the quality of consultation.
- There are a number of regulations and associated administrative processes affecting the superannuation industry that could be revised to reduce the regulatory burdens on business, including in relation to:
  - binding death nominations
  - departing Australia superannuation payments
  - superannuation splitting
  - superannuation transaction confirmation letters.
- There is duplication, overlap and inconsistency in the regulation of certain occupations including:
  - the requirement that architects must register and pay a separate registration fee in each state and territory
  - lawyers wishing to practise as migration agents must comply with both the Australian Government regulatory scheme for migration agents and legal profession regulation under state and territory laws
  - different regulatory treatment of the administration of personal insolvency and corporate insolvency imposes an unnecessary regulatory burden on insolvency practitioners
  - inconsistent state and territory real property laws are creating an uncertain business environment.

Key points (continued)

- The Anti-Money Laundering/Counter Terrorism Financing (AML/CTF) requirements placed on small bookmakers and some hotel based property management schemes appear to be disproportionate to the risk of these activities and arrangements being used for money laundering or terrorism financing. The AML/CTF exemption policy provides the means to assess and reduce the compliance costs faced by these businesses.
- Issues with regulation in the hospitality and tourism sector include:
  - the monetary threshold at which proposed foreign investment in developed commercial property, including hotels, is subject to FIRB assessment is not indexed, unlike the thresholds applying to other types of foreign investment
  - the lower monetary threshold relating to the purchase of heritage listed properties by foreign interests is unlikely to provide any additional protection to the heritage values of these properties
  - lack of mutual recognition across state borders of responsible service of alcohol training
  - inconsistencies between the EPBC Act and the regulations relating to the importation of endangered species
  - having Sunday and public holiday menu surcharges subject to the s.53c amendments to the TPA dealing with component pricing.
- The monthly earnings threshold attached to the superannuation guarantee should be increased and subject to indexation.

Overview

Regulation is a necessary means by which governments can achieve important economic, social and environmental objectives. There is general acknowledgement that when regulation is directed at business it carries burdens associated with accountability or reporting mechanisms, changing what is produced or how goods and services are made or delivered. But some of this regulatory burden may be unnecessary to the achievement of the outcomes desired by governments. Such unnecessary burdens arise where regulation is unduly complex or redundant or duplicates the regulations of other jurisdictions or regulatory bodies. Such regulation can lead to excessive financial costs on businesses, change how they operate in undesirable ways, and can reduce their flexibility to respond to challenges and opportunities.

The overarching objective of regulatory reform is to ensure that regulation is able to achieve its broader objectives without unnecessarily undermining the capacity of businesses to generate productivity growth to underpin growth in community welfare. In February 2007, the Commission was asked to review, over a five-year period, the burdens on business arising from Commonwealth Government regulation. The objective of the review is to ensure that the current stock of regulation is efficient and effective and to identify priority areas where regulation needs to be improved, consolidated or removed. The Commission's task is to identify improvements to regulation that will reduce the burden on business without compromising the underlying policy objectives.

The regulations to be assessed each year are determined according to the sector on which they have their main impact. For 2010, the task is to examine regulations that affect the business and consumer services sector – this includes finance and insurance services, accommodation and food services, professional, scientific and technical services, arts and recreational services.

The business and consumer services sector is a major contributor to Australia's overall economic activity. In 2008–09, the sector accounted for 28 per cent of Australia's GDP, with the largest individual industry contributions coming from the financial services and insurance industry (10.8 per cent) and the professional, scientific and technical services industry (6.1 per cent).

The business and consumer services sector employs over 3 million people and accounts for over 29 per cent of national employment. Of this, the greatest contribution can be attributed to the professional, scientific and technical services sector —which provides 7.8 per cent of total employment — followed by the accommodation and food services industry — which provides 6.7 per cent of total employment. The finance and insurance services industry — which provided the largest contribution to the output of the sector — employs over 400 000 persons, representing about 3.8 per cent of total employment.

The Commission conducted extensive consultation with industry stakeholders and received 27 submissions prior to the release of this Draft Report. While stakeholders welcomed government attention on reducing red tape, it was clear that many have review fatigue or overload, particularly in the finance sector (including the superannuation industry). Stakeholders are finding it difficult or challenging to effectively participate in all of the reviews relevant to their sector. This fatigue is compounded, in some cases, by the view that some recent government consultation was rushed, unresponsive to their concerns, or otherwise inadequate.

The terms of reference set boundaries on the nature of the concerns that could be considered. The Commission is required, for instance, to have regard to the underlying policy intent of the regulations and to any other current or recent reviews. As a consequence some concerns were out of scope and for others it was not considered appropriate for the Commission to recommend specific actions. More specifically, these concerns related to:

- issues pertaining to the policy objective, rather than the nature or design of the regulation or the way in which it is being administered — for example, concerns about the level of fees or charges associated with the Passenger Movement Charge and the classification of films as opposed to the way in which their collection is being administered
- regulation currently under review or only recently reviewed — many concerns dealing with the superannuation sector such as superannuation legacy products, sole purpose test, portability requirements, in particular, were deemed out of scope as they are being addressed by the Cooper Review of superannuation
- regulation that has only recently been reformed, and insufficient time has elapsed to judge the effectiveness of the changes, or regulation that has been announced, but not yet implemented — for example concerns were raised about the business cost implications of the National Consumer Credit Protection Act and associated credit licensing regime; paid parental leave; and various prospective environmental measures

- generic regulation that does not have a particular impact on the business and consumer services sector — for example, concerns about taxation, corporate governance and reporting, workplace awards and equal employment opportunity legislation
- state, territory or local government regulations — for example, occupational, health and safety regulations, various state taxes and assessment processes.

The Commission has generally provided at least a brief response to each of the concerns raised by participants.

Regulatory issues facing the business and consumer services sector

All three levels of government regulate the business and consumer services sector. Some industries, such as the finance and insurance industry, are primarily regulated by the Australian Government, while other industries, for example, large parts of the food and accommodation services industry, and the rental, hiring and real estate services industry, are primarily regulated by state, territory and local governments. The participation of all three levels of government in the regulation of the business and consumer services sector can mean that duplication or inconsistency in regulatory responsibility can occur and this has again been a theme in this year's review.

Governments are involved in the regulation of the business and consumer services sector for a number of reasons. These include:

- the importance of the sector to the overall performance of the economy
- the need to protect vulnerable end users and address information asymmetries
- to assist with meeting Australian Government national objectives
- the need to uphold international treaties and standards
- the cultural importance of some activities of the sector
- as a driver of national reforms to achieve greater consistency in regulation across Australia to facilitate provision of services and labour mobility across state borders.

As well as being an important source of economic activity in its own right, there is a strong relationship between the performance of the business and consumer services sector and the overall performance of the economy. This is most apparent with the finance and insurance industry which has an unique role in wealth generation,

providing a stable payments system and allocating capital to the most rewarding opportunities in the economy. A stable, effective and efficient finance and insurance industry is essential for a strong, well functioning economy.

The complex and highly technical nature of much of the activity of the industries in the business and consumer services sector provides another reason for regulation of the sector to ensure the protection of consumers and users of those services. This is particularly relevant to the professional occupations covered in this review, including lawyers, architects and auditors.

Regulation of the business and consumer services sector also seeks to achieve the Government's broader policy objectives. An example of this is the regulation of Australia's superannuation industry, including mandated contributions from employers and restrictions on the circumstances in which superannuation can be accessed. The regulatory framework in this area reflects the objective of the Australian Government with regard to retirement savings.

Many of the industries that constitute the business and consumer services sector are affected by international treaties or agreements to which Australia is a signatory. Examples of this include international treaties on banking prudence such as the Basel Accords, agreed principles on accounting and auditing standards such as the International Financial Reporting Standards and international agreements concerning the care and control of international heritage sites. Regulation is often used to ensure that Australian businesses comply with these international agreements.

The business and consumer services sector encompasses many activities that can be deemed culturally important to Australia. This includes the provision of museums, nature reserves and conservation parks, creative and performing arts, and activities related to sport and recreation. Regulation of some activities in this sector often occurs to preserve and enhance Australia's cultural heritage for the benefit of current and future generations.

Although state and territory governments have direct and primary responsibility for many of the areas of regulation impacting on the business and consumer services sector, the Australian Government plays an important role as a driver of reforms that seek to achieve uniformity or at least greater consistency in regulation across jurisdictions. In particular, the Australian Government has been involved in the COAG regulatory reform agenda and efforts to move towards a 'seamless national economy'.

Notwithstanding some positive initiatives and significant progress by governments, overlap and inconsistencies in the regulation of businesses or occupations across

jurisdictions has been a major concern again with this year's review of regulatory burdens. Differences in regulation across jurisdictions are leading to excessive compliance costs for businesses that operate in more than one jurisdiction and impose unnecessary barriers to the movement of labour — for example the lack of mutual recognition of responsible service of alcohol qualifications across state borders — and the provision of services between states and territories for example, architectural services, property services, and building-related services.

Regulatory issues facing the finance and insurance sector

The shape of the financial services industry is, to a greater extent than in most other industries, driven by the regulatory structure of the industry. Changes in regulation, therefore, have profound effects on the sector. This has been particularly the case in response to the Global Financial Crisis (GFC) and is likely to continue with changes to regulations currently being developed internationally.

The regulation of financial services has a range of objectives, but the main objectives are to promote stability and efficiency in the financial services system. The primary policy focus in the finance sector over the recent past has, appropriately, been systemic stability in the face of the GFC. The GFC began to emerge during 2007 and reached its most critical stage in late 2008 when financial markets experienced a severe liquidity crisis.

In response to deteriorating global financial conditions governments around the world acted to shore up the stability of financial markets. The Australian Government implemented a number of measures to stabilise financial markets and restore confidence in the domestic economy. These measures included investment in up to $16 billon of Australian residential mortgage-backed securities, $9 billion has been invested up to the end of May 2010, restrictions on short selling of equities, the guarantee of all retail and wholesale deposits, and a voluntary guarantee for designated state borrowings.

In introducing these measures the Australian Government bypassed or truncated many of the usual processes which would be undertaken during the development of regulation. Usually, regulatory proposals which have a significant impact on business and individuals, or the economy, require detailed analysis through a regulation impact statement (RIS).

However, because of the urgent need to respond to the GFC and ensure the stability of the financial system these processes could not be followed in relation to all of these measures. In a number of cases no RISs were prepared (wholesale bank deposit scheme) or exemptions granted from the RIS process (bans on short selling)

or RISs were prepared and they were not made public (in relation to the introduction of the Financial Claims Scheme).

The finance sector that emerged from the GFC is more concentrated and less diverse. The rules and regulations being developed through the G20, the Basel Committee and the IMF will inform any subsequent regulatory changes to ensure the stability of the sector. But they do not address the objective of ensuring continued and improved competitiveness and efficiency in the sector and, as noted by the RBA, these reforms will raise the cost of intermediation above pre-crisis levels.

The achievement of both objectives of financial stability and efficiency is necessary for continued growth in the productivity of the economy and prosperity of the community. The full impact and consequences of any proposed regulatory changes, including those on the competitiveness and efficiency of the finance sector, need to be clearly identified through a rigorous and transparent process of analysis and discussion with all stakeholders. The RIS process provides a framework within which proposed regulatory changes can be assessed against the likely achievement of higher level policy goals.

But if there are to be significant changes to prudential or other regulations the Commission sees value in a wider public review of financial sector regulation in preference to piecemeal consideration of such changes.

A number of finance industry groups consider existing consultation processes are inadequate. Indeed, some view consultation as the most significant failing in the current regulation-making process. Criticisms of consultation from finance industry groups include:

- lack of transparency and participation in consultation processes, including the inappropriate use of confidentiality agreements
- lack of continuity in consultation processes, particularly around the time of implementation of new arrangements, resulting in increasing business costs and inefficiencies in implementation
- consultation timeframes that are too short to allow stakeholders to provide a considered response
- lack of evidence provided in consultation to engender industry-wide acceptance of the stated benefits and costs to business.

Best practice regulation is most likely to be achieved when timely, transparent and rigorous consultation is undertaken with industry. The Australian Government should improve its consultation processes by:

- incorporating a 'consultation' RIS in the regulation-making process
- requiring the Office of Best Practice Regulation (OBPR) to extend its monitoring and reporting to the quality of consultation, by explicitly reporting on compliance by departments and agencies with the best practice consultation principles
- using confidential consultation processes only in limited circumstances where transparency would clearly compromise policy outcomes — such as for national security or commercial-in-confidence matters, or for proposed tax regulation to deal with tax avoidance.

The OBPR has recently released a draft for a revised Best Practice Regulation Handbook (OBPR 2010) which implements some changes to regulation impact assessment processes. The Government's ongoing commitment to reviewing regulation processes is welcomed and some of the proposed changes — such as the development of a central online register of both RISs and post-implementation reviews, and the earlier signalling of non-compliance with the process — will improve transparency and accountability.

However, other proposed changes — such as potentially narrowing the range of options analysed in a RIS, and changes to some adequacy criteria such as the RIS no longer being required to demonstrate that the preferred option has the greatest net benefit — may serve to constrain the operations of the RIS process and seem unlikely to address the concerns of industry.

Specific concerns about finance and insurance regulation

A number of specific matters raised in submissions relate to superannuation regulation. Many relate to administrative processes which finance industry organisations suggest create unnecessary or excessive compliance costs. Regulations and associated administrative processes affecting the superannuation industry could be revised to reduce the regulatory burdens on business, including by:

- allowing non-lapsing binding death nominations
- giving departing temporary residents the ability to apply for their Australian superannuation payments at or before the time of their departure, rather than after they have left Australia.

- standardising the instructions to superannuation trustees made on the dissolution of marriage
- requiring superannuation fund members to make a specific request to receive transaction confirmation letters.

Most of the large wealth management institutions now manage both superannuation and non-superannuation investments. However, processes associated with unclaimed monies are fragmented both within and between these investment types. This places an unnecessary burden on wealth management businesses. To remove inconsistency, lessen confusion and reduce inefficiency in the administration of unclaimed monies in the wealth management sector — and reduce whole of government administration costs — the Treasury and state and territory revenue authorities should jointly streamline administrative processes dealing with unclaimed monies.

Attempts to develop a mechanism for rationalising legacy financial products, such as managed investment schemes and life insurance products, have been underway since late 2006 with very little to show for the efforts undertaken by the Australian Government. As a consequence, the administrative burden associated with maintaining legacy products continues unabated. Greater efforts should be made by the Treasury to expedite the implementation of this agreed reform.

Regulatory barriers for occupations

National Competition Policy reforms were successful in addressing many of the unjustified anti-competitive elements of occupational regulation. Mutual recognition arrangements have reduced barriers to trade across state and territory borders for a number of occupations. Nevertheless inefficiencies remain in the regulatory frameworks applying to various occupations. Work underway as part of COAG's National Reform Agenda — including rationalisation of occupational licences and the implementation of national licensing and registration reforms for selected occupations — has the potential to further reduce unnecessary barriers to entry and interstate trade in services. That said, the Commission has identified specific regulatory burdens impacting on particular occupations that should be separately addressed.

The requirement that architects must register and pay a separate registration fee in each state and territory that they wish to practise in, acts as a barrier to architects working across jurisdictions. A national register, based on mutual recognition principles, should be implemented so that architects that satisfy the requirements in

any one jurisdiction would automatically be permitted to practise in all jurisdictions within Australia.

Lawyers wishing to practise as migration agents must comply with both the Australian Government regulatory scheme for migration agents and legal profession regulation under state and territory laws. This creates a disincentive for lawyers to practise migration law. Existing regulation of the legal profession should afford adequate consumer protection and lawyer agents should be exempt from the Migration Agents Registration Scheme.

Different regulatory treatment of the administration of personal insolvency and corporate insolvency imposes an unnecessary regulatory burden on insolvency practitioners and is impeding the efficient conduct of the insolvency regime. A reform taskforce should be established to identify provisions and processes that could be aligned. The Government should also examine the case for making one regulator responsible for both areas of insolvency law.

Inconsistent state and territory real property laws are a burden for practitioners in various property services-related occupations. COAG's Business Regulation and Competition Working Group, in consultation with relevant Ministerial Councils, should oversee the development of a Uniform Real Property Act for adoption in all Australian jurisdictions.

Audit firms can be subjected to audit inspections and quality reviews by multiple domestic and international inspection bodies. The Australian Securities and Investments Commission should expedite and expand its current work exploring opportunities to rationalise and streamline inspection processes for audit firms.

Building and planning regulation

State and territory government variations to the Building Code of Australia are creating significant inconsistencies in regulation across jurisdictions. Although addressing state and territory variations in building regulation has been a reform priority for many years, progress has been disappointing and governments need to reassess current strategies, including considering providing additional resources to expedite reforms.

Anti-Money Laundering/Counter Terrorism Financing (AML/CTF) regulation

Banks and superannuation funds considered that the Anti-Money Laundering/Counter Terrorism Financing (AML/CTF) legislation failed to take an overarching risk-based approach to all the obligations placed on reporting entities.

Other participants, such as small bookmakers and hotel operators involved in property management schemes, considered that the arrangements placed a disproportionate burden on their businesses relative to the risk of the activities they undertake being used for money laundering or terrorism financing.

The existing AML/CTF legislation provides for exemptions recognising that there will be occasions when the requirements placed on businesses may be excessive and exceed the intention of the legislation. This process provides the means to assess removing or adjusting the AML/CTF program requirements, such as through the use of a turnover threshold on on-course bookmakers, to reduce compliance costs against the increased risk of money laundering and terrorism financing activity. Such exemptions to mitigate compliance burdens have been provided to on-course bookmakers and TABs in regard to having to maintain transaction records in respect of receiving bets.

Regulation of accommodation and food services

The accommodation sector is concerned with some of the requirements to have management agreements between overseas hotel operators and Australian hotel owners subject to Foreign Investment Review Board (FIRB) assessment. They highlighted regulatory burdens associated with the monetary thresholds applying to foreign investment in developed non-residential commercial property. The threshold at which proposed foreign investment in commercial property is subject to FIRB assessment is not indexed. Indexing this threshold on the same basis as the thresholds applying to other types of foreign investment would prevent these arrangements becoming more restrictive over time.

Also, the lower monetary threshold applying to heritage listed commercial property is unlikely to provide any additional protection to the heritage values of these properties. Being heritage listed, such properties are protected by the relevant legislation irrespective of the nationality of the owner. Given there is no clear purpose or benefit in imposing this threshold, and it is likely to impose additional costs on potential investors, it should be removed.

The amendments to the *Trade Practices Act 1974* requiring businesses to provide a single total price in any representation to consumers, rather than a price based on components, have meant that separate menus or dual price lists are required by food businesses when levying a Sunday or public holiday surcharge. However, other surcharges, such as corkage, remain outside the scope of the amendments. Sunday and public holiday menu surcharges should also be outside the scope of the amendments as their inclusion imposes costs on these businesses without providing any additional benefit to consumers.

The different terms used in the EPBC Act and in the regulations regarding the commercial use of imported CITES specimens were seen by the industry as being ambiguous and lacking a clear and concise definition. Ensuring greater consistency between the Act and the regulations in regard to the commercial use of these animals, would provide greater certainty and clarity to industry as to what activities they were permitted to use an imported specimen for, and assist them to make informed decisions.

Lack of recognition of Responsible Service of Alcohol training across jurisdictions has been an ongoing problem for businesses that impacts on labour mobility and imposes additional costs on those businesses operating across jurisdictions. COAG should develop and implement mutual recognition arrangements in respect of training as soon as possible.

Other regulatory concerns

The earnings threshold for the superannuation guarantee continues to be an issue for business, in particular small businesses. The monthly earnings threshold attached to the superannuation guarantee has been in place since 1992 — as noted by the Regulation Taskforce and previous reviews by the Commission. As such, it should be increased through an appropriate process and be subject to periodic review, to reduce administrative costs and regulatory creep associated with the scheme.

Draft Recommendations

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

Regulatory Processes

DRAFT RECOMMENDATION 2.1

The Australian Government should improve the transparency and accountability of its consultation processes by:

- ***incorporating a 'consultation' Regulation Impact Statement in the regulation-making process (in a similar manner to the COAG requirements) for use in public consultation***
- ***requiring the Office of Best Practice Regulation to extend its monitoring and reporting to the quality of consultation, by explicitly reporting on compliance by departments and agencies with the best practice consultation principles***
- ***using confidential consultation processes only in limited circumstances where transparency would clearly compromise policy outcomes.***

Finance

DRAFT RECOMMENDATION 2.2

The Australian Government should amend the Superannuation Industry (Supervision) Regulations 1994 to permit non-lapsing binding nominations.

DRAFT RECOMMENDATION 2.3

The Australian Taxation Office and the Department of Immigration and Citizenship should examine options that give departing temporary residents the ability to apply for their Australian superannuation payments at or before the time of their departure, rather than after they have left Australia.

DRAFT RECOMMENDATION 2.4

The Attorney-General's Department should explore options with stakeholders to standardise the instructions to superannuation trustees made on the dissolution of marriage.

DRAFT RECOMMENDATION 2.5

The Australian Government should amend the Corporations Act 2001 and associated regulations so that superannuation fund members must make a specific request to receive transaction confirmation letters.

DRAFT RECOMMENDATION 2.6

The Treasury and state and territory revenue authorities should streamline administrative processes dealing with unclaimed monies.

DRAFT RECOMMENDATION 2.7

The Treasury should resolve any outstanding issues associated with legacy products and then implement the product rationalisation mechanism for managed investment schemes and life insurance policies as soon as possible.

DRAFT RECOMMENDATION 2.8

An implementation timetable for the project to improve the effectiveness of mutual recognition of powers of attorney between jurisdictions should be made publicly available by the Standing Committee of Attorneys-General as soon as possible.

Tourism and Hospitality

DRAFT RECOMMENDATION 3.1

The Australian Government should index monetary thresholds applying to all overseas investment in developed non-residential commercial real estate on the same basis as the thresholds applying to other types of overseas investment in Australian businesses.

DRAFT RECOMMENDATION 3.2

The Australian Government should remove the monetary threshold applying to proposed overseas investment in heritage listed non-residential commercial property. Such properties should be subject to the same threshold at which Foreign Investment Review Board assessment is required for proposed investment in developed non-residential commercial property not subject to heritage listing.

DRAFT RECOMMENDATION 3.3

The Australian Government should amend the Trade Practices Act 1974 to have restaurant and café menu surcharges for specific days placed outside the scope of the component pricing provisions of that legislation.

DRAFT RECOMMENDATION 3.4

The Council of Australian Governments should develop and implement mutual recognition arrangements in respect of Responsible Service of Alcohol training as soon as possible.

DRAFT RECOMMENDATION 3.5

The Department of Environment, Water, Heritage and the Arts should revise the Environment Protection and Biodiversity Conservation Act and its relevant regulations and memoranda to ensure that reference to the commercial use of imported specimens is consistent and clearly defined.

DRAFT RECOMMENDATION 3.6

The monthly earnings threshold of the superannuation guarantee should be increased through an appropriate process and subject to periodic review established by the Treasury.

Occupations

DRAFT RECOMMENDATION 4.1

The Australian Government should work with state and territory governments to implement a national register for architects.

DRAFT RECOMMENDATION 4.2

The Australian Government should amend the Migration Act 1958 to exempt lawyer migration agents from the Migration Agents' Registration Scheme. An independent review of the performance of lawyer agents, complaints handling and disciplinary procedures should be conducted three years after an exemption becomes effective.

DRAFT RECOMMENDATION 4.3

The Australian Securities and Investments Commission should expedite and expand its current cooperative efforts with international audit and inspection bodies and explore opportunities to work with relevant domestic bodies, to rationalise and streamline inspection processes for audit firms. Wherever inspections overlap, consideration should be given to greater coordination and recognition of the findings of audit and inspection processes conducted by other bodies.

DRAFT RECOMMENDATION 4.4

A taskforce should be established to identify personal and corporate insolvency provisions and processes that could be aligned. The taskforce should comprise officials from the Attorney-General's Department and the Treasury and should also work closely with the Insolvency and Trustee Service Australia and the Australian Securities and Investments Commission. The case for making one regulator responsible for both areas of insolvency law should also be examined.

DRAFT RECOMMENDATION 4.5

COAG's Business Regulation and Competition Working Group should, in consultation with relevant Ministerial Councils, oversee the development of a Uniform Real Property Act. The provisions of the Act, once agreed, should then be adopted in all Australian jurisdictions, with any variations to be kept to a minimum and subject to a public interest test.

1 About the review

Regulation is used to prevent undesirable social, economic and environmental outcomes from occurring or to promote beneficial outcomes. For example, regulation is used to ensure that markets operate fairly and competitively, to protect the health and welfare of workers, and to prevent damage to Australia's natural environment. Regulation has an important role to play in maintaining Australia's economic prosperity.

However, regulations also impose costs on businesses. When regulation is poorly designed, excessive, needlessly complex, duplicative, or formulated without adequate transparency or consultation, these costs are unnecessarily greater.

The Council of Australian Governments (COAG) has recognised that the costs of existing regulation may be unnecessarily high and is exploring ways in which the regulatory burden placed on businesses can be reduced. Not only will such reforms make operating a business easier, they will also improve the efficiency and productivity of the Australian economy, leading to improved living standards for the Australian people.

1.1 What the Commission has been asked to do

The Commission has been asked to undertake a review of the regulatory burdens placed on businesses as a result of Commonwealth regulation. This review is being conducted over a five year period, with a different sector being examined each year.

The Commission has been directed to identify areas where regulation imposes unnecessary burdens on businesses. In such instances, the Commission has also been asked to identify regulatory and non-regulatory options that will reduce such burdens without compromising achievement of the underlying policy objectives of the regulation.

The schedule for undertaking the reviews is as follows:

- primary industries in 2007 (completed)
- manufacturing and distributive trades in 2008 (completed)

- social and economic infrastructure services in 2009 (completed)
- business and consumer services in 2010 (current)
- economy-wide generic regulation and any regulation missed in earlier reviews in 2011.

This year the Commission will examine regulations that affect the business and consumer services sector (box 1.1).

Box 1.1 Industries included in the 2010 review — business and consumer services

The business activities that are considered to be within the scope of this year's review are based on divisions H, K, L, M, N, R and S of the Australian and New Zealand Standard Industrial Classification (ANZSIC). These include:

Division H: Accommodation and food services

- Accommodation
- Food and beverage services

Division K: Financial and insurance services

- Finance
- Insurance and superannuation funds
- Auxiliary finance and insurance services

Division L: Rental, hiring and real estate services

- Rental and hiring services
- Property operators and real estate services

Division M: Professional, scientific and technical services

- Professional, scientific and technical services
- Computer system design and related services

Division N: Administrative and support services

- Administrative services
- Building cleaning, pest control and other support services

Division R: Arts and recreation services

- Heritage activities
- Creative and performing arts activities

(continued on next page)

Box 1.1 **(continued)**

- Sports and recreation activities
- Gambling activities

Division S: Other services

- Repair and maintenance
- Personal and other services
- Private households employing staff and undifferentiated goods — and service — producing activities of households for own use

Source: ABS (2006).

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

1.2 Industry characteristics

The business and consumer services sector is a major contributor to Australia's overall economic activity. In 2008-09, the sector accounted for 28 per cent of Australia's GDP, with the largest individual industry contributions coming from the financial services and insurance industry (10.8 per cent) and the professional, scientific and technical services industry (6.1 per cent). Table 1.1 outlines the contributions of the industries in the business and consumer services sector to Australia's national output.

The business and consumer services sector employs over 3 million people and accounts for almost 30 per cent of national employment. Of this, the greatest contribution can be attributed to the professional, scientific and technical services sector — which provides 7.8 per cent of total employment — followed by the accommodation and food services industry — which provides 6.7 per cent of total employment. The finance and insurance services industry — which provided the largest contribution to the output of the sector — employs over 400 000 persons, representing about 3.8 per cent of total national employment.

Ascertaining the contribution of the business and consumer services sector to total exports is difficult. This is because information on exports is typically not collected by ANZSIC code, and therefore a breakdown of the contribution that each industry makes to national exports is not possible. However, from what data are available, it can be estimated that the business and consumer services sector contributes at least $12 billion to total exports and accounts for over four per cent of all the goods and services Australia exports. This figure is likely to be an underestimate given that

export data for many of the industries in the business and consumer services sector are not available. Of the industries where export data are available, the professional, scientific and technical services industry is the largest exporter, providing over $9 billion dollars (or 3.5 per cent) of Australia's national exports.

While Department of Foreign Affairs and Trade (DFAT) statistics for the food and accommodation services industry are not available, estimates provided by the ABS (2009a) suggest that in 2007-08 international tourists spent over $4.6 billion on accommodation and meals in Australia, suggesting that these services also represent a sizeable contribution to Australia's national exports.

Over 40 per cent of businesses in Australia could be classified as part of the business and consumer services sector in 2007. More than half a million businesses (representing over 25 per cent of the national business count) can be categorised as participating in the property and business services industry, which covers the rental, hiring and real estate services industry, the professional, scientific and technical services industry and the administrative and support services industry. There was also in excess of 130 000 businesses operating in the financial and insurance services industry in 2007, representing just under seven per cent of all Australian enterprises.

As Table 1.2 outlines, the business and consumer services sector features a high concentration of small businesses. Across all the industries which are to be examined in this review, over 96 percent of businesses can be categorised either as small (employing between 1 and 19 employees) or non employers. The financial and insurance services industry featured the highest concentration of small firms, with over 98 per cent of businesses being classed as small or non employing. By contrast, in the accommodation and food services industry, only a little over 80 per cent of firms fell into these classifications, with a sizeable proportion (over 16 per cent) in this industry being medium sized businesses.

Large firms are relatively few across all industries in the business and consumer services sector, with only around 0.3 per cent of all businesses in the sector employing in excess of 200 employees. However, despite only representing a small proportion of total businesses in consumer and business services, large firms do have a larger presence in specific industries within the sector. For example, in the finance and insurance services industry, the four largest Australian banks in 2009 employed in excess of 157 000 full time equivalent employees, which shows that the consumer and business service sector also contains some very large businesses.

Table 1.1 **Business and consumer services sector summary statistics**

		Accomm and food services	*Financial and insurance services*	*Rental, hiring and real estate services*	*Professional, scientific and technical services*	*Admin and support services*	*Arts and recreation services*	*Other services*	*All industries covered*
Gross value added 2008-09 (current prices)									
Value	$m	28 457	124 615	35 065	70 371	30 941	9 790	23 110	322 349
Contribution to GDP	(per cent)	2.5	10.8	3.0	6.1	2.7	0.8	2.0	27.9
Exports (2008-09)[a]									
Value	$m	N/A	1 578	N/A	9 770	N/A	790[b]	86[c]	12 224
Contribution to services sector exports	(per cent)	N/A	3.0	N/A	18.3	N/A	1.5	0.2	23.0
Contribution to national exports	(per cent)	N/A	0.6	N/A	3.4	N/A	0.3	0.0	4.3
Employment (February 2010)									
Number of persons	('000)	730.3	418.5	164.2	856.0	391.9	200.5	462.0	3 223.4
Contribution to national employment	(per cent)	6.7	3.8	1.5	7.8	3.6	1.8	4.2	29.4
Businesses									
	number	56 678	136 578	507 508[d]	N/A[d]	N/A[d]	46 808	56 642	804 214
Contribution to total national business count	(per cent)	2.8	6.8	25.2	N/A	N/A	2.3	2.8	39.9

a Export data are not classified by ANZSIC categories, and therefore should be considered approximate **b** Includes personal services **c** Repairs and maintenance only **d** Data for professional, scientific and technical services industry and the administration and support services industry are only available when combined with the rental, hiring and real estate services industry as the property and business services industry. Approximate value only.

Sources: Gross value added data from the ABS, *Australian National Accounts*, Cat. No. 5204.0 (2009b); Export data from Department of Foreign Affairs and Trade, *Composition of Trade Australia*, 2008-09; Employment data from ABS, *Labour Force, Australia, Detailed*, Cat. No. 6291.0.55.003 February, 2010 values; Business data from ABS, *Counts of Australian businesses including entries and exits,* Cat. No. 8165.0, June 2007.

Table 1.2 **Business size** [a,b]

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

	Small business (1 to 19 employees)	*Medium business (20 to 199 employees)*	*Large business (200 or more employees)*	*Non employers*	*Total*
Accommodation and food services	31 293	9 246	456	15 504	56 499
	(55.4)	(16.4)	(0.8)	(27.4)	
Financial and insurance services	35 667	1 704	345	99 030	136 746
	(26.1)	(1.2)	(0.3)	(72.4)	
Property and business services [c]	161 766	13 479	1 377	331 704	508 326
	(31.8)	(2.7)	(0.3)	(65.3)	
Arts and recreation services	14 721	2 283	180	29 529	46 713
	(31.5)	(4.9)	(0.4)	(63.2)	
Other services	24 192	1 299	60	31 077	56 628
	(42.7)	(2.3)	(0.1)	(54.9)	
All industries covered	**267 639**	**28 011**	**2 418**	**506 844**	**804 912**
	(33.3)	**(3.5)**	**(0.3)**	**(63.0)**	

a These data may not correspond to Table 1.1, as the data have been rounded to preserve the confidentiality of individual businesses. **b** Percentages may not summate to 100 per cent due to rounding. **c** Individual data for the rental, hiring and real estate industry, the professional, scientific and technical services industry and the administrative and support services industry is not available. Many of the businesses that fall into these industries are counted in the property and business services ABS classification.

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

Regulation in the business and consumer services sector

All three levels of government regulate the business and consumer services sector. Some industries, such as the financial and insurance industry, are primarily regulated by the Australian government, while other industries, for example, large parts of the food and accommodation services industry, and the rental, hiring and real estate services industry, are primarily regulated by state, territory and local governments.

The participation of all three levels of government in the regulation of the business and consumer services sector can mean that duplication or inconsistency in regulatory responsibility can occur. For example, new buildings are subject to the regulations outlined in the Building Code of Australia (BCA), however individual

states may vary this code to meet local conditions. New buildings may also be subject to planning and zoning regulations under the jurisdiction of local councils.

Governments regulate the business and consumer services sector for a number of reasons. These include:

- the importance of the sector to the overall performance of the economy
- the need to protect vulnerable end users and address information asymmetries
- to assist with meeting Australian government national objectives
- the need to uphold international treaties and standards
- the cultural importance of some activities within the sector.

The importance of the sector to the overall performance of the economy

There is a strong relationship between the performance of the business and consumer services sector and the overall performance of the economy. This is perhaps most apparent with the finance and insurance industry. Given the unique role that the finance and insurance industry plays in allocating capital to the most rewarding opportunities in the economy, a stable, effective and efficient banking and insurance industry is essential for a strong, well functioning economy. A second example can be seen in importance of tourism to Australia's aggregate level of exports and the reliance of some regional communities on tourism as their primary source of income and employment.

The need to protect vulnerable end users and address information asymmetries

The complex and highly technical nature of much of the output of the business and consumer services sector also provides another reason for regulation of the sector. In many cases, consumers will lack the knowledge and skills to verify the quality of the information and output produced by the sector, and therefore regulation is used to ensure that end users can be assured that that the services provided by the sector are of an acceptable standard. This is particularly relevant to the professional occupations covered in this review, including lawyers, architects and accountants. Financial disclosure requirements provide an example of governments regulating to address information asymmetry by ensuring that an organisation's financial information is presented in an accurate and standardised format.

To assist with meeting government national objectives

Regulation of the business and consumer services sector also seeks to achieve government national objectives. Australia's superannuation regulations are an example of this. Compulsory superannuation was introduced by the Commonwealth Government with the intention that it would form part of a broader retirement savings policy and shift part of the financing of retirement from the public to the private sector. The regulation of Australia's superannuation industry, including mandated contributions from employers and restrictions on the circumstances in which superannuation can be accessed, reflect these policy goals of the government.

The need to uphold international treaties and agreements

Many of the industries that constitute the business and consumer services sector are subject to international treaties or agreements of which Australia is a signatory. Examples include international treaties on banking prudence such as the Basel Accords, agreed principles on accounting and auditing standards such as the International Financial Reporting Standards and international agreements concerning the care and control of heritage sites of international significance. Regulation is often used to ensure that Australian businesses comply with these international agreements.

The cultural importance of the sector

The business and consumer services sector encompasses many activities that can be deemed culturally important to Australia. These include the provision of museums, nature reserves and conservation parks, creative and performing arts, and activities related to sports and recreation. Regulation often occurs to preserve and enhance Australia's cultural heritage for the benefit of current and future generations. Regulations governing the activities that can and cannot occur in Australia's heritage listed areas are an example.

Achieving greater national consistency in regulation

Although state and territory governments have direct and primary responsibility for many of the areas of regulation impacting on the business and consumer services sector, the Australian Government plays an important role as a driver of reforms that seek to achieve uniformity, or at least greater consistency, in regulation across jurisdictions. In particular, the Australian Government has been involved in the

COAG regulatory reform agenda and efforts to move towards a 'seamless national economy'.

Notwithstanding some positive initiatives and significant progress by governments, overlap and inconsistencies in the regulation of businesses or occupations across jurisdictions have been a major concern again with this year's review of regulatory burdens. Differences in regulation across jurisdictions are leading to excessive compliance costs for businesses that operate in more than one jurisdiction and impose unnecessary barriers to the movement of labour — for example the lack of mutual recognition of responsible service of alcohol qualifications across state borders — and the provision of services between states and territories — for example architectural services, property services, building regulation.

1.3 The regulatory reform context

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

The establishment of the Taskforce on Reducing Regulatory Burdens on Business was announced by the Australian Government in October 2005. The purpose of the Taskforce was to examine Commonwealth regulation, and identify instances where it was 'unnecessarily burdensome, complex [or] redundant' and where regulation was duplicated across multiple jurisdictions (Regulation Taskforce, 2006, p. i).

The Taskforce reported in January 2006 and identified nearly 100 reforms of existing regulation, as well as proposing 50 areas of regulation to be investigated in greater depth by the Australian Government or COAG.

The Government accepted many of the report's recommendations in 2006 and implemented regulatory reforms. Further, additional reviews have been announced or set in train. The report of the Taskforce formed the foundation of this five year annual review cycle, with this report representing the fourth in the series.

COAG's National Reform Agenda

In 2006-07, COAG agreed to the National Reform Agenda (NRA), which aims to — amongst other things — reduce the regulatory burden placed on businesses by all levels of government. COAG also agreed to conduct targeted annual reviews of existing regulation to identify areas where reform would provide significant benefits to business and the community.

In 2008, COAG signed an agreement to deliver a seamless national economy, under which the Commonwealth and state and territory governments committed to reform 27 priority areas, including the acceleration of the implementation of reforms for existing 'hot spots'. Reforms as part of this agenda commenced in 2008-09 in line with an implementation plan. The reforms of specific relevance to the business and consumer services sector include:

- the development of a national system of consumer protection regulation concerning mortgage credit and advice, margin lending and non-deposit taking institutions
- the harmonisation of development assessment procedures across all levels of government
- the development of a national system of building regulation, including the removal of unnecessary state and local government variations to the BCA.

Other reforms agreed to by COAG also impact on the business and consumer services sector. These include the implementation of nationally uniform Occupational Health and Safety (OHS) regulations, payroll tax harmonisation and the development of a national trade licensing system.

Standard Business Reporting

In 2008, COAG also introduced Standard Business Reporting (SBR) into its reform agenda. SBR represents a streamlining of business reporting requirements for financial information to the government, which includes the removal of unnecessary duplication of financial data in government forms, the ability to automatically pre-fill data on government financial forms, and a single online log in point for financial reporting by business to government authorities. The 2009 Review of Regulatory Burdens commented extensively on SBR and made a number of recommendations to extend its principles and methodology to non-financial reporting.

The Commission's 2009 Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services

This year's review follows a review completed last year which focused on the regulation of the social and economic infrastructure services sector. As with this year's review, it drew on submissions from stakeholders to identify overly burdensome or duplicative regulations and recommend ways in which these could be improved.

The final report was released in September 2009 and contained 42 recommendations for improving regulation of social and economic infrastructure services. The Government formally responded to the review in December 2009 with the majority of the recommendations being accepted. Actions have since been undertaken to implement many of the recommendations.

Current and previous reviews concerning regulatory reform

Along with this review, throughout 2009 and early 2010, the Commission has benchmarked regulatory compliance burdens across all jurisdictions in Australia with respect to food safety and OHS. This follows a similar review undertaken in 2008 on the costs of business registrations across different Australian jurisdictions. In 2010, the Commission is also examining planning and zoning regulations as part of its on-going Performance Benchmarking of Business Regulation project.

Many other reviews relevant to the business and consumer services sector are being, or have recently been, conducted by other bodies. These include:

- the Review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System, more commonly known as the Cooper Review
- Australia's Future Tax System Review, more commonly known as the Henry Review
- the Inquiry into Financial Products and Services in Australia, more commonly known as the Ripoll Inquiry.

1.4 The Commission's approach for this review

Defining regulation

Regulation refers to any 'rule' that influences the way that people or businesses act. Regulation is not just limited to legislation, but also includes co-regulation and 'quasi-regulation' through codes of conduct, for example (box 1.2).

Box 1.2 **Types of regulation**

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

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

Defining unnecessary burden

'Regulatory burdens' are the costs that regulations impose on businesses. These include:

- the financial and time costs incurred by businesses in complying with regulations, such as filling out forms, completing mandatory returns and so on
- similar costs associated with businesses needing to engage with regulators, policy makers and other businesses in relation to existing or new regulation
- changing the way goods and services are produced by a business
- changing or restricting the goods and services that otherwise would be produced by a business
- the costs of forgone or reduced opportunities resulting from constraints on the capacity of a businesses to enter markets, innovate or respond to changing technology, market demand or other factors.

While regulation necessarily imposes costs on those being regulated, an unnecessary burden arises when the policy objectives of the regulation can be

achieved with a lower cost to the affected parties. Examples of how this may arise include:

- excessive coverage, including regulatory overlap and inconsistency
- consultation processes that lack transparency or continuity, or whose timeframes are too short
- heavy-handed conduct from regulators
- complex approval and licensing processes
- exceedingly prescriptive measures and burdensome reporting processes.

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

- there are compliance costs imposed by the regulation or the conduct of the regulator that appear to be unnecessary in order to meet the objectives of the regulation
- the regulation mainly affects the business and consumer services sector either directly or indirectly
- the regulatory burdens are the consequence of regulation by the Australian Government, which includes areas where state and territory government regulations overlap with Commonwealth regulation or involve the Australian Government in policy participation
- the regulation has been implemented for a long enough time period for its impact to be properly assessed and investigated. Prospective regulation, or regulation that has only been implemented very recently, is generally beyond the scope of this review.

Scope and limitations of the review

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

The focus is on Commonwealth regulation

As outlined in its terms of reference, this review focuses on Commonwealth regulation. This means that the review will not examine regulation that is exclusively the responsibility of the state, territory or local governments apart from instances where there is a duplication or overlap of regulatory responsibilities

between the Commonwealth and other jurisdictions, or where the Australian Government is involved in efforts to obtain national consistency.

The focus is on business impact

The terms of reference for this review focus on the regulatory burdens on business. Importantly, the review will examine the cumulative impact of this regulation. Businesses are subject to regulation during many stages of their operations, including in establishment and expansion, as well as during production, marketing and distribution. An additional layer of regulatory burden may arise for businesses operating across multiple jurisdictional boundaries.

The cumulative nature of regulation means that even when the impact of a single regulation, when examined in isolation, may be deemed to be small, the combined impact of all regulation may be significant. This is why the Commission views removing even small unnecessary regulatory burdens as important.

The focus is on the business and consumer services sector

The terms of reference for this year's review focus on regulation specific to the business and consumer services sector. Many submissions made to this review presented concerns that extended beyond this sector to encompass a number of other sectors in the economy or economy-wide generic regulation. Such issues included:

- generic tax issues
- generic concerns relating to industrial relations and occupational health and safety
- issues relating to planning and zoning regulations
- issues relating to corporate governance regulation, and generic components of corporations and contract law.

In a number of cases issues were raised that have impacts on all businesses across the economy, rather than just in the business and consumer services sector. Unless these issues related specifically to the business and consumer services sector, the Commission considered such concerns to be out of the scope of this year's review. Some of these issues may be more appropriately examined in the review to commence in 2011, which covers generic, economy wide regulation.

Policy objectives of the regulation

The terms of reference of this review indicate that the Commission is required to have regard to the underlying policy intent of government regulation. This means the underlying policy objectives of the regulation of the business and consumer services sector are largely beyond the scope of this review. Rather the regulatory means by which they are achieved is under review. While some comment may be made in instances where the Commission believes the achievement of the objectives of regulation is demonstrably inadequate, the purpose of this review is to examine the unnecessary costs of regulations required to meet these policy objectives.

Identifying the significant issues

The Commission has used analysis and judgement when determining the most significant issues raised by participants, as well as deciding what issues will be deferred to the fifth year (the economy-wide review) of the review process. The procedure that the Commission followed to assist with such judgements was as follows:

1. A concern or complaint was considered to be out of scope entirely if it did not relate to regulation which impacts on business and cannot be related to Commonwealth regulation or to a national agreement or arrangement. Generally, a matter was also felt to be out of scope if it clearly related to the objectives of regulation, rather than its associated impact on businesses.
2. Instances where concerns and complaints were recently reviewed were taken into account. In situations where other reviews are being conducted relevant to industries in the business and consumer services sector, judgement was made about the relevance and scope of that review, as well as its timeliness, transparency and degree of industry consultation.

Where interested parties did not raise any concerns in relation to an area of Commonwealth regulation, it was generally taken as prima facie evidence that there is no perceived problem of excessive regulatory burden. However, the Commission is also mindful of review fatigue, and is aware that industries characterised by smaller enterprises are less likely to have resources to make substantive submissions.

Quantifying impacts, including unnecessary burdens

Ideally, the Commission would determine the relative importance of each concern by estimating the unnecessary costs of regulation and estimating the potential

productivity gains that could be made by making improvements. Given this, in its issues paper, the Commission encouraged participants to provide as detailed information as possible on the costs of complying with regulation, with a specific focus on the components of the cost that are associated with unnecessarily burdensome, duplicative or inconsistent regulation.

However, the Commission accepts that there are significant challenges associated with quantifying the costs of burdensome regulation on business. Most participants were unable to provide information on the pecuniary costs of regulation, and even when data was provided, this was usually for the overall cost of complying with regulation, rather than the specific cost pertaining to unnecessary regulatory burdens. Furthermore, the Commission also identified challenges in ensuring the integrity of the data, for example, ensuring that the data was free of selection bias or measurement errors.

Qualitative indicators of excessive regulatory burdens

As a result of the substantial difficulties in quantifying the cost of regulatory burdens, particularly unnecessary burdens, the Commission has based its prioritisation of reforms on a largely qualitative criteria, supplemented with relevant case studies when available. Regulations that were developed in accordance with best practice principles were considered less likely to impose undue burdens on the economy.

Assessment of concerns

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

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

1.5 Conduct of the study

The Commission received the terms of reference for these annual reviews in February 2007. Work began on the current review into the business and consumer services sector in late 2009. An issues paper was released in December 2009 to

assist stakeholders in preparing submissions. The Commission also held consultations and meetings with relevant stakeholders throughout late 2009 and early 2010. Submissions were due by 26 February 2010. The Commission received 27 submissions prior to the release of this Draft Report on 29 June 2010.

In addition to submissions from a number of Government agencies, the Commission has had a number of discussions with agencies in relation to issues raised by industry participants. This process has enable the Commission to clarify its thinking on a number of issues and it looks forward to clarification by agencies of a number of outstanding points in their responses to the Draft Report.

1.6 Structure of the report

The remainder of this report is divided into five chapters. Chapter 2 considers some issues relating to the overall regulatory framework in Australia in the wake of the Global Financial Crisis (GFC) and then discusses the specific issues which were raised in submissions in relation to the financial services industry along with the Commission's recommendations on how they should be addressed. Chapter 3 discusses the issues that were raised in submissions that were relevant to the hospitality and tourism services industry. Chapter 4 presents issues raised with respect to occupations regulation, while chapter 5 discusses issues relevant to building and zoning regulation. Chapter 6 presents issues raised within other sections of the business and consumer services sector. Appendix A documents the bodies that the Commission consulted with as it undertook this review.

2 Finance issues

Key points

- Consultation processes have been criticised by the finance industry. Concerns include:
  - lack of transparency and participation in consultation processes, including the inappropriate use of confidentiality agreements
  - lack of continuity in consultation processes, particularly around the time of implementation of new arrangements, which increases business costs and creates inefficiencies in implementation
  - consultation timeframes that are too short to allow stakeholders to provide a considered response
  - lack of evidence provided in consultation to engender industry-wide acceptance of the stated benefits and costs to business.
- To improve the transparency and accountability of its consultation processes the Australian Government should:
  - incorporate a 'consultation' Regulation Impact Statement (RIS) in the regulation-making process
  - require the Office of Best Practice Regulation to extend its monitoring and reporting role to the quality of consultation
  - only use confidential consultation processes in limited circumstances where transparency would clearly compromise policy outcomes.
- There are a number of regulations and associated administrative processes affecting the superannuation industry that could be revised to reduce the regulatory burdens on business, including in relation to:
  - binding death nominations
  - departing Australia superannuation payments
  - superannuation splitting
  - superannuation transaction confirmation letters.
- Administrative burden in the wealth management sector would be reduced if a number of Australian, state and territory government processes dealing with unclaimed monies were streamlined.
- The product rationalisation mechanism for managed investment schemes and life insurance policies should be implemented as soon as possible.

2.1 Finance regulation

The finance sector (including the superannuation industry) is a central part of the Australian economy and its smooth functioning is important to the economy's underlying strength and stability. Moreover, a significant proportion of the accumulated wealth of Australians is held in this sector.

Financial services regulators

Policy oversight relating to the Australian financial system is the responsibility of Treasury and the Reserve Bank of Australia (RBA) while two other Commonwealth bodies, the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) are responsible for the implementation of the policy through their regulation of the industry (Figure 3.1).

Australian Treasury

The Treasury has responsibility for advising the Australian Government on the full range of economic policy issues including issues relating to increasing the efficiency, competitiveness and stability of Australia's financial system. The Treasury is also responsible for advising Government on retirement income policies. Treasury provides advice to the Government on policy processes and reforms that support well functioning markets by:

- promoting a secure financial system and sound corporate practices
- removing impediments to competition in product and services markets
- safeguarding the public interest in matters such as consumer protection and foreign investment.

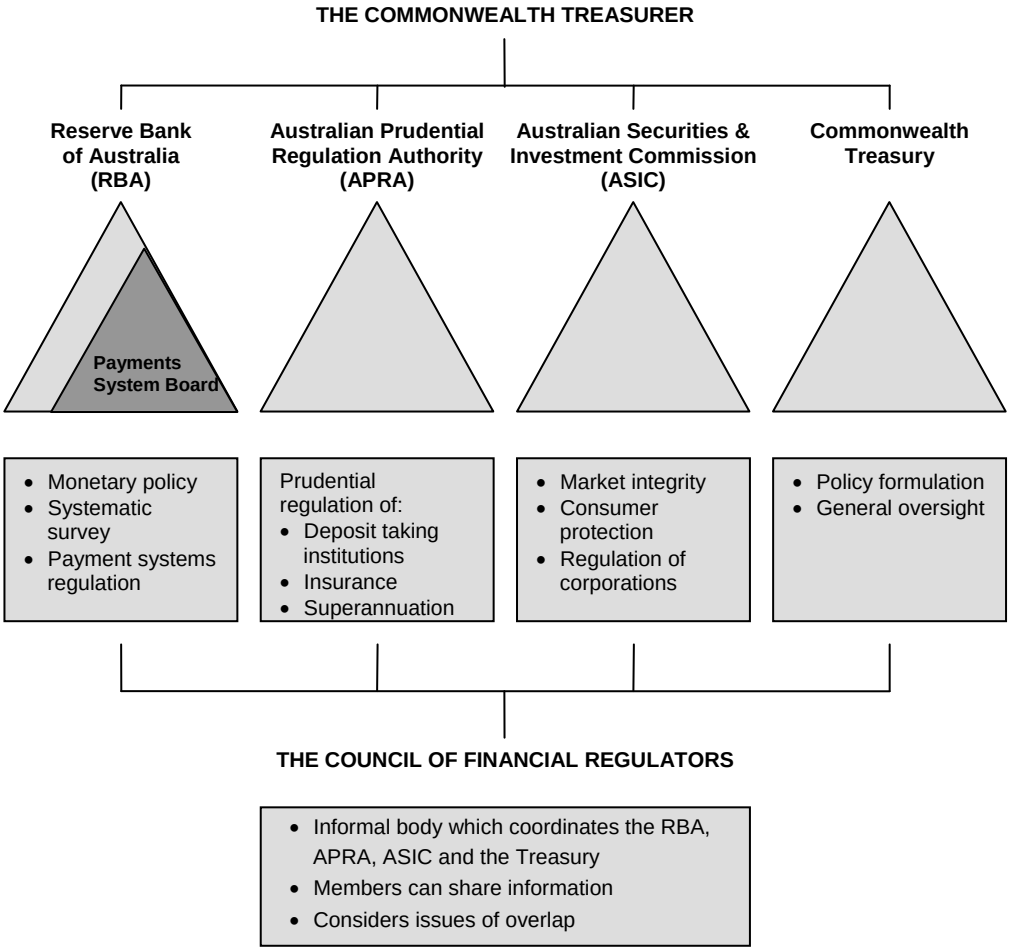
Reserve Bank of Australia

The Reserve Bank of Australia is responsible for monetary policy, the stability of the financial system, and oversight of the payments system.

The key responsibility of the RBA is to maintain financial stability so that financial intermediaries and markets can facilitate the smooth flow of funds between savers and investors and, by doing so, promote growth in economic activity and full employment. In meeting this responsibility, the RBA focuses on the prevention of financial disturbances with potentially systemic consequences, or in the event that a financial system disturbance does occur, it aims to respond in such a way that public confidence in the financial system will not be undermined. The RBA uses monetary

policy to lay the foundation for low and stable inflation, and sustainable economic growth, and works to ensure that the payments system is safe and robust reducing the scope for problems at an individual institution to spread to other financial intermediaries (RBA 2010a).

Figure 2.1 **Commonwealth regulatory framework**



Data source: VCEC 2010, adapted from KPMG 1998

Australian Prudential Regulation Authority

APRA was established in 1998 to take over the role of prudential regulation of the financial system from the Bank Supervision Department of the RBA and the Insurance and Superannuation Commission. APRA is now responsible for the prudential regulation of approved deposit-taking institutions (i.e. banks, building societies and credit unions), friendly societies, life and general insurance businesses, and superannuation funds.

APRA's supervisory approach is based on the premise that the primary responsibility for ensuring that financial institutions meet their financial obligations lies with the board and management of these institutions. Consistent with this approach, APRA promotes prudent behaviour through:

> … a robust prudential framework of legislation, prudential standards and prudential guidance, which aims to ensure that risk-taking is conducted within reasonable bounds and that risks are clearly identified and well managed. (APRA 2007, p. 2)

In exercising its functions and powers, APRA is required by the *Australian Prudential Regulation Authority Act 1998* to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality.

Australian Securities and Investments Commission

The Australian Securities Commission replaced the earlier National Companies and Securities Commission and the state and territory corporate affairs offices in 1991. It became the Australian Securities and Investments Commission in 1998 when its role was expanded to include consumer protection in superannuation, insurance and deposit taking. ASIC is responsible for regulating financial markets (including securities and futures markets), providing investor protection in relation to financial products, the regulation of the conduct and governance of corporations, and (recently) consumer credit.

ASIC administers the provisions of the *Financial Services Reform Act 2001* (the FSR Act), which introduced a streamlined regulatory regime for market integrity and consumer protection across the financial services industry. The FSR Act provides for a harmonised licensing, disclosure, conduct and consumer protection framework for financial service providers, and a single statutory regime for financial product disclosure.

In addition, there are several other regulators which, while not solely focused on the operations of the finance and investment industry, nonetheless also have a significant impact in affecting the structure and operations of the industry. These are the Australian Competition and Consumer Commission (ACCC), Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Australian Taxation Office (ATO).

2.2 Future regulatory reform: a need to balance stability and competition

Global financial crisis (GFC)

The chief policy focus on the finance sector over the recent past has, appropriately, been systemic stability in the face of the GFC. The GFC began to emerge during 2007 and reached its most critical stage in late 2008 when financial markets experienced a severe liquidity crisis leading to an international response by governments aimed at restoring stability to the financial markets. These events have had a significant impact on Australia's financial services industry.

The Australian Government implemented a number of measures to stabilise financial markets and restore confidence in the domestic economy. These measures included investment in up to $16 billon of Australian residential mortgage-backed securities, $9 billion has been invested up to the end of May 2010 (AOFM 2010), restrictions on short selling of equities, the guarantee of all retail and wholesale deposits and a voluntary guarantee for designated state borrowings. These measures were similar to those introduced by other governments, although the Australian Government did not employ the stronger measures used in some other jurisdictions such as capital injections by governments, nationalisation of some financial institutions, and purchasing toxic assets (OECD 2010b).

In introducing these measures the government bypassed or truncated many of the usual policy processes which would be undertaken during the development of regulation. Usually, regulatory proposals which have a significant impact on business and individuals, or the economy, require analysis through a regulation impact statement (RIS) (OBPR 2007).

However, because of the urgent need to respond to the GFC and ensure the stability of the financial system these processes could not be followed in relation to all of these measures. A RIS was prepared in relation to the introduction of the Financial Claims Scheme and for the arrangements for the management of distressed financial institutions, but neither were published. The Prime Minister granted 'exceptional circumstance' exemptions from the regulatory impact analysis requirements for the interim bans on short selling. No RIS was prepared in relation to the guarantee of deposits or the Guarantee Scheme for wholesale deposits (OBPR 2009, pp. 5, 15, 49-50).

The Government's rapid response to the GFC, focused on financial stability, is generally considered to have contributed to the relatively mild impact of the GFC

on Australia's economy. Nevertheless, the GFC has had an adverse impact on competition in the financial services sector – this is evidenced by the substantial reduction in off-balance sheet borrowing through securitisation. Within the banking sector the crisis has precipitated some consolidation in the industry and has seen the market share of the large banks increase significantly because:

- closure of the securitisation markets led to several non-bank lenders exiting the market, scaling back their activities, or being acquired by the major banks
- constraints in other markets have led to the exit or scaling back of other non-bank lenders such as GE, Virgin Money, GMAC-RFC and Seiza
- of the exit, scaling back of operations, or slower growth by foreign banks such as Royal Bank of Scotland, Society Generale, and the sale of BankWest by HBOS
- of the scaling back of operations of some smaller Australian banks (OECD 2010a).

Some of the measures introduced by the Government, such as the purchase of residential mortgage backed securities (RMBS) issuances, were aimed at supporting a competitive market. Notwithstanding these efforts the securitisation sector has failed to return to pre-crisis levels.

Moreover, it has been asserted that other measures, such as the fee structure for guaranteeing large deposits (based on the credit rating of the ADI) favored the major banks (Abacus sub. 22). It earlier strongly objected to this differential pricing asserting that it made it impossible for mutual ADIs to compete effectively in the market for deposits and that it damaged competition and choice (Abacus 2009). Whilst there was a need to act urgently in this case, it is these sorts of unintended outcomes that normal regulatory development processes are designed to identify and minimise.

In December 2009, the Basel Committee on Banking Supervision released significant proposals as part of a long term response to the weaknesses exposed by the GFC. The proposed changes are aimed at 'ensuring that the risks inherent in banks' portfolios relating to trading activities, securitisations and exposures to off-balance sheet vehicles are better reflected in minimum capital requirements, risk management practices and accompanying public disclosures' (APRA 2009b, p. 1).

It has been claimed that these proposals may have an effect on the productivity of the Australian economy. The Australian Bankers' Association (ABA) indicates that 'increased levels of prudential regulation have the potential to significantly impact the funding and balance sheet composition of the ADI sector and, through that, the productivity and efficiency of the economy as a whole' (sub. 17, p. 3).

Focus on competition

There have been increases in concentration of the financial services sector in recent years associated with rising interest margins. While the stability of the finance industry is a crucial objective, protecting and promoting competition should also be at the centre of any discussions about regulation in the industry. In this regard the rules and regulations being developed through the G20, the Basel Committee and the IMF will create a more robustly regulated financial system but they do not address the objective of ensuring continued and improved competitiveness in the sector. As noted by the RBA 'these reforms will inevitably raise the cost of intermediation above pre-crisis levels'(RBA 2010b, p. 25).

While there is benefit in the development of harmonised international financial regulations, their development and implementation needs to reflect the existing strengths of national financial systems. There should be 'scope for some tailoring to national circumstances' in the new regulations (RBA 2010b, p. 25). This is particularly the situation in Australia where the existing regulations and prudential oversight by APRA contributed to the relatively reduced impact of the GFC on the financial system.

Future of financial services regulation

Over the past thirty years many countries, including Australia, have liberalised their financial regulatory settings and reduced barriers to investment between countries. These reforms have helped to drive higher rates of economic growth (Bekaert et al. 2005; Jayaratne and Strahan 1996).

Greater competition in the financial sector has also reduced costs and increased the number and type of financial products provided to consumers (PC 2004a). Regulatory changes that inhibit competition and innovation, without yielding significant benefits in terms of increased stability or consumer protection, could put these benefits at risk.

Discussions at the OECD have supported the view that competition and stability can co-exist. The oligopolistic structure of the banking sector in many countries may have contributed to the crisis as it meant that many banks were systemically important, leading to moral hazard issues, perceived guarantees and excessive risk taking. More competitive market structures can promote stability by reducing the number of major banks that are 'too big to fail' (OECD 2009).

Designing the most effective financial regulatory settings involves balancing the twin objectives of financial stability and competition. However, the full impact and

consequences of any proposed regulatory changes, including those on the competitiveness of the finance sector, need to be clearly identified through a rigorous process of analysis. Finsia (2009) has expressed the view that any proposed changes to Australia's regulatory framework should be developed according to a consistent conceptual framework. Australia's established regulation impact assessment process establishes a framework within which proposed changes to regulation can be evaluated.

The Commission considers that undertaking regulatory changes underpinned by a full analysis of impacts will facilitate developing a broader perspective of the regulatory environment and will assist the development of policies to improve both the stability and efficiency of the financial services industry. The achievement of both objectives is necessary for continued growth in the productivity of the economy and prosperity of the community. If there are to be significant changes to prudential or other regulations the Commission sees value in a wider public review of financial sector regulation in preference to piecemeal consideration of such changes.

2.3 Consultation and implementation processes

As the finance sector plays such an important role in the performance of the economy, it is critical that financial regulation is designed, implemented and administered efficiently. As the Regulation Taskforce said, financial regulation should:

- seek to maintain an appropriate balance between achieving safety and investor protection and ensuring that regulated entities are not unduly constrained in conducting business
- be applied flexibly in recognition of the diversity within the sector and the pace of structural change and innovation
- allow for decision-making to occur within a framework that promotes transparency and public confidence. (Regulation Taskforce 2006, p. 89)

Over regulation or poorly designed regulation is a concern for the Association of Superannuation Funds of Australia (ASFA):

> While much regulation is necessary and beneficial, there are cases where this may not be so or where regulation could be better designed. There is a perception that law makers too often concern themselves with effectiveness, ignoring efficiency issues — that is, existing or proposed regulation may achieve a particular policy goal but not necessarily be the 'best' or lowest cost means of doings so. (ASFA sub. 20, pp. 1-2)

Effective consultation is an important means of ensuring that unintended consequences do not arise in the development and design of regulation and that regulatory burdens on business are not excessive. Engaging in consultation provides government departments and agencies with access to information and perspectives that might otherwise not be available, particularly about the compliance costs of different options and the timelines needed to achieve successful policy implementation.

As the Regulation Taskforce (2006) emphasised, good regulatory process requires effective consultation with regulated parties at all stages of the regulatory cycle:

> It is important that stakeholders are consulted both at an early stage when policy options and approaches are being considered, and later when the detailed design features are being bedded down. (Regulation Taskforce 2006, p. 147)

As with previous annual reviews of regulatory burdens on business, consultation processes continue to be criticised by industry. Criticisms from the finance industry include:

- lack of transparency and participation in consultation processes, including the inappropriate use of confidentiality agreements
- lack of continuity in consultation processes, particularly around the time of implementation of new arrangements, increasing business costs and creating inefficiencies in implementation
- consultation timeframes that are too short to allow stakeholders to provide a considered response
- lack of evidence provided in consultation to engender industry-wide acceptance of the stated benefits and costs to business.

Specific concerns about consultation processes raised in industry submissions were expressed in relation to the following regulations:

- National Consumer Credit Protection Package
- long-term superannuation reporting
- short selling disclosure
- product disclosure statements.

National Consumer Credit Protection Package

The National Consumer Credit Protection Reform Package (the NCCP Reform Package) was passed by the Federal Parliament in late 2009. According to the

Explanatory Memorandum for the National Consumer Credit Protection Bill 2009, the Reform Package:

- gives effect to COAG agreements of 26 March and 3 July 2008 to transfer responsibility for regulation of consumer credit, and related financial services, to the Commonwealth
- implements the first phase of a two-phase Implementation Plan to transfer credit regulation to the Commonwealth endorsed by COAG on 2 October 2008. (House of Representatives 2009a, p. 3)

The new National Consumer Credit Code largely replicates the Uniform Consumer Credit Code (UCCC), which was enacted in the *Consumer Credit (Queensland) Act 1994*, and subsequently adopted by the other states and territories with varying degrees of consistency.

According to the Minister for Financial Services, Superannuation and Corporate Law, not only will the new laws make the consumer credit system fairer by improving the effectiveness of protection for consumers, but by replacing the state-based UCCC, they will also reduce duplication, red tape and compliance costs for business (Bowen 2009a).

In order to progress the COAG decisions of 2008, Treasury established an Implementation Taskforce consisting of officials from Treasury, ASIC and the states and territories to discuss policy approaches and consider draft provisions. In addition, an Industry and Consumer Consultative Group was established, which included representatives from the following organisations:

- Consumer advocates — Australian Consumers Association (CHOICE), Consumer Law Action Centre
- Dispute resolution — Credit Ombudsman Service Ltd and Financial Ombudsman Service
- Finance industry — Abacus-Australian Mutuals, Australian Bankers' Association, Australian Finance Conference, Finance Brokers Association of Australia, Financial Planning Association, Insurance Council of Australia, Investment and Financial Services Association, Mortgage and Finance Association of Australia, National Financial Services Federation
- Legal — Consumer Credit Legal Centre, Law Council of Australia.

The consultations consisted of a number of face-to-face and telephone meetings, and written comments were also provided on some aspects of the draft provisions. The consultations were conducted on a confidential basis. According to the ABA, the confidential nature of the discussions detracted from the consultation process:

> Each member of the Group had to enter into a standard form confidentiality agreement, breach of which could give rise to Crimes Act implications. The ABA was only permitted to consult with its member bank personnel if those personnel in turn signed confidentiality agreements. This slowed the consultation process with banks as relevant personnel came into and out of regulatory policy issues as their expertise dictated. We were requested by Treasury to keep the number of confidentiality agreements to a minimum. (ABA sub. 17, p. 11)

Assessment

Consultation that is transparent and which allows all interested parties to comment, not just a select few, can help raise public awareness of policy problems, lead to more informed analysis of policy options (including identifying unintended consequences) and build support for proposed changes.

As noted in Productivity Commission (2010c), public transparency is a 'safety net' for evidence-based policy:

> … a form of quality control that provides opportunities for correction or refinement when the evidence is not complete. It can elicit new sources of information and alternative analysis, expose weakness in prevailing analysis, and shed light on how the positions of sectoral interests relate to overall community impact, thereby helping achieve better policies and outcomes. (p. 51)

This is not to say there are not advantages with confidential consultation in some circumstances. One of these advantages — seeing proposals much earlier than might be possible in the usual public consultation process — was discussed briefly in last year's Annual Review of Regulatory Burdens on Business in relation to the establishment of a Small Business Advisory Committee (Productivity Commission 2009a).

It is also recognised that for a minority of proposals a public consultation process may not be appropriate. For example, where there is a need for Cabinet confidentiality, such as for national security or commercial-in-confidence matters, or for proposed regulation to deal with tax avoidance.

The National Consumer Credit Package would not appear to fall into any of these categories. Moreover, with the Industry and Consumer Consultative Group comprising industry organisations — that consult with member organisations on a daily basis — it is not surprising that the consultation process soon became unwieldy for some industry representatives on the Group.

For the vast majority of regulatory proposals open, public consultation processes should improve the quality of analysis used to inform government decisions. As stated in last year's Annual Review of Regulatory Burdens on Business:

> … the regulation resulting from a more transparent process should improve the design of regulation, lessen business compliance costs, reduce unintended consequences and lower the cumulative burden of regulation on business. At the very least, the regulatory proposal would go forward with a greater understanding and acceptance by all stakeholders of its full impact. (Productivity Commission 2009a, p. 341)

In the Commission's view, confidential consultation processes should only be used in limited circumstances where transparency would clearly compromise policy outcomes.

Long-term superannuation reporting

Recent changes to long-term superannuation reporting have been made to assist funds to convey this information to their members in a form that is more relevant and more easily understood.

The Investment and Financial Services Association (IFSA sub. 18) is critical of the recent consultation and implementation processes surrounding the changes to long-term superannuation reporting. In particular:

- the implementation of the Corporations Amendment Regulations (No. 3) 2009 which took effect from 1 July 2009
- the proposed refinements announced by the Minister for Financial Services, Superannuation and Corporate Law in February 2010.

Assessment

The *Corporations Act 2001* and the Corporations Regulations 2001 provide for the regulation of corporations, financial markets, products and services, including in relation to licensing, conduct, financial product advice and disclosure. In relation to superannuation reporting, the regulations set out the specific requirements for periodic statements to members of a superannuation fund (other than self-managed superannuation funds), the specific nature of information that is required to be disclosed, and the ways of providing annual report information to members (House of Representatives 2009b).

According to the Explanatory Statement for the Corporations Amendment Regulations (No. 3) 2009, the purpose of the amendments was to assist superannuation fund members to engage with the long term performance of their

superannuation by requiring the disclosure of five and ten year average returns in periodic member statements. The amending regulations were intended to address a concern that the disclosure of only recent negative periodic returns for superannuation products may lead to inappropriate responses by investors, for example a flight to cash or low risk investments, with consequent lower longer term returns. Such responses may be ameliorated if members are also informed about longer term returns (House of Representatives 2009b).

On 19 February 2010, the Minister for Financial Services, Superannuation and Corporate Law announced that the Government proposed to 'streamline' long term superannuation disclosure requirements (Bowen 2010a). The refinements would amend the regulations to:

- exclude exit statements
- allow the industry to use inserts to provide five-year performance information for one more year up until 30 June 2011
- exempt 'traditional' funds of an insurance nature
- allow approved deposit funds and pooled superannuation trusts to provide annual reports online.

The announcement by the Minister was welcomed by ASFA which saw the previous changes as providing little benefit to the superannuation system:

> The costs incurred in revising benefit statements to comply with new requirements is another example of deadweight costs to the system — for example, the requirement to disclose historical long term investment returns in exit statements which arguably provides little or no value to an individual who is leaving the fund. (ASFA sub. 20, p. 2)

Consultation processes associated with long-term superannuation reporting

According to IFSA, such concerns were raised with the Minister prior to the regulations taking effect in July 2009. The industry was then obliged to undertake major commitments to meet the new requirements, only to have them unwound some months later by the proposed refinements:

> As foreshadowed in the IFSA submission to Minister Bowen dated 19 June 2009, industry recognised numerous operational impediments to implementation of the regulation. The limited consultation period did not allow time for a proper evaluation of the practical impact and operational impact of the regulations.
>
> Relief was not granted by ASIC on the basis that the regulations had just been made, the outcomes were intended by Government, and hence industry moved towards

implementation. Many trustees undertook significant projects incorporating significant planning, information technology and resource spend.

There was no formal consultation from Treasury or ASIC subsequent to IFSA's submission, and no prior indication was given regarding the changes announced by the Minister. Hence, implementation by industry had reached a point whereby the refinements, though welcome, were not as beneficial as they should have been simply via improved communication. (IFSA sub. 18, p. 10)

The Australian Government's best practice consultation principles are unambiguous in stating that meaningful consultation with stakeholders should be an ongoing process:

> Regulators need to be involved in consultation to ensure that regulations can be administered in a manner that is consistent with the policy intent of government. Regulators need to maintain constructive relationships with key stakeholders to obtain information on the potential impacts of how regulation may be administered. (Australian Government 2007, p. 40)

From the information provided to the Commission, in this case it would appear that industry consultation by the Australian Government could have been more effective in the period leading up to July 2009 and between then and the 'streamlining' announcement in February 2010.

Following the approach taken in the recent report by the Australian Financial Centre Forum (2009), IFSA suggest that consultation processes with industry be improved by closer engagement with industry when government is testing and evaluating significant regulatory proposals. This would improve the chances that new regulations are necessary, effective and impose as small a compliance burden on industry as possible (IFSA sub. 18).

Short-selling disclosure regulation

IFSA is also critical of the recent consultation/implementation processes associated with the short-selling disclosure regime regulations. In particular, IFSA is concerned about the lack of guidance provided by ASIC in implementing the positional reporting requirements. According to IFSA, a lack of timely technical guidance by ASIC led to:

> … commercial uncertainty, increasing business costs, and inefficiencies in implementation (the full impacts of which are yet to be determined at the time of writing). Government, regulators and industry need to work closely to ensure they are aware of each other's capabilities and limitations to achieve efficient and timely regulatory change implementation. (IFSA sub 18, p. 12).

In September 2008, after regulators in the United States and the United Kingdom imposed bans on short selling of equities to help preserve financial stability, ASIC banned both covered and naked short selling of stocks listed on the Australian Stock Exchange (ASIC 2008a, 2008b).[1]

The ban on covered short selling of non-financial stocks was lifted on 19 November 2008 and that on financial stocks was lifted on 25 May 2009 (ASIC 2008c, 2009b). The ban on naked short selling of all stocks is permanent under the Act, subject to certain limited exemptions (ASIC 2009a).

As an interim disclosure measure, ASIC implemented transactional reporting of covered short selling positions in November 2008. Transactional reporting involves disclosure of any transaction that is a covered short sale.

In December 2008, the Government passed the *Corporations Amendment (Short Selling) Act 200*8 (the Act). The Act established the framework for the disclosure of covered short selling positions and clarified ASIC's power to make declarations with regard to all aspects of short selling.

The disclosure framework established under the Act requires short sellers to provide information to their broker relating to any covered short sale transaction. The broker is then required to pass this information, and any information relating to short sales entered into by the broker on their own behalf, onto the market operator. The information to be disclosed and the timing of the disclosure are specified by regulations. According to the Explanatory Statement for the Corporations Amendment Regulations 2009 (No. 8), at the time:

> It was thought best to determine the detailed aspects of short selling disclosure by regulations as only regulations could provide the flexibility to respond to an environment of rapid change, including technological innovation and ongoing developments in the conduct and structure of financial markets. (House of Representatives 2009c, p. 2 of the Regulation Impact Statement)

Further to these changes, in November 2009, the Australian Government introduced new regulations in relation to the disclosure of short selling information (ASIC 2009c, Bowen 2009b). The Corporations Amendment Regulations 2009 (No. 8) require reporting of two forms of short selling information:

- Transactional reporting: this involves reporting of the aggregate number of shares in a particular security sold in covered short sale transactions on a given day. This

[1] A 'covered' short sale is a sale of a product that the seller, at the time of sale, does not own, but does have an existing right to obtain, typically via a binding securities lending agreement, while a 'naked' short sale is one where the seller has no such right at the time of sale and must acquire it prior to settlement.

information will be reported through Australian financial services licensees (brokers) to market operators. The market operator then releases the information on the following day. This is consistent with the existing ASIC interim disclosure regime.

- Postitional reporting: this involves reporting of all short positions directly to ASIC. ASIC will aggregate all short positions in a particular security and release this information to the public four days after the position was established. A person is required to continue reporting this position to ASIC on a daily basis until the position no longer exists. Positional reporting is scheduled to commence from 1 April 2010 to provide industry and ASIC with sufficient time to assist with the reporting requirements. (Bowen 2009b, pp. 1-2)

In effect, the Government kept in place the interim disclosure rules that had operated since November 2008, which required brokers to report clients' short selling transactions to the ASX. But from 1 April 2010, the Government also intended to require short-sellers to report their net short sale positions to ASIC, which will aggregate the data for public release four days later.

However, on 5 March 2010 ASIC delayed the start date for short position reporting in response to industry concerns about meeting their reporting obligations by 1 April. It announced decisions:

- to delay the commencement of short seller obligations to lodge short position reports from 1 April 2010 to 1 June 2010
- to reschedule the commencement of ASIC obligations to publish aggregated short position reports from 1 April 2010 to 21 June 2010. (ASIC 2010a, p. 1)

ASIC said the postponement 'will allow short sellers more time to ensure they have appropriate systems in place to meet their reporting obligations' (ASIC 2010a, p. 1). ASIC also conducted an industry-wide pilot test that allowed short sellers to test their systems for submitting short position reports from 10 May 2010.

On 5 March 2010, to reduce the regulatory burden on short sellers, ASIC also announced that short sellers will be exempted from reporting short positions that are both valued at less than $100 000 and less than 0.01 per cent of the product's quoted securities (ASIC 2010b). More information about the threshold will be published in revised Regulatory Guide 196 Short selling (RG 196).

Consultation/ implementation processes associated with the short-selling disclosure regime

According to the Explanatory Statement for the Corporations Amendment Regulations 2009 (No. 8) the regulations were subject to extensive consultations:

> In March 2009, Treasury released a consultation paper for public comment on issues associated with disclosure of short sales following the passage of the Amendment Act in 2008. Following the close of submissions on the consultation paper, Treasury and the Government engaged in targeted consultations with industry and ASIC as part of finalising consideration of policy issues. In addition, a Regulation Impact Statement was prepared and cleared by the Office of Best Practice Regulation. Draft regulations were then prepared implementing this policy and released for public consultation for three weeks on 2 October 2009. This consultation period focused on the technical aspects of implementing the policy rather than the policy itself. (House of Representatives 2009c, p. 4)

However, whilst industry was pleased with the initial consultation process outlined above, IFSA said the later consultation focusing on technical implementation issues was poorly handled:

> Certainly, the initial consultation was strong and led to regulations that met policy objectives supported by industry. However, crucial technical aspects raised by industry regarding the final draft regulations were neither addressed nor responded to. The rush to implement and lack of response late in the piece was not in line with the excellent prior consultation. (IFSA sub. 18, p. 11)

Assessment

The delays in the start date for short position reporting by two months could be seen as evidence of a consultation process that was challenged in terms of continuity and appropriate timeliness. The Australian Government's best practice consultation principles state that meaningful consultation with stakeholders should be a continuous process:

> Consultation should continue through all stages of the regulatory cycle, including when detailed design features are being bedded down. This will assist in identifying and understanding potential problems, and in designing and implementing better regulation. (Australian Government 2007, pp. 39-40)

The best practice principles are also clear in stating that timeframes for consultation should be realistic to allow stakeholders sufficient time to provide a considered response, with the amount of time required dependent on the specifics of the proposal, such as the complexity of the issue or the diversity of stakeholder views. (Australian Government 2007).

IFSA says recent examples of poor consultation in relation to short-selling and long-term superannuation reporting highlight the need for a more structured consultation process with regulators:

> The legislative and regulatory actions in relation to long-term superannuation reporting and short selling are examples of the need for an introduction of a standardised formal

> consultative process. In the absence of such a process industry will repeatedly be subject to legislative/regulatory changes that result in unintended consequences and costs. (IFSA sub. 18, p. 12)

A more formal consultation process requiring detailed industry engagement is seen by IFSA as mandatory where regulation requires implementation in a short period of time, yet at the same time, may be subject to subsequent review or change. ASFA also supports a more formal industry consultation process:

> … there should be more rigour on disclosing the cost of implementing legislation since this ultimately reduces members' account balances. Whilst we understand this is done now, it is not always done with industry consultation. ASFA believes there should be a formal industry consultation process with respect to costing proposed legislative changes. The industry should provide input on likely implementation costs (i.e. the industry as well as government should provide cost estimates, since the latter has often produced underestimated figures in the past). (ASFA sub. 20, p. 2)

A more formal consultation process is proposed by the Commission in section 2.4 that provides scope for better engagement between industry and government when consultation occurs on regulatory proposals.

Product disclosure statements regulation

ASFA say the current product disclosure requirements in the Corporations Act (the Act) have driven up compliance costs for the superannuation industry and not achieved their objectives, including greater consumer protection:

> Disclosure has become a millstone and has not achieved many of its objectives … and has involved super funds in excessive compliance costs. (ASFA sub. 20, p. 2)

The ABA also questioned whether the new Product Disclosure Statements (PDSs) currently being implemented by the Australian Government will reduce compliance costs and have speculated that compliance costs may actually increase:

> It is unlikely that the new PDS disclosure requirements will reduce compliance costs, although some cost efficiencies may be gained from leveraging opportunities to incorporate information which resides in other information repositories as well as the delivery of documentation via electronic disclosure. It is more likely that the new PDS disclosure requirements will increase compliance costs as banks and other financial service providers will need to manage their various product documents and other information repositories pursuant to various legal obligations. (ABA sub. 17, pp. 7-8)

Assessment

Any product that is prescribed as a financial product in the Act is subject to the general disclosure rules of the Act. The Act contains a number of general requirements regarding matters that must be disclosed in PDSs (and there are additional rules set out in the Corporations Regulations for specific products).

While sub-section 1013C(3) of the Act states that 'the information included in the PDS must be worded in a clear, concise and effective manner,' there is no limit on the length of PDSs. It has been suggested that the principles-based nature of the regime has been one of the drivers of lengthy PDSs, as financial product issuers have responded to the lack of prescription in the law by including any information that could be considered relevant (Treasury 2009b).

Others have said that the current disclosure requirements for financial products and services have led businesses to focus unduly on protecting themselves from liability rather than helping consumers to avoid poor financial decisions (Productivity Commission 2008a).

In February 2008, the then Minister for Superannuation and Corporate Law and the Minister for Finance and Deregulation jointly established the Financial Services Working Group (FSWG) to develop shortened and simplified PDSs that allow consumers to easily compare products (Tanner 2008). The FSWG consists of senior officers from Treasury, ASIC and the Department of Finance and Deregulation. In addition, to facilitate consultation with industry and consumer groups, the FSWG established an Industry and Consumer Advisory Panel, which has met 14 times since its establishment in early 2008 (as at 13 May 2010).

A four page PDS has been prescribed for First Home Saver Accounts and a similar document has been developed for margin loans. The Government is also developing PDSs that are no longer than six pages for managed investment schemes and superannuation funds.

The PDS documents include:

- standardised headings and sections about the entity offering the product
- information on how the product works
- product benefits, risks and aggregate costs to enable easier comparison between products.

While the ABA generally supports a move to shorter and simpler PDSs, it is concerned that in attempting to simplify and standardise the content of the PDS

government may just shift the compliance burden for industry from the PDS document to the linked information that is available online:

> The new PDS disclosure requirements will impose initial and ongoing compliance costs on banks and other financial service providers — that is, initial costs associated with development of new documentation and ongoing costs of managing the new disclosure obligations in terms of the PDS itself and other information incorporated by reference. (ABS sub. 17, p. 6)

PDS documents should aim to provide sufficient information such that consumers can easily compare financial products and select one that has the features and characteristics most suited to their preferences. At the same time the documents should not create an excessive compliance burden for business.

Business has indicated that a major reason for the length of earlier PDSs (in some cases exceeding 100 pages) was to meet necessary legal requirements. While incorporation of 'information by reference' will shorten the documents and improve their readability for consumers, it is unlikely that such an approach will have a significant impact on the regulatory burden on business — instead of having one large PDS they will have a number of smaller documents to separately administer. This is because such information will either be:

- 'deemed to be part of the PDS' and the full range of PDS liability and enforcement provisions of the Act will apply
- not part of the PDS (and therefore not subject to the PDS enforcement provisions) but still subject to other provisions such as those relating to misleading and deceptive conduct in the Act and the *Australian Securities and Investments Act 2001*.

In other words, there has been no diminution of legal requirements for business to meet consumer protection requirements under the new arrangements.

In September 2009, the Minister for Finance and Deregulation said, in relation to the new margin lending investor disclosure regime, that it will reduce the costs and complexity for business:

> Consistent with our ambitious deregulation agenda to improve productivity the framework allows for more detailed or frequently updated information to be provided online which will result in genuine savings to business. (Tanner 2009, p. 1)

While business printing and postage costs are likely to decline, it is questionable whether these cost reductions will offset the establishment and ongoing administration costs of the new product disclosure statements and the other information linked to them (that may or may not be deemed part of the new PDSs). If expected overall savings to business have been costed by government, it is not

clear why they have not been provided to business either through the Industry and Consumer Advisory Panel or in the documentation released as part of the recent consultation processes for the disclosure regimes related to margin loans (submissions closed on 23 October 2009) or managed investment schemes and superannuation funds (submissions closed on 26 February 2010). It appears there has been a lack of evidence provided to (at least some) industry organisations, as part of the consultation process, to support the stated benefits to business.

2.4 Achieving more effective consultation

In responding to the Regulation Taskforce on Reducing Regulatory Burdens on Business, the Australian Government adopted a whole-of-government policy on consultation in 2006. The policy, outlined in the 'Best Practice Regulation Handbook' (BPR Handbook, Australian Government 2007), sets out seven best practice principles that need to be followed by all agencies when developing regulation (box 2.1). These principles have also been endorsed in the current revised draft Handbook (Australian Government 2010c).

The Handbook details the procedures and processes for achieving best practice consultation and then goes on to explain that a Regulation Impact Statement (RIS) must include a consultation statement which documents what processes were followed, who was consulted, what their views are, and how those views have been taken into consideration. Importantly, to be assessed as 'adequate' the consultation process reported in the RIS 'should conform with the Government's best practice principles and policy on consultation' (Australian Government 2007, p. 55).

In commenting on the Australian Government's consultation model, the OECD recently suggested that not all government agencies were meeting the best practice consultation requirements:

> The consultation model outlined in the BPR Handbook and the requirement to demonstrate in the RIA [RIS] the consultation that was undertaken appear best practice and there is clear evidence of good practice in significant policy issues. However, it may be that consultation practices vary across departments and are not as broadly applied as the guidelines require, which suggests that further consistency in processes could be promoted. (OECD 2010c, p. 78)

The concerns raised by some finance industry organisations (ABA, IFSA, ASFA) in the previous section confirm that the consultation principles discussed in box 2.1 have not always been followed by some government departments and agencies. This lends weight to the OECD's assessment that consistency in consultation processes across government could be promoted more vigorously.

Box 2.1 Australian Government best practice consultation principles

Continuity – consultation should be a continuous process that starts early in the policy development process.

Targeting – consultation should be widely based to ensure it captures the diversity of stakeholders affected by proposed changes. This includes state, territory and local governments, as appropriate, and relevant Australian Government departments and agencies.

Appropriate timeliness – consultation should start when policy objectives and options are being identified. Throughout the consultation process, stakeholders should be given sufficient time to provide considered responses.

Accessibility – stakeholder groups should be informed of proposed consultation and be provided with information about proposals through a range of means appropriate to these groups.

Transparency – policy agencies need to explain clearly the objectives of the consultation process and the regulation policy framework within which consultations will take place, and provide feedback on how they have taken consultation responses into consideration.

Consistency and flexibility – consistent consultation procedures can make it easier for stakeholders to participate. However, this must be balanced with the need for consultation arrangements to be designed to suit the circumstances of the particular proposal under consideration.

Evaluation and review – policy agencies should evaluate consultation processes and continue to examine ways of making them more effective.

Source: Australian Government (2007).

IFSA suggests that consultation processes need to be strengthened by adopting a more formal structure so that greater accountability is achieved:

> IFSA's view is that the current consultative arrangements in respect of legislative/regulatory proposals will continue to operate in a somewhat 'ad hoc' fashion and lack any structure or arrangements for accountability unless a more formal consultative structure is adopted. (IFSA sub. 18, p. 2)

The OECD (2010c) suggests three approaches to improve consultation processes and ensure a sustained commitment to effective consultation across government:

- more extensive guidance to departments and agencies on the use of consultation practices drawing on examples from other OECD countries
- update the Best Practice Handbook consultation guidelines to encourage agencies to take into account these guidelines when developing their own

agency's consultation practices, and to publish information to stakeholders concerning these practices

- collecting more detailed information on the actual use (and effectiveness) of different consultation practices by agencies.

In response to the OECD's recommendations, amongst other changes to the RIS process, the Australian Government announced that it:

> … will strengthen the requirement for agencies to demonstrate that effective consultation has been undertaken in order for a RIS to be assessed as compliant. Agencies will [also] be required to develop their own consultation practices and publish details of them. (Australian Government 2010b, p. 3)

At this stage, it has not been confirmed how the Australian Government intends to strengthen the consultation requirements in practice. Strengthening could mean that either:

- the current adequacy criterion related to consultation in the BPR Handbook is strengthened or
- the current adequacy criterion related to consultation is more stringently enforced by the Office of Best Practice Regulation (OBPR).

However, if strengthening is to occur, it appears to be more likely to occur via the latter strategy since the draft of the revised BPR Handbook (released on 29 April 2010) made no changes to the consultation criterion for assessing the adequacy of a RIS (Australian Government 2010c).

Irrespective of whether the Government is 'raising the bar' or just improving enforcement of the current requirements, it decided that 'no regulatory proposal should go to Cabinet or any other decision maker unless it has complied with the Government's regulatory impact assessment requirements, as advised by the OBPR' (Australian Government 2007, p. 36). This has been the case since 20 November 2006 when the current best practice regulation requirements came into effect. For regulatory proposals going to Cabinet, where a RIS is required and consultation processes do not meet the best practice principles on consultation, the Cabinet Secretariat should prevent the associated regulatory proposal from proceeding to Cabinet, unless the Prime Minister has deemed that exceptional circumstances apply. Similarly, a regulatory proposal for decision by the Prime Minister, minister or other decision maker should not go forward to the decision maker unless the OBPR has indicated that the Government's best practice consultation requirements have been satisfied (Australian Government 2007).

As recommended in last year's Annual Review of Regulatory Burdens on Business, and recently endorsed by the OECD, consultation on RISs would be more effective if a two stage approach were taken (in a similar manner to the COAG requirements) that required the RIS to be published in a draft form as a consultation document on regulatory proposals (Productivity Commission 2009a, OECD 2010c). This would formalise the consultation process and allow the draft RIS to form a tangible centrepiece for discussions between industry and government.

To improve the community's understanding of the quality of Australian Government consultation processes, the OBPR's monitoring and reporting role should be extended. For example, the OBPR could publish information in its annual report on the number of RISs that were assessed as non-compliant with the Government's regulation requirements because the consultation process reported in the RIS did not conform with the Government's best practice principles on consultation. Reporting of such information would provide the community with an indicator of the Government's threshold for quality consultation, and also reflect the Government's commitment to its best practice consultation principles.

DRAFT RECOMMENDATION 2.1

The Australian Government should improve the transparency and accountability of its consultation processes by:

- ***incorporating a 'consultation' Regulation Impact Statement in the regulation-making process (in a similar manner to the COAG requirements) for use in public consultation***
- ***requiring the Office of Best Practice Regulation to extend its monitoring and reporting to the quality of consultation, by explicitly reporting on compliance by departments and agencies with the best practice consultation principles***
- ***using confidential consultation processes only in limited circumstances where transparency would clearly compromise policy outcomes.***

2.5 Superannuation

A number of specific matters raised in submissions relate to superannuation regulation. Many relate to administrative processes which superannuation industry organisations suggest create unnecessary or excessive compliance costs.

Binding death nominations

The Superannuation Industry (Supervision) Regulations 1994 (i.e. Division 6.2) require that a member of a superannuation fund who has provided the fund with a binding death nomination renew that nomination every three years.

According to IFSA this requirement creates an unnecessary burden on superannuation fund managers. To support its case IFSA provided the administration costs of one of its member fund manager's:

> A leading fund manager's costs around administering this requirement are:
>
> - $30 000 per annum in printing and postage costs
> - $200 000 (approx) per annum in processing the renewals. (IFSA sub. 18, p. 3)

Assessment

A superannuation fund may permit a member to give a notice to the trustee of the superannuation fund requesting the member's benefit be paid at their death to either the member's estate or their dependants specified in the notice.

The notice may either be a binding or non-binding nomination. A binding nomination is an instruction to the trustee by the member and the trustee must comply with it. A non-binding nomination, on the other hand, is merely an expression of the member's wishes, and the trustee can exercise its discretion not to follow the nomination.

Only by making a binding nomination can members ensure that their intentions regarding their superannuation will be carried out. In the absence of a binding nomination, it is the trustee of a superannuation fund who decides how and to whom superannuation benefits are paid following a member's death.

In a public offer superannuation fund a member's death benefit nomination is binding if a number of conditions are met including, no more than three years have passed since the notice was first signed, last confirmed or amended by the member.[2]

A binding death benefit nomination, like a will, should be kept up to date so that it reflects current estate planning strategy and takes into account changes to personal circumstances and intended beneficiaries. However, it is unnecessarily burdensome on superannuation fund members and superannuation funds to have to go through

[2] Public offer funds are superannuation funds and superannuation master trusts that are open to general membership and not limited to any group of employees or industry sectors.

the administrative process of renewing the nomination every three years regardless of whether there are changes in these matters.

As long as a member of a superannuation fund is advised of their existing nomination each time they receive their annual statement, and are provided with adequate instructions on how to update their nomination (if required), this should be sufficient to ensure timely review by the member.

DRAFT RECOMMENDATION 2.2

The Australian Government should amend the Superannuation Industry (Supervision) Regulations 1994 to permit non-lapsing binding nominations.

Releasing superannuation benefits for departing temporary residents

Under regulations 6.01B and 6.18 of the Superannuation Industry (Supervision) Regulations 1994 temporary residents of Australia, who have departed the country and provided evidence that their visas have been cancelled, are able to receive superannuation benefits direct from superannuation funds within six months of leaving Australia.[3]

IFSA are critical of the current regulations regarding superannuation payments for departing temporary residents. According to IFSA, the regulations create excessive cost imposts on both the members of superannuation funds and the industry:

> The process becomes inefficient due to the fact that the superannuation fund can only release the benefits after receiving the request and notification from the member once they have departed Australia. This often proves difficult for the member due to not having contact details readily available from another country, and the cost and time associated with communicating with the fund from overseas. (IFSA sub. 18, p. 5)

Assessment

IFSA suggest that compliance costs for the superannuation industry would be reduced if departing temporary residents were able to submit their applications for payment of superannuation benefits at the time of their departure rather than following their departure from Australia.

3 Superannuation benefits are treated as 'unclaimed superannuation' if at least six months have passed since the person's temporary visa ceased to be in effect and they have left Australia. Superannuation funds who hold these benefits are required to pay these amounts to the ATO. The affected individuals are able to recover their benefits from the ATO.

The current superannuation regulations pertaining to preservation are aimed at enabling superannuation savings to be preserved until the time of retirement. Temporary residents who leave Australia and who do not have an immediate right of return because their visa has ceased to be in effect are seen as no longer requiring their superannuation savings to be preserved as there is no obvious intention to retire in Australia. Hence the current conditions that need to be met by a person in order to apply for a Departing Australia Superannuation Payment (DASP) through the ATO include evidence that the person was a holder of a temporary visa that has ceased to be in effect (i.e. has expired or been cancelled) and the person has left Australia.

It is appropriate to have checks and balances in place in order to avoid abuse of the early access system by temporary residents. Enabling temporary residents to apply for a DASP once they have left Australia is an effective way to ensure integrity. However, it also appears to be an inefficient and cumbersome process because it requires departing temporary residents to submit their applications only after they have left Australia.

Once temporary residents have departed Australia, the application can be undertaken online or a paper application can be submitted. According to the ATO, over 90 per cent of applications are currently made online. The online process has a number of advantages over a paper application:

- it is a free service and eligibility can be confirmed automatically — meaning the need to provide certified copies of documents, such as a visa and passport is avoided
- the Department of Immigration and Citizenship (DIAC) $55 fee to provide a certificate of immigration status, which is compulsory for payments over $5000, is not charged
- if the temporary resident departed Australia more than six months prior, the request stays with the ATO and becomes an unclaimed superannuation request. (ATO, pers. comm., 3 May 2010).

However, if there are errors, or additional information is required, or additional forms need to be completed, it may be cheaper and more convenient for the departing temporary resident and the superannuation fund to undertake these tasks whilst the departing temporary resident is still in Australia rather than overseas.

It appears the majority of the information required by the ATO could be submitted (either online or by post) at or before the time the temporary resident departs Australia, this includes:

- applicant details

- superannuation fund details
- employment details
- consent to trustee
- declaration by individual.

If this were possible, all that would then be required, after the temporary resident has departed Australia, is for evidence of departure to be sent directly from the Department of Immigration and Citizenship (DIAC) to the superannuation fund so it can make the payment.

In the current DASP paper application form, the nature of evidence required by the departing temporary resident is determined by the amount of superannuation money in the departing resident's superannuation account balance.

If the balance in the superannuation fund is less than $5000, and a paper application is being submitted, the departing temporary resident must provide certified copies of the following documents after leaving Australia:

- temporary resident visa, or evidence the applicant was the holder of a temporary visa which has ceased to be in effect
- passport showing the applicant's photograph and identification pages, together with the page showing the applicant's departure stamp from Australia.

In this case, the completed application and evidence of departure is sent directly to the superannuation fund.

If the superannuation fund balance is $5000 or more, and a paper application is being submitted, the departing temporary resident must provide after leaving Australia a written statement from DIAC stating that the departing temporary resident:

- was the holder of a temporary visa which has ceased to be in effect
- has departed Australia. (To obtain this written statement from DIAC the temporary resident must first complete DIAC's Form 1194 Certification of immigration status).

In this case, the completed paper application and evidence of departure (including Form 1194) is sent to DIAC , to confirm eligibility for payment, and then forwarded to the superannuation fund. DIAC charges the departed temporary resident a fee of $55 for the verification of immigration status of former temporary residents for the refund of superannuation contributions. As discussed above, this fee is waived if an online application is undertaken with the ATO.

The involvement of departing temporary residents could stop at or before departure if they could submit their DASP application forms directly to superannuation funds at or before the point of departure, and then rely on DIAC to unilaterally complete the process by confirming evidence of their departure (with superannuation funds) after they have left Australia so that eligible super payments can be made.

Such a process would ensure integrity of the system for departing temporary residents — since they will not receive their superannuation payments unless DIAC has confirmed evidence of their departure from Australia — but at a lower cost to departing temporary residents and superannuation funds. It may also result in a reduction in superannuation funds sent to the ATO by trustees as unclaimed superannuation.

RECOMMENDATION 2.3

The Australian Taxation Office and the Department of Immigration and Citizenship should examine options that give departing temporary residents the ability to apply for their Australian superannuation payments at or before the time of their departure, rather than after they have left Australia.

Superannuation splitting

IFSA would like to see greater standardisation in superannuation splitting in financial agreements or court orders made on the dissolution of marriage. IFSA says the current process is time-consuming because there is no consistency in the format of instructions to the superannuation trustee:

> … the superannuation component is simply one of the items in the financial agreement or orders. This can lead to inefficiencies in the process as a result of locating the relevant sections in sometimes lengthy documents and interpretation of the sections, as there is no required wording. (IFSA sub. 18, p. 6)

One of IFSA's members estimated that if a more standardised approach was introduced it would save, on average, at least 15 minutes per case. The member indicated it receives 1200 cases per year, equating to a saving of approximately $13 500 per year (IFSA, pers. comm., 31 March 2010).

Assessment

The *Family Law Act 1975* allows for the splitting of superannuation interests in the event of marriage breakdown. These instructions come from superannuation fund members in the form of financial agreements or court orders made on the dissolution of a marriage.

IFSA have identified three main areas of concern with financial agreements and court orders:

- the superannuation splitting section/s may be anywhere in the order or agreement, and these documents can be very long, so it can take some time to locate the relevant section
- in some cases superannuation splitting details are in several sections of the order or agreement, so the administrator needs to read the whole document to ensure they have noted every relevant section
- the wording of the superannuation splitting section/s is non-standard, and may at times require consultation to ensure the administrators understand the instruction to the trustee. (IFSA, pers. comm., 31 March 2010)

In order to reduce costs and facilitate the administration of superannuation splitting, IFSA have made a number of suggestions for standardisation:

- allocate a specific item number in any agreement or order to deal with superannuation matters
- standardise the wording dealing with superannuation splitting
- develop a standard form for the parties to sign-off and send to the superannuation trustee that just gives instruction to the trustee on super splitting (without any other items such as the family home and other property). These other items are not relevant to the trustee and do not need to be provided to the trustee. (IFSA, pers. comm., 31 March 2010)

Standardisation may also have additional benefits by reducing the risk of processing errors and any resultant disputes, solicitor and court costs.

To improve efficiency and deliver cost savings in this administrative process there is merit in the Attorney-General's Department exploring options with stakeholders for greater standardisation of instructions to superannuation trustees. Any reform should ensure that there is no impact on the ability of consenting parties to the dissolution of a marriage or the discretion of the relevant Family Court to deal with the superannuation assets in question.

It is the Commission's understanding that preliminary discussions between the Attorney-General's Department, the Law Council of Australia and IFSA have recently commenced.

DRAFT RECOMMENDATION 2.4

The Attorney-General's Department should explore options with stakeholders to standardise the instructions to superannuation trustees made on the dissolution of marriage.

Superannuation confirmation letters

IFSA claims that public offer superannuation funds must send out confirmation letters for regular contribution transactions whilst employer-sponsored funds are subject to an exception for similar types of transactions. According to IFSA this requirement is costly on public offer superannuation funds and also annoying to fund members:

> [The lack of an exception] … results in members receiving confirmation letters for regular contributions that they are expecting as a matter of course, and that are required to be confirmed by the employer in their pay advice. Colonial First State (CFS) regularly receive complaints from members about the money and resources [it] is wasting on this requirement. (IFSA sub. 18, p. 7)

IFSA recommends that superannuation fund members have the ability to request they receive no transaction confirmation letters — because there are alternative disclosure options that members can access to check on transaction activity:

> … members are able to access information on their accounts at any time by contacting the fund, receive confirmation of the contributions in their pay advices, and receive semi-annual statements that list all transactions on their account. We believe that this is sufficient disclosure for many, if not all, superannuation fund members. (IFSA sub. 18, p. 7)

Assessment

Section 1017F of the Corporations Act (the Act) and Division 5 of the Corporations Regulations 2001 require a confirmation letter to be sent by a superannuation fund for all transactions, except where the frequency and amount (or method of calculation) is agreed at the time of establishing the account or payment. Under this exception, employer-sponsored funds are exempt from sending confirmation letters for regular superannuation guarantee or other regular employer contributions. However, in a public offer fund, this exemption does not apply.

Given fund members receive information on regular contributions in their pay advices and also receive semi-annual statements that list all transactions on their account little information value would be lost if such confirmation letters were made optional. If superannuation fund members were required to make a specific request to receive transaction confirmation letters (i.e. opt in), this would reduce the level of duplication by superannuation funds and employers in notifying members about transactions on their account. To the extent that superannuation fund members do not opt in, it would also remove the level of differential treatment between employer-sponsored superannuation funds and public offer funds in relation to the sending of confirmation letters.

DRAFT RECOMMENDATION 2.5

The Australian Government should amend the Corporations Act 2001 and associated regulations so that superannuation fund members must make a specific request to receive transaction confirmation letters.

Form filling for tax deductions for personal superannuation contributions

To be eligible for a tax deduction for a personal superannuation contribution:

- a person must have written to their superannuation fund, in the approved form, and advised them of the amount intended to be claimed as a deduction
- the superannuation fund must have acknowledged the notice of intent and agreed to the amount intended to be claimed as a deduction.

These requirements are specified in section 290-170 of the *Income Tax Assessment Act 1997* (ITAA 1997).

IFSA are critical of the process by which members of superannuation funds must advise their funds in writing using an approved form — the 'Deductions for personal super contributions' form (NAT 71121):

> The requirement to only accept the notice on the approved form means that superannuation fund members make the [superannuation] contribution electronically, then must forward a paper form to the fund to advise of their intent to claim a tax deduction for the contribution. (IFSA sub. 18, p. 5)

Assessment

In response to IFSA's concern, the ATO indicated to the Commission that the approved form — to lodge a notice of intent with a superannuation provider to claim a deduction in respect of contributions — is capable of being lodged electronically (ATO, pers. comm., 7 May 2010). Where the current paper form is completed, including an actual signature and declaration, and then sent electronically — for instance, the completed form is scanned and then embedded in an email — this would meet the requirements of an approved form as outlined in section 388-50 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) and the instrument of approval (as the form approved is paper).

However, it must be said that this process does not appear to relieve the regulatory burden on trustees. The paper 'form' still has to be received, put in a workflow

queue and manually entered by an administrator. While this process may make it easier and quicker for individual members to send the form to trustees, it does not appear to make the administrative process for trustees receiving and inputting the information any better.

In addition, as the instrument of approval for the current form (dated July 2008) does not approve a virtual or electronic form, any form of electronic lodgement that does not use the actual paper form (such as online applications) would not be supported by section 388-50 of the TAA or the instrument of approval. However, in recent discussions with the Commission, the ATO signalled its intention to create instruments of approval for the 'approved form' to be given in a virtual form and also by telephone (ATO, pers. comm., 7 and 28 May 2010).

The ATO's proposed changes to superannuation tax deduction notifications should be developed in consultation with the superannuation industry so that they not only allow superannuation fund members to advise of their intention to claim a tax deduction electronically or by telephone, but at the same time improve the administrative processes of trustees receiving and inputting the information.

Illiquid superannuation investments

IFSA (sub. 18) are critical that the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations) do not provide superannuation trustees with a general ability to 'freeze' redemptions in circumstances where a superannuation fund becomes illiquid.

When an APRA regulated superannuation fund invests in an asset or asset class which is or becomes illiquid, and a member has requested a redemption, regulation 6.34 of the SIS regulations (the portability provisions) requires the transfer of the member's benefit within 30 days unless the member has consented to a longer period. Where the circumstances are such that a trustee is unable to comply with the obligations under regulation 6.34, APRA can suspend the trustee's redemption obligation following an application from the trustee for portability relief under regulation 6.37 of the SIS Regulations.

IFSA contend that as a consequence of the lack of an explicit power for trustees to freeze redemptions of their own accord, trustees are compelled to process redemptions even though this depletes other assets of the fund (including assets of other members) which is inconsistent with a trustee's overriding duty to protect the interests of all members as outlined by section 52(2)(c) of the SIS Act.

According to IFSA, if the limiting conditions discussed above do not eventuate, which it suggests is highly likely, the only recourse to defer redemptions, is to rely on section 155 of the SIS Act. This section states that the trustee must not redeem a person's interest if the price is not fair and reasonable (as between the person and the beneficiaries of the entity), or the trustee cannot work out the price at which the interest should be redeemed. IFSA suggests that while section 155 may apply in certain situations it will not have universal application.

IFSA says that as regulation 6.34 and section 155 together provide no certainty for trustees to freeze redemptions in circumstances where a superannuation fund becomes illiquid it recommends that SIS regulation 6.34 be reviewed and that it be aligned with section 601KA of the Corporations Act (the Act). This section provides a general ability for non-superannuation trustees to 'freeze' redemptions in circumstances where managed investment schemes become illiquid.

Assessment

During 2008 a number of managed investment schemes, mainly property and mortgage schemes, suspended or froze redemptions. This affected superannuation funds invested in those schemes, where previously liquid investments had become illiquid. During this time trustees were unable to meet the 30 day portability requirements or accommodate internal switching between investment options. The ability of trustees to pay member lump sum benefits and in some cases, pension benefits were also affected (APRA 2009a).

Since September 2008, APRA has assessed a number of trustee applications for relief from the portability requirements and it is the Commission's understanding that relief has been granted on a case-by-case basis to all those trustees who submitted applications. When considering portability requests, APRA is required to take into account whether the payment would have a significant adverse effect on the financial position of the fund or the interests of other members of the fund. In taking into account the effect of the interests of other members of the fund, APRA considers whether cashing of other liquid investments would unfairly concentrate the exposure of remaining members to the frozen assets (APRA 2009a).

APRA recently clarified its position to superannuation industry associations on portability relief in a letter entitled 'Superannuation and illiquid investments' (APRA 2009b). In this letter APRA makes clear that it sees an ongoing role for itself in considering applications for relief from regulation 6.34 in circumstances where underlying liquid investments become illiquid:

> Our experience has demonstrated that it remains appropriate that APRA continue to consider applications on a case-by-case basis.

Where a trustee:

- identifies investment options (e.g. where those options are invested in an underlying managed investment scheme that has suspended payments) where portability relief needs to be considered; or
- is applying to vary/extend relief already granted;

the trustee will need to lodge an application for APRA's consideration. (APRA 2009b, p. 1)

This suggests that in APRA's experience, trustees do not always make a proper assessment of the liquidity situation of the superannuation funds for which they are responsible. As a consequence APRA does not support industry representations for general relief to be granted. Such general relief would effectively allow trustees to 'self assess' when considering the freezing of redemptions.

In APRA's letter to industry organisations, it makes clear that the onus is on the trustee to effectively manage the liquidity of the superannuation fund; treat superannuation fund members in an appropriate manner; and maintain diversified investment options:

> APRA expects trustees to factor into their liquidity management practices matters such as the payment/processing of withdrawal applications (i.e. portability), investment switches and benefit payments to members/beneficiaries (including pensions, payments to the ATO for temporary residents and death payments). It is an important aspect of trustees acting in the best interests of members to be satisfied that members are being treated in an equitable manner when determining the priority of payment. This will obviously be more of a challenge where certain investment options are in a position where no redemptions can be made from underlying investments. (APRA 2009b, p. 2)

APRA also stipulates in the letter that trustees must approach APRA for relief from the portability requirements (under regulation 6.37) notwithstanding that in certain circumstances section 155 of the SIS Act allows trustees to freeze redemptions to achieve a fair and equitable outcome for beneficiaries. APRA emphasises that it does not believe section 155 applies in the case of frozen underlying investments (APRA 2009b).

There appears to be explicit intent by policy makers for different redemption arrangements to be in place for superannuation funds and managed investment schemes. Trustees of a regulated superannuation fund have only limited ability to defer redemptions under the SIS Regulations compared to responsible entities of non-superannuation investments under the Act. This is mainly because of the compulsory nature of superannuation compared to the voluntary nature of non-superannuation investments (Treasury, pers. comm., 10 May 2010).

The *Superannuation Guarantee (Administration) Act 1992* requires employers to make superannuation contributions on behalf of their employees (except in certain circumstances). These compulsory contributions are invested by trustees of superannuation funds on behalf of, and in the best interests of, their members. Unlike non-superannuation investments, superannuation members do not normally choose the specific underlying assets that their contributions are invested in. Instead, where they make a choice, members tend to choose a generalised investment option (developed by the trustee) that has a certain level of risk (and expected return).[4] Irrespective of any overarching investment choices made by members, trustees are required to manage funds to ensure they can meet obligations when they fall due, including portability requests and pension payments.

Portability is an important feature of the compulsory superannuation regime. Enabling members to move their funds facilitates inter-fund competition and creates pressure on trustees to perform well. There is also a very strong policy design element that suggests that portability is a right conferred upon people in part recognition of the fact that they are forced to make superannuation contributions. It is therefore problematic to suggest that the decision to effectively suspend portability (albeit temporarily) should be placed in the hands of superannuation funds whose conduct it is in part designed to influence.

At this point, it is also important to note that submissions have not suggested that APRA has been tardy or overly intrusive in considering applications for relief by trustees. This suggests the regulatory burden has not been substantial for those trustees making portability relief applications. Further, submissions have not identified the proportion of these illiquid funds relative to the total funds under management by superannuation trustees. It is therefore difficult for the Commission to assess the extent or significance of any burden these arrangements place on trustees.

In the Commission's view, particularly in the absence of the identification of a significant regulatory burden by industry, if trustees want to suspend portability then it is appropriate that they should have that decision effectively approved by APRA. At this stage, unless further evidence is forthcoming, it appears neither necessary or appropriate to align the SIS Act with the Corporations Act with regards to illiquid investments.

4 With the more aggressive investment options tending to be more heavily invested in higher risk assets like Australian and international shares and the more conservative investment options allocating a greater proportion of funds to cash and fixed interest investments.

Other concerns raised where further information is sought

At this stage, the Commission has not been provided with sufficient information to make an assessment of the issues and the extent of any regulatory burden on business for the following concerns:

- definition of 'superannuation interest' for the purposes of tax, disclosure, Family Law and prudential regulation
- tax and prudential law inconsistency
- regulation of defined benefit superannuation funds.

Further submissions on these concerns from interested parties are encouraged prior to the release of the Commission's final report in August.

Definition of 'superannuation interest' for the purposes of tax, disclosure, Family Law and prudential regulation

According to ASFA, there is regulatory inconsistency with regard to what constitutes a 'superannuation interest' for the purposes of tax, disclosure, Family Law and for prudential purposes. ASFA states:

> This can have implications for systems design and member disclosure and may give different outcomes depending upon fund structures. It also potentially leads to confusion and inefficiencies resulting from different providers (and members having inconsistent views of the requirements. (sub. 20, p. 4)

Tax and prudential law inconsistency

ASFA (sub. 20) raises issues regarding tax and prudential law inconsistency, in particular:

- in relation to income streams and the distinction between capital and income for tax purposes
- the nature of what constitutes an income stream for statutory/prudential purposes in the superannuation context.

Regulation of defined benefit superannuation funds

ASFA raises a number of issues relating to the taxation treatment of defined benefit superannuation funds, including:

- elements of tax legislation relating to notional contributions
- calculation of members' crystallised tax free components as at 30 June 2007

- tax legislation relating to the caps on concessional contributions given that notional contributions have to be allocated to individual members
- potential inability for a sponsoring employer to make contributions to a defined benefit plan that comprises only lifetime pensioners, and the potential inability of an employer to obtain a tax deduction for contributions made in these circumstances. (sub. 20, p. 5)

2.6 Streamlining of processes

Industry organisations raise concerns in submissions about a number of reporting requirements which they see as unnecessarily duplicative. For finance regulation in a variety of areas, industry suggests that duplication of processes creates excessive cost burdens in complying with regulation.

Unclaimed monies

IFSA (sub. 18) is critical of the different processes for dealing with unclaimed monies depending on whether the monies are a superannuation or non-superannuation investment. The unclaimed monies process is different for each investment type, and there is a third process when dealing with terminated funds (i.e. winding up of a registered scheme).

According to IFSA this places an unnecessary burden on wealth management businesses when dealing with unclaimed monies:

> This inconsistency of treatment and regulation leads to confusion and inefficiencies in the processes managing unclaimed monies in the wealth management sector. (IFSA sub. 18, p. 5)

Assessment

Most of the large wealth management institutions now manage both superannuation and non-superannuation investments. However, processes associated with unclaimed monies are fragmented both within and between these different investment types.

For example, responsibility for unclaimed superannuation depends on the type of fund the superannuation is held with and when it became unclaimed superannuation money. The ATO's management of unclaimed monies in superannuation is outlined in the *Superannuation (Unclaimed Money and Lost Members) Act 1999*. The ATO's role in relation to unclaimed superannuation changed in 2007. Up to that time it

collected unclaimed superannuation in relation to Commonwealth Government funds, and all other unclaimed superannuation went to relevant state revenue authorities. Since then, however, the ATO has received unclaimed superannuation from all funds except state and territory government funds. Superannuation that became unclaimed prior to 2007 remains with relevant state revenue authorities.

In summary, if unclaimed superannuation is held in:

- an Australian Government superannuation fund — the ATO is the administrator
- a state or territory government superannuation fund — the relevant state or territory authority is the administrator
- a private sector superannuation fund and became unclaimed superannuation money before 1 July 2007 — the relevant state or territory authority is the administrator (according to the ATO, there are Constitutional and state law barriers to moving this money from the states to the ATO)
- a private sector superannuation fund and became unclaimed superannuation money on or after 1 July 2007 — the ATO is the administrator.

Also, since 2007, superannuation of a former temporary Australian resident whose visa has expired and has left Australia more than six months prior is also unclaimed superannuation money held by the ATO.

In addition, from 1 July 2010, superannuation funds will also be required to pay the following accounts to the ATO as unclaimed superannuation money:

- lost accounts with balances less than $200 (small lost member accounts)
- lost accounts which have been inactive for a period of five years and have insufficient records to ever identify the owner of the account (insoluble lost member accounts).

Unclaimed monies for non-superannuation investments are dealt with under various state legislation (e.g. NSW *Unclaimed Money Act 1995*) and regulated by state government agencies in each jurisdiction. When winding up a registered scheme, section 601NG of the Corporations Act requires any unclaimed money to be paid to ASIC.

To remove inconsistency, lessen confusion and reduce inefficiency in the administration of unclaimed monies in the wealth management sector — and reduce whole of government administration costs — the Treasury and state and territory revenue authorities should jointly streamline administrative processes dealing with unclaimed monies.

DRAFT RECOMMENDATION 2.6

The Treasury and state and territory revenue authorities should streamline administrative processes dealing with unclaimed monies.

Licensing of superannuation trustees

ASFA (sub. 20) considers that trustees who hold a Registrable Superannuation Entity (RSE) licence should not be required to obtain an Australian Financial Services (AFS) licence in order to be able to provide members with general advice.

Assessment

All trustees operating an APRA-regulated superannuation entity are required to hold an RSE licence issued by APRA. The RSE licensing requirements are prudentially focused and concentrate on the probity and competence of superannuation trustees as measured by the fitness and propriety of their 'responsible persons' (ASIC 2010c). They focus on the operations, systems and resources that trustees have in place to prevent or minimise losses to those who hold interests in the superannuation fund.

While an RSE licence is tailored to the operation of superannuation funds, an AFS licence covers a much wider range of financial services. An AFS licence is issued by ASIC and is required by people who are:

- providing financial product advice
- dealing in a financial product
- making a market for a financial product
- operating a registered scheme
- providing a custodial or depository service (ASIC 2010d).

ASIC's licensing requirements mainly focus on consumer protection and market integrity. ASIC considers the applicants competence to provide financial services as well as whether an applicant will provide financial services in an efficient, honest and fair manner.

The two licences do not regulate the same activity. While some businesses will provide services that require both licences, this is not necessarily the case.

The legislation and the licensing bodies both aim to minimise potential overlap. The Corporations Act exempts AFS licensees from certain prudential and risk management requirements if the licensee is regulated by APRA (section 912A). Similarly, ASIC does not require bankruptcy checks, criminal history checks or business references if a person holds, or has applied for, an RSE licence for any of the responsible managers. ASIC will also accept that a responsible manager who meets APRA's standards has adequate qualifications and training for those financial services that APRA regulates. The process of applying for the two licences can be conducted at the same time (ASIC 2010c).

In response to a report of the Parliamentary Joint Committee on Corporations and Financial Services (PJC 2009) the Government has announced a number of changes to the regulation of financial advice (Bowen 2010c). The proposed changes include expanding the scope of simple 'intra-fund' advice provided within a superannuation context to other areas of advice such as transition to retirement, intra-pension advice, nomination of beneficiaries, superannuation and Centrelink payments, and retirement planning generally. There will also be a review to establish if other measures are needed to clarify whether simple advice can be provided in a compliant manner outside of intra-fund advice. This is intended to enhance the trustees' ability to give low cost, simple, compliant advice within a member's superannuation fund. These proposals may affect the number of trustees who need to obtain a separate AFS licence.

Industry's concerns about the licensing arrangements appear to be addressed by the existing provisions to streamline the licensing processes. In light of the proposed change to some aspects of the licensing regime, and the in the absence of any detailed information about the extent to which the overlap between the two licensing regimes imposes an unnecessary regulatory burden on business, the Commission is reluctant to recommend any changes to the existing arrangements.

Reporting of identity fraud

ASFA (sub. 20) cites the multiple reporting of attempted or real identity fraud cases as an example of the inefficiencies that result from multiple regulators. ASFA says that the information on these cases needs to be lodged with AUSTRAC, ASIC, ATO and APRA; all of whom require the information in their own form.

Assessment

The Commission understands that the number of identity fraud reports is low. AUSTRAC (sub. 26) has advised that in 2008-09 it received a total of 32 449

suspicious matter reports (SMRs) of which 297 involved false names or identity documents, although some other reports could also have involved identity fraud. Reporting of SMRs by superannuation funds has only come into full force in March 2010 and AUSTRAC has received 232 SMRs from superannuation funds to 30 April 2010.

AUSTRAC advises that it already disseminates SMRs for investigation to relevant law enforcement agencies designated in section 5 of the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* and has said that it 'would be prepared to consult further with ASIC, the ATO and APRA to see if there is scope for harmonising reporting' (sub. 26, p. 13). The Commission also understands that APRA may be prepared to support a single form initiative.

The extent of the unnecessary burden imposed by this issue is not clear. Nevertheless any unnecessary regulatory burdens should be removed. AUSTRAC, ASIC, ATO and APRA should consult on developing a single form and reporting system. The Commission welcomes further information on this issue from other industry stakeholders and regulators.

Reporting of breaches

ASFA (sub. 20) states that although there has been some alignment in reporting of breaches of licensing requirements between APRA and ASIC, they each require separate lodgements and that in some cases the auditors will also have to lodge a notice.

Assessment

The issue of the reporting of breaches was raised with the Taskforce on Reducing Regulatory Burdens on Business (Regulation Taskforce 2006). In its Report it identified the different reporting requirements and timeframes for ASIC and APRA as an issue that should be addressed and recommended that the Australian Government amend the breach reporting requirements to improve consistency and reduce the compliance burden.

In response the Government consulted with industry through a paper released in 2006 (Treasury 2006) and then amended a number of acts to streamline and simplify the prudential regulation requirements. The *Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007* included amendments to the Corporations Act to align the reporting requirements and to provide that:

- a report is taken to have been lodged with ASIC if the licensee is registered with APRA and the report is received by APRA in accordance with an agreement between APRA and ASIC under which APRA is to act as ASIC's agent in relation to such reports (s. 912D(1C))
- the requirement on the licensee to report a breach to APRA does not apply if the auditor or actuary of the licensee gives APRA a written report about the breach within the specified timeframe (s. 912D(1D)).

APRA has instituted a revised process:

> A new version of APRA's online breach reporting system covering all industries was released on 11 March 2008. The system is fully integrated and automatically notifies APRA supervisors by email when a breach notification is received; there is a separate database for reporting and data analysis purposes. The online system also allows APRA-regulated institutions to submit dual reports to APRA and ASIC simultaneously (APRA 2009a, p. 8).

The Commission understands that the number of breaches reported to APRA is relatively low. It appears that the regulatory arrangements which are now in place are sufficient to address the concerns raised.

Funeral funds

Abacus (sub. 22) states that friendly societies are seeking amendments to the NSW *Funeral Funds Act 1979* (FFA) to remove regulatory duplication for those friendly societies operating in NSW that offer funeral insurance and funeral bonds. Friendly societies are already regulated by ASIC under the Corporations Act and are subject to prudential regulation by APRA through the *Life Insurance Act 1995* (Life Act). They are also regulated by the NSW Office of Fair Trading whose reporting and regulatory requirements sometimes overlap or conflict with those of the Commonwealth regulators.

Abacus (sub. 22) notes that there have already been meeting and correspondence on this issue, but it is concerned at the lack of progress.

Assessment

In NSW funeral funds are regulated under the *Funeral Funds Act 1979*. That Act requires the separation of the operation of funeral funds from funeral directing services, and creates a licensing regime requiring the registration of funeral funds. The Act provides for prudential regulation through a range of measures including:

- stipulating how funds can be invested

- requiring annual returns and auditor's reports
- requiring a register of information to be kept
- requiring an actuarial investigation to be undertaken for contribution funds (NSW Department of Fair Trading 2002).

A review of the NSW legislation in 2002 identified an overlap between the prudential regulation by APRA of funeral funds operated by friendly societies, and their regulation under NSW legislation. It noted that only one registered funeral fund was not subject to the legislation governing friendly societies and that the provisions of the Commonwealth *Life Insurance Act 1995* provide a higher standard of prudential supervision than the NSW *Funeral Funds Act 1979*. Submissions to that review highlighted that this 'lead to duplication of reporting at a cost to industry and without an increase in consumer protection'. The report suggested that the duplication be removed by exempting funeral funds that are already subject to alternate prudential regulatory systems from the corresponding provisions within the Funeral Funds Act 1979. It recommended further consultation on this issue. It also recommended removing the exemption of some organisations so that all funeral funds would be covered by the consumer protection provisions (NSW Department of Fair Trading 2002).

The NSW Parliament passed the *Funeral Funds Amendment Act 2003* to implement the findings of the review. It removed the existing exemption from registration for friendly societies and allowed the Director-General to exempt them from the requirements of the Act (s. 16C(5) and s. 39B(5)). It also allows the Director-General of the NSW Department of Commerce to waive the requirements for an actuarial investigation (s. 28(2) and s. 49A(2)) if it would be unduly onerous or otherwise unwarranted to require the investigation.

The amended FFA raises two types of issues for friendly societies offering products covered by the Act. The mutual structure of friendly societies does not fit the requirements of the FFA:

- as mutual organisations the policy holders in friendly societies are members of the friendly society. However, section 13(1)(c) of the FFA prohibits the registration of a company to operate a funeral contribution fund if the contributors are members of the company
- sections 13(1)(a) of the FFA prohibits a company which carries on a pre-paid funeral business from registering to carry on a contributory funeral benefit business
- the FFA requires a pre-paid funeral fund to maintain trust accounts and requires the registration of trustees of trust funds under prepaid contracts. However,

friendly societies do not and cannot act as trustees of their benefit funds (NobleOak, pers. comm., 31 May 2010).

A second set of issues relate to overlaps between the FFA and the Life Act which would impose a regulatory burden on the operation of contribution funds and pre-paid funds by friendly societies:

- both the FFA and the regulations under the Life Act require a regulator's approval to amend the rules of a fund. Friendly societies operating funeral contribution funds must seek approval from both APRA and the NSW Director-General for rule changes
- the two acts have different requirements for the investment of funds held by funeral contribution funds and pre-paid funeral funds
- the two acts have different restrictions on borrowing by funeral contribution funds
- prepaid funeral funds are required to pay a bond as a condition of registration, but the maintenance of that bond may detract from a friendly societies ability to satisfy actuarial standards under the Life Act
- there are duplicate requirements for actuarial investigations, although the NSW Director-General has given the friendly societies an exemption from the requirements under the FFA (NobleOak, pers. comm., 31 May 2010).

As most friendly society products are sold nationally, often via the internet, this issue affects all seventeen friendly societies. The Commission understands that there is ongoing contact between the industry and the NSW Office of Fair Trading. Given that the issue appears to be confined to one state the appropriate approach would be for this matter to be addressed through continued discussions between the industry and the NSW Government.

Prescriptive training requirements for simple financial services products

Abacus are critical of prescriptive training requirements for a number of simple financial services products despite recent changes:

> ASIC's prescriptive AFSL [Australian Financial Services Licence] training policy, Regulatory Guide 146, has already been amended at least twice to take a more realistic approach to basic deposit products. ASIC should go further and remove the prescription for all simple products — deposits (including FHSA [First Home Saver Account] deposit accounts), non-cash payment products, general insurance, and consumer credit insurance. (Abacus sub. 22, p. 4)

Abacus suggests that the approach to training for the simple financial services products listed above (known as Tier 2 products) should allow AFS licensees to self-assess courses for advisers on *all* Tier 2 products. This approach would then be consistent with the approach taken by ASIC in 'Regulatory Guide 206 Credit licensing: Competence and training', which states:

> Generally, we think that you should determine for yourself what is appropriate initial and ongoing training for your representatives, and embed this in your recruitment and training systems. The diversity of roles in the credit industry requires a flexible approach to representative training. Therefore, we have not set specific educational prerequisites or ongoing training requirements for credit representatives. We expect you to ensure that your representatives are suitably qualified to perform the role that they are employed to perform. (ASIC 2009d, p. 19)

Assessment

In 2006, the Regulation Taskforce identified staff training requirements as one of the key areas requiring further reform in financial services regulation, in particular it suggested:

- amending the training required for staff involved in the sale of different financial services products to improve consistency and achieve closer alignment between the inherent risks of a product and training obligations. (Regulation Taskforce 2006, p. 101)

And recommended:

> The Australian Government should establish a further process to enable additional refinements to be made to the operation of the financial services reforms regime in outstanding areas of concern. (Regulation Taskforce 2006, p. 102)

Since the Regulation Taskforce Report was released in January 2006, some refinements have been made to the training requirements for simple financial services products by ASIC. On 22 November 2007, ASIC released an updated version of 'Regulatory Guide 146 Licensing: Training of financial product advisers' (RG 146). This Guide sets out the minimum training standards for financial product advisers and explains how advisers can meet these training standards.

The revisions to RG 146 followed a review ASIC carried out to deal with issues raised by industry stakeholders that were reflected in the earlier 'Corporate and Financial Services Regulation Review — Proposal Paper' released by the Parliamentary Secretary to the Treasurer in November 2006.

As part of its 2007 review, ASIC held discussions with industry organisations and released a consultation paper. According to ASIC, the main issues raised by respondents were:

- the appropriateness of the current training standards
- recognition of prior study and training
- the quality of courses on the [ASIC Training] Register. (ASIC 2007a, p. 4)

Following its review, ASIC decided to:

- amend RG 146 to facilitate more tailored and flexible training requirements for some products that are relatively straightforward and do not involve an investment component (Tier 2 products)
- maintain the current requirements that advisers be trained across the range of products within existing specialist knowledge categories
- maintain the existing policy on the recognition of prior study and training
- amend RG 146 to clarify ASIC's capacity to deal with non-compliant courses
- improve the currency of the information on the ASIC Training Register by requiring course providers to periodically re-register courses
- clarify some aspects of ASIC's policy and re-write it in the new regulatory guide format. (ASIC 2007b, p. 1)

Rather than allow AFS licensees to self-assess courses for advisers on Tier 2 products, ASIC decided to remove the generic knowledge requirement for all Tier 2 products, suggesting this alternative would reduce the training compliance burden without significantly increasing the risk of inappropriate advice. ASIC made the following comments on the self-assessment of courses for advisers on Tier 2 products:

> We do not think that allowing licensees to self-assess their own courses for all Tier 2 products strikes the appropriate balance between making training more flexible and ensuring that advisers are adequately trained. We believe that training that is subject to some quality assessment (by authorised assessors and the state/territory recognition authorities) is still appropriate for advisers on general insurance and consumer credit insurance products because these products are not as simple and well-understood as basic deposit products and related non-cash payment products, and the consequences for consumers of choosing an inappropriate product are far greater. (ASIC 2007a, p. 8)

On 26 April 2010, the Minister for Financial Services, Superannuation and Corporate Law announced the Future of Financial Advice reforms, which among other things establishes an expert advisory panel to review professional standards in the financial advice industry, including conduct and competency standards (Bowen 2010c). These reforms are the Government's response to the Parliamentary Joint Committee on Corporations and Financial Services 'Inquiry into financial products and services in Australia' (Ripoll Review).

Given ongoing industry concerns with the appropriateness of current training standards, the expert advisory panel's terms of reference should include explicit

consideration of the training requirements applicable to simple financial services products outlined in RG 146. It will be important to ensure that:

- there are no unnecessarily stringent training obligations on these products
- the amount and type of staff training obligations are consistent with the complexity and inherent risks of these products.

Joint forum of regulators

ASFA (sub. 20) states that its members are regulated by a number of bodies and there:

- is duplication of activities
- are risks that issues may fall between the gaps in regulatory responsibility
- is dialogue and referrals between regulators that may not always be consistent.

ASFA suggests there is a need for a joint forum involving the four key regulators AUSTRAC, ASIC, ATO and APRA. It also says there is a need for greater transparency to industry on the existing joint forum which has been established between APRA and ASIC.

The Commission understands that there is already an informal joint forum involving representatives from Treasury, APRA, ASIC, ATO, AUSTRAC and the Department of Families, Housing, Community Services, and Indigenous Affairs (FaHCSIA) which meets on a quarterly basis. The forum looks at emerging issues that may be relevant to one or more of the agencies attending, shares information on regulatory and supervisory initiatives, and identifies regulatory gaps and areas where the regulators can work together.

Consistent approach to proof of identification requirements

ASFA (sub. 20) suggests that with both the Anti-Money Laundering and the Superannuation Industry Supervision legislation ‘having their own differing proof of identification requirements, it would make sense to align these and have only one set of rules’ (ASFA sub. 20, p. 4). This issue and others related to money laundering and terrorism financing are discussed in chapter six.

2.7 Other general finance issues raised

Product rationalisation of managed investment schemes and life insurance products

Innovation in financial products, together with technological and regulatory developments, has led to a significant number of 'legacy products' — financial products that are closed to new investors and supported by outdated administrative infrastructure.

According to Treasury, IFSA has estimated that the total amount of funds under management in legacy products may amount to $221 billion, or approximately 25 per cent of all funds under management (Treasury 2009a).

IFSA indicates that the continuation of legacy products is a burden to both industry and consumers due to the outdated nature of the products and the systems that support them. This burden grows with each regulatory change that is made to the sector (sub. 18).

Assessment

There are significant costs to the funds management industry in having to maintain these products and meet regulatory requirements. Current processes to rationalise legacy products are usually lengthy and costly. For example, resolving legacy issues through compensation or system changes have proved to be expensive and time consuming for product providers (Treasury 2007). In addition, it has often been difficult to achieve adequate engagement with investors to get their approval (Regulation Taskforce 2006).

The Regulation Taskforce (2006) recommended that:

> The Australian Government, state and territory governments, APRA and ASIC, should, in consultation with industry stakeholders, develop a mechanism for rationalising legacy financial products. This mechanism should balance achieving greater operational efficiency with ensuring that consumers of the products are not disadvantaged. (Regulation Taskforce 2006, p. 103)

The Australian Government response of 15 August 2006 indicated that it agreed with this recommendation (Australian Government 2006).

In June 2007, Treasury released a Product Rationalisation Issues Paper for public consultation (Treasury 2007). Approximately 20 submissions were received in response to the Issues Paper. According to Treasury there was a considerable level

of disagreement between stakeholders on a number of key issues (Treasury 2009a). It was therefore deemed necessary for further consultation to take place before the Government could develop a product rationalisation framework.

In February 2008, the Australian Government agreed to the formation of a panel of experts to advise on the development of a product rationalisation framework. ASIC, APRA and the ATO attended panel meetings as observers.

In addition, superannuation legacy products are currently being considered by the Cooper Review. On 14 December 2009, the Review Panel published an Issues Paper dealing with the structural problems of the superannuation system. The Paper made the following references to legacy products:

> Legacy products' are drivers of increased cost and operational risk throughout the financial services industries. *To what extent are they a problem in superannuation? What measures can be taken to facilitate elimination of legacy products (and movements of legacy members) without material disadvantage, in circumstances where a successor fund transfer might not be available?* (Australian Government 2009b, p. 18)

In December 2009, Treasury released a Proposals Paper for public consultation that focused on developing a product rationalisation framework for managed investment schemes and life insurance polices. The Paper suggested that rationalisation issues for superannuation and friendly society funds could be considered at a later stage because the existing transfer provisions are working reasonably smoothly and they do not urgently require a new rationalisation process (Treasury 2009a).

There are many complex issues to resolve in developing an effective product rationalisation mechanism, including whether taxation relief may be required to facilitate product rationalisation transfers for life insurance policies and managed investment schemes. In addition, the overarching consultation process also requires extensive collaboration between a number of government agencies (i.e. Treasury, ASIC, APRA and the ATO).

However, even with these complications, more progress should have been made. Attempts to develop a mechanism for rationalising legacy financial products have been underway since late 2006 with very little to show for these efforts. As a consequence, the administrative burden associated with maintaining legacy products continues unabated.

Industry estimates of annual cost savings from the introduction of a product rationalisation mechanism for managed investments, superannuation and life insurance legacy products are between $120 million (conservative estimate) and

$350 million (optimistic estimate). The savings included in the estimates relate to internal cost items such as the following:

- reduced compliance, risk management, complaint resolution and legal costs relating to legacy products
- reduced IT system maintenance costs due to elimination of legacy systems
- reduced incidence of unit pricing errors
- reduced staff training costs (Treasury 2007, p. 10).

Greater efforts should therefore be made by the Treasury to expedite the implementation of this agreed reform.

DRAFT RECOMMENDATION 2.7

The Treasury should resolve any outstanding issues associated with legacy products and then implement the product rationalisation mechanism for managed investment schemes and life insurance policies as soon as possible.

Administration of powers of attorney

IFSA is critical of the inconsistency in various state Acts administering powers of attorney, certification and witnessing. According to IFSA, 'There is no consistency in the format of a Power of Attorney document, whether the Attorney is entitled to benefits from the estate and who can witness the disclosures' (IFSA sub. 18, p. 6). As a consequence, different state Acts and regulations have to be checked to ensure compliance.

Assessment

According to the Standing Committee of Attorneys-General (SCAG) there is an existing intergovernmental process dealing with this issue.

In November 2008, SCAG agreed to undertake a project to improve the effectiveness of mutual recognition of powers of attorney between jurisdictions, as recommended by the House of Representatives Standing Committee on Legal and Constitutional Affairs in their reports on Harmonisation of Legal Systems Within Australia and between Australia and New Zealand, and Older People and the Law (SCAG 2008).

According to the SCAG Secretariat, while this project is currently being progressed, there is no publicly available implementation timetable. It therefore remains unclear to interested parties when greater consistency is likely to be achieved.

DRAFT RECOMMENDATION 2.8

An implementation timetable for the project to improve the effectiveness of mutual recognition of powers of attorney between jurisdictions should be made publicly available by the Standing Committee of Attorneys-General as soon as possible.

Bank – what's in a name?

Abacus considers that the current restrictions on the use of the term 'bank' are placing credit unions and mutual building societies at a competitive disadvantage. Similarly, it considers that the term 'Approved Deposit-taking Institution' (ADI) is not well understood in the community. Abacus recommends that APRA should remove the current impediment to non-bank ADIs having the option of marketing themselves as 'banks' and suggests that the term 'Authorised Deposit-taking Institution' should be replaced with the term 'Authorised Banking Institution'. This would enable Abacus members to exercise the choice of calling themselves 'mutual banks' (Abacus sub. 22).

In an earlier submission to the Senate Standing Committee on Economics, Abacus stated that 'the global financial crises highlighted widespread community ignorance about the prudential regulatory framework and ADIs' (Abacus 2009, p. 3). Abacus asserted that even experienced financial journalists don't understand the prudential status of ADIs and argued that this advantaged the major banks. It sought support for funding of a public education campaign to encourage retail banking consumers to shop around with confidence in the ADI sector.

Assessment

Section 66 of the *Banking Act 1959* (Banking Act) restricts the use of the words 'bank', 'banker' and 'banking', and the expressions 'building society', 'credit union', 'credit society', 'authorised deposit-taking institution' and 'ADI'. The restriction extends to 'any other word or expression (whether or not in English) that is of like import' to those words or expressions. Other terms such as 'specialist credit card institution' have been made restricted expressions through determinations made under the Banking Act (Banking (Restricted Word or Expression) Determination No. 1 of 2006). It is an offence for a person to use these terms unless the Act allows them to do so, or APRA has given its consent for them to do so.

The Banking Act allows all ADIs to assume or use the word 'banking' in referring to the fact that it has been granted an authority under the Act. APRA has given a class consent for:

- building societies to use the expression 'building society'
- credit unions to use the expressions 'credit union', 'credit society' and 'credit co-operative'
- building societies and credit unions to use the expression 'banking' in relation to their banking activities. (APRA 2000)

APRA has given a number of Australian ADIs an unrestricted consent to use the words 'bank', 'banker' or 'banking'. Although currently APRA restricts the use of the terms 'bank' and 'banking' to ADIs that have at least $50 million in Tier 1 capital (APRA 2006a). Foreign banks with a representative office in Australia are allowed to use the word 'bank' and foreign banks which are raising funds in the Australian wholesale capital market are allowed to use the words 'bank', 'banker' or 'banking'. Similarly registered money market corporations are allowed to use the expressions 'merchant bank', 'merchant banker' or 'merchant banking' in relation to their businesses.

The use of these terms is restricted to protect potential customers from being misled about the institutions they are dealing with.

> The purpose of the restriction on the assumption or use of the restricted words by non-ADIs is to ensure potential customers are not mislead into believing that such institutions have the same level of capital adequacy, depositor-priority and other prudential requirements that apply to ADIs. (APRA 2006a, p. 46)

Businesses may apply to APRA for consent to use these words. APRA has a broad discretion to give consent, or conditional consent, under the Banking Act. APRA has indicated that 'consent would only be granted if APRA is reasonably satisfied that to grant consent would not defeat the purpose of the restriction, namely, the protection of the public' (APRA 2006a).

The policy objective of protecting the public against the misleading use of these terms has not been questioned. However, the reasons for the way in which this policy is currently applied to building societies and credit unions are less clear. In practice there seems to be little to distinguish certain banks from certain building societies and credit unions.

All of the approved deposit-taking institutions are governed by the same prudential framework. This includes banks, building societies and credit unions. Nor do there appear to be any restrictions on the activities that banks, building societies and

credit unions are allowed to engage in which would distinguish the three types of ADI from each other.

Historically credit unions and building societies have been distinguished from banks by having a mutual structure. But several building societies have adopted a corporate structure. The Rock Building Society Ltd has a corporate structure and was listed on the Australian Stock Exchange (ASX) in 1992. Wide Bay Australia listed on the ASX in 1994. The Mackay Permanent Building Society was also listed on the ASX before being taken over by Wide Bay in 2008.

Historically banks in Australia have usually been larger businesses than building societies or credit unions and might, therefore, be thought to offer a greater level of security and a wider range of services. But that is not always the case. The largest building societies and credit unions (such as Credit Union Australia, Heritage Building Society, Newcastle Permanent Building Society and IMB) are larger than, or of similar size to, the smallest Australian owned banks (Members Equity Bank and AMP Bank). The largest mutuals are also significantly larger than a number of the foreign subsidiary banks operating in Australia. Abacus (sub. 22) states that there are 27 mutual ADIs that have the level of Tier 1 capital which APRA currently requires before allowing an ADI to use the term 'bank'. Although Abacus noted that, as far as it is aware, to date none of them have opted to call themselves a 'bank'.

It would seem, *prima facie*, that there is little beyond the name 'bank' to distinguish some credit unions and building societies from banks. It would be useful to remove any unnecessary restrictions which limit the ability of building societies and credit unions to compete with banks on a level playing field. The current restrictions on the use of terms such as 'bank' by other ADIs could be reconsidered.

However, as outlined above, there is an existing process under which building societies and credit unions can seek consent from APRA to use the terms protected under the Banking Act. The Commission understands that these processes have not been fully explored by building societies and credit unions. It is therefore reluctant to recommend any change to the existing arrangements in the absence of evidence that those arrangements are unnecessarily burdensome in their operation, or that the outcomes are inconsistent with the policy objectives of protecting the consumers of financial services and facilitating a competitive industry.

2.8 Issues that are out of scope

Superannuation issues being addressed by Cooper Review

A number of issues raised in submissions are currently being considered by the Cooper Review. The Review is examining the governance, efficiency, structure and operation of Australia's superannuation system. The Cooper Review has implications for the scope of this year's Annual Review of Regulatory Burdens on Business because it is 'to be conducted with reference to improving the regulation of the superannuation system, whilst also reducing business costs within the system' (Australian Government 2009a, p. 10).

Given that the following issues are being addressed in detail by the Cooper Review, the Commission will not be developing responses to the concerns raised in submissions by interested parties. The Cooper Review Panel's Final Report will be delivered to the Australian Government by 30 June 2010.

Sole purpose test

The sole purpose test is the central rule applying to all regulated superannuation funds. Under the test, funds must be maintained for the sole or core purpose of providing retirement benefits to members or death benefits to their dependants or deceased estate in the event of death — and a limited range of ancillary purposes, including the provision of death and disability insurance.

ASFA says that the sole purpose test is inhibiting the operation and efficiency of the superannuation system and suggests that there should be a less restrictive approach. ASFA suggests that trustees should be able to provide financial advice to members that extends beyond superannuation advice, with payment from members' accounts for not only the superannuation advice, which occurs now, but also for the general financial advice (ASFA sub. 20).

ASFA believes that APRA's manner of dealing with this issue of payment for financial advice — by limiting the amount paid from a member's superannuation account to payment for superannuation advice — 'is an artificial contrivance and the practice should be an ancillary purpose under section 62 [of the *Superannuation Industry (Supervision) Act 1993* or SIS Act]'(ASFA sub. 20, p. 3).

The sole purpose test is currently subject to consideration by the Cooper Review. On the 16 October 2009, the Review Panel published an Issues Paper dealing with

the operation and efficiency of the superannuation system which made the following references to the sole purpose test:

> *Are super funds engaged in activities that cost members (but which are not closely connected to increasing the long-term investment returns of members) and consequently, should not be undertaken? Alternatively, should a more open approach apply to the sole purpose test so that funds could provide a range of other products to members (e.g. home loans, other types of insurance, health insurance)?*
>
> *Is the sole purpose test in section 62 of the SIS Act: too restrictive in the context of a large fund with many thousands of members; inhibiting efficiency in the superannuation industry as fund assets cannot be used to pay for financial advice that is not strictly related to super; or about right?* (Australian Government 2009c, p. 35)

Superannuation fund investment strategy and member investment choice

Under section 52(2)(f) of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) trustees have a duty to implement an investment strategy that gives consideration to:

- the need to balance risk and return in the best interests of members
- expected cash flow requirements
- appropriate diversification
- the liquidity of the underlying investments.

ASFA says that the covenant (i.e. an obligation of the trustee) related to investment strategy has not kept pace with member investment choice:

> APRA's position on this covenant is that trustees must still meet this requirement when members exercise investment choice. ASFA considers this to be unworkable as the concept of choice by its very nature requires a shift of responsibility for the investment decision from the trustee to the member. (ASFA sub. 20, p. 3)

ASFA states that while trustees should remain responsible for the options offered and how they are delivered and communicated to members, they should not remain liable for the properly informed decisions of members who take up choice. ASFA says the covenant on investment strategy should be limited to the default option offered to members by the trustee. Where members choose to invest outside the default option it should be up to the member to take personal responsibility for their choice.

At the time the SIS Act was introduced member investment choice was rare, but it is now seen as common practice, with many trustees offering a range of options, with no, or limited, restrictions on the member's asset selection. Nevertheless, APRA's interpretation of the SIS Act suggests that trustees must continue to

observe the requirements in relation to setting the investment strategies offered to members, irrespective of member investment choice. APRA's guidance on member investment choice is outlined in Superannuation Circular No. II.D.1 – Managing Investments and Investment Choice (APRA 2006b).

The Cooper Review received a number of submissions which identified that some trustees were unsure of the extent of their duty to those members who had exercised an investment choice within their fund. The Review Panel's Preliminary Report acknowledged that there is a lack of clarity in the current legislation:

> … the Panel supports amending the SIS Act so that it sets out clearly the trustees duties that arise with respect to 'universal' members and 'choice' members recognising that these might differ in important respects. (Australian Government 2009d, p. 12)

Licensing of superannuation administrators

ASFA calls for the licensing of superannuation administrators (ASFA sub. 20).

While not a regulatory burden issue, the licensing of super administrators is currently subject to consideration by the Cooper Review. A Review Panel issues paper made the following references to administrators:

> *Are super fund administrators systemically significant institutions? Should there be minimum capital requirements and compulsory APRA licensing for super administrators, with accompanying operating standards? Alternatively, should APRA be empowered to engage directly with administrators, rather than through the relevant trustee as is currently the case?*
>
> The SIS Act does not regulate administrators, though disclosure obligations (including whistle blowing), disqualification powers and enforcement provisions are applied to investment managers and custodians as well as trustees. *Is this appropriate? Should the SIS Act be extended to administrators in this regard?* (Australian Government 2009c, p. 17)

Regulation of administrators was also canvassed by the Cooper Review in the 'Superstream' paper issued on 22 March 2010:

> The Panel has no doubt about the significance of the administration function, and will settle a view over the balance of the Review as to whether this warrants its [i.e. APRA's] direct prudential supervision, in contrast to other service providers in superannuation, and in other prudentially regulated industries. An alternative may be to extend the current Australian Financial Services Licence scheme to cover all super administrators, especially as many are already required to hold one. This may provide a vehicle for imposing suitable capital and other requirements. (Australian Government 2010a, pp. 15-16)

Rollovers/switching funds portability requirements

ASFA suggests proof of identification and other information requirements should be made simpler for rollovers between APRA regulated funds to make member requests to switch or consolidate to another fund easier:

> A superannuation fund should not have to re-verify any part of a member's identity if another APRA regulated fund has already verified that information. They should be able to rely on the other fund's verification. A standard form and standard industry process is required.
>
> Where a superannuation fund has received the agreed minimum required data and notification from another APRA regulated fund that the member's identity has been verified and the data items match, the fund should have to make the rollover payment without seeking further information from the member. (ASFA sub. 20, pp. 4-5)

Regulation 6.34 and Schedule 2A of the Superannuation Industry (Supervision) Regulations 1994 (the SIS Regulations) require members wanting to change funds to contact their employer to have future contributions redirected and also their existing fund to have their existing balance transferred to their new fund.

The requirements for rollovers/switching funds are currently subject to consideration by the Cooper Review. On the 22 March 2010 the Review Panel published its preliminary conclusions on some of the key issues which could lead to major efficiency gains in the operational aspects of the superannuation industry. In relation to rollovers/switching funds:

> The Panel agrees that it is too difficult for members to consolidate multiple accounts to their chosen fund because of the onerous requirements placed on them by funds to roll their money out. Despite the introduction of a standard form by way of Schedule 2A to the SIS Regulations, the information required by the form is overly-detailed, the identification requirements are onerous and the process simply becomes too difficult. (Australian Government 2010a, p. 23)

The Review Panel made a number of detailed preliminary recommendations to simplify the portability requirements of superannuation, including:

- enable the trustee of an APRA-regulated fund, with the authority of a member, to initiate a rollover of all or part of that member's benefit from another fund as though the member had initiated the request to the exiting fund, without further proof of the member's identity being required
- require the trustee of any fund receiving such a request to normally remit the member's balance electronically to the new fund within two clear business days, subject to a capacity for APRA to provide relief from this provision when prudential considerations require it
- amend the choice of fund form to make it more user-friendly and to enable the member to tick a box requiring all super accounts to be consolidated, with the

> nominated APRA-regulated fund to action. (Australian Government 2010a, pp. 24-25)

Margin lending unsuitability test

IFSA is critical of recent amendments to the Corporations Act (the Act) which introduce responsible lending obligations for margin lending which will become operational from 1 January 2011 — see *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009*. IFSA views these new requirements on lenders as duplicating processes already undertaken by financial advisers:

> New rules for margin lending products will soon require the product provider to conduct a 'suitability test' to establish that the product is suitable for the investor. However, the financial planner or adviser will have been through an assessment process for establishing the investment and loan … Therefore, a requirement for the product provider to undertake a second assessment process is inefficient and costly, with no benefit. (IFSA sub. 18, p. 4)

The Commission understands that during the consultation process for this legislation, the views of financial advisers and margin lenders were presented. Lenders proposed that advisers should conduct the assessment along the lines of the IFSA argument described above. On the other hand, advisers argued that lenders are in a better position to make this assessment, based on their commercial relationship with the client and access to sources of information about the client's debt exposure. In particular, advisers noted that credit reports, which are the most important source of this type of information, are only made available to lenders, and cannot be accessed by advisers.

In addition, some borrowers do not use the services of a financial adviser, but approach lenders directly. For these borrowers, the lender is the only party that can undertake the unsuitability assessment. It also seems appropriate that lenders should have the ultimate responsibility for deciding whether to extend a loan or not, as they are the entities that determine the collateral requirements, make the margin calls, and suffer the consequences of any defaults by clients.

While lenders may be better placed than advisers to conduct the unsuitability assessment for margin loans, there should be as little overlap and duplication as possible between the functions of advisers and lenders. To reduce the extent of overlap, regulations are in place (but not yet operational) that require financial advisers, when they provide a statement of advice to their clients, to incorporate certain information which margin lenders can then rely on when conducting their unsuitability assessments:

> In making reasonable inquiries, lenders may rely on information provided in a statement of advice for the client, where the statement of advice recommends the margin lending facility, and it was prepared no more than 90 days before the day on which the margin lending facility is proposed to be entered into. In these circumstances, the provider is not required to verify such information. (Senate 2009, p. 27)

According to the Explanatory Memorandum for the recent Bill, this measure (section 985G(3) which is known as the 'reliance provision') has been designed to avoid the need for both advisers and lenders to obtain and verify certain key information, and is expected to ease the burden on lenders obtaining information required to conduct their assessments (Senate 2009).

It would be premature for the Commission to consider and assess the regulatory burden of the unsuitability test on margin lenders in this current review, given the regulation is not yet operational.

The First Home Savers Accounts

Since late 2008 the Australian Government has sought to partner with the banking sector to promote housing affordability through First Home Savers Accounts (FHSAs), which until now have had a slow take-up. The ABA said that the FHSA initiative was 'announced without detailed consultation with the banking sector' (ABA sub. 17, p. 11).

Following the Australian Government's announcement in February 2008, the banking sector then had to separately consult with a number of government agencies to fine tune implementation. These agencies included:

- APRA on prudential matters
- ATO on administration and tax related matters
- ASIC on financial services licensing and disclosure obligations.

The ABA was not only critical of the timing and convoluted nature of the consultation, but also the effect on the bank-customer relationship arising from the regulation:

> Consultation processes engaging with banks was unnecessarily complicated and the FHSAs disclosure document was developed with limited industry input. Some adverse bank-customer relationship experiences have resulted from the legislative restrictions imposed on these accounts as well as the prescriptive nature of the FHSAs disclosure document, and related issues. (ABA sub. 17, p. 11)

Moreover, Abacus have suggested that the FHSAs have not achieved their savings objective because of the time restrictions placed on withdrawals from the accounts:

The Government estimated in early 2008 that FHSAs would hold around $4 billion in savings after four years. The amount in FHSAs as at September 2009, $43.9 million, is just over one per cent of this anticipated amount.

The most consistent issue that appears in feedback to Abacus from credit unions and building societies about FHSAs is that the four-year 'lock-up' requirement is too long and is the single most important disincentive for savers. (Abacus sub. 22, p. 8)

Box 2.2 Consultation processes associated with the First Home Saver Accounts

On 4 February 2008, the Government confirmed its election commitment to establish FHSAs to assist Australians to save for their first home (Swan 2008a).

0n 8 February 2008, a consultation paper was released outlining the proposed features of the accounts and how they would operate (Swan 2008b). According to the Treasurer, the Government received over 150 submissions from individuals, business and organisations (Swan 2008c). The comments made during the consultation focused on increasing the attractiveness of the accounts to first home buyers and lowering the compliance costs on the finance industry.

On 13 May 2008, in response to the issues and suggestions raised during the consultation period, the Treasurer announced some amendments to the scheme. The Government also decided to defer the commencement of the policy until 1 October 2008 to enable account providers more time to develop products. The Treasurer indicated that the regulators, ASIC, the ATO and APRA were all working closely with industry to make FHSA easier to provide (Swan 2008c).

Source: Swan (2008a, 2008b, 2008c).

Up until recently, account holders were required to keep their savings in their FHSAs for four financial years before they were able to use those savings to buy a home. If account holders purchased a home prior to the end of the four year period, the balance of their FHSAs had to be transferred to their superannuation fund and preserved until a condition of release was met.

On 11 May 2010, the Treasurer announced that the Government would increase the flexibility of FHSAs. The Government will allow savings in a FHSA to be paid into an approved mortgage after the end of the four year minimum qualifying period, rather than requiring it to be paid to a superannuation account. The Government is expected to release draft amendments for consultation in the near future (Swan 2010).

Given that concerns of the ABA and Abacus relate to a financial product rather than a regulation their members are compelled to obey (currently only about 20 financial institutions offer the accounts), it is beyond the scope of the Commission's terms of

reference to conduct an assessment of these concerns in this year's annual review of regulatory burdens on business.

Implementation/enforcement of the National Consumer Credit Protection Act and the new credit licensing regime

The Mortgage and Finance Association of Australia (MFAA sub. 2) raises concerns about ASIC's future implementation and enforcement of the recently passed *National Consumer Credit Protection Act 2009* (the NCCP Act). The MFAA has concerns that a 'one-size-fits-all' approach will, if implemented, 'potentially create compliance costs and roadblocks, perhaps worse than applying under the state-based patchwork the NCCP [Act] was intended to eliminate' (MFAA sub. 2, p. 3).

The ABA (sub. 17) and Abacus (sub. 22) raise associated concerns with the Australian Credit Licence (ACL) regime outlined in the NCCP Act. These industry groups suggest that some requirements will replicate the Australian Financial Services Licence (AFSL) regime outlined in the Corporations Act — despite the streamlined application process for authorised deposit-taking institutions granted by ASIC — causing unnecessary compliance costs.

The Commission understands that there has been some consideration of the regulatory burden imposed on persons falling under both regulatory regimes by ASIC and Treasury. In particular:

- a streamlined process is available for authorised deposit-taking institutions (ADIs) and for Western Australian brokers who held an 'A' or 'B' class finance broker's licence under the Western Australian regime. The streamlined process means that those persons do not have to provide any supporting documentation for their application. It also means that ASIC has limited grounds upon which it could refuse to grant a licence for these persons
- a simplified process is available for current AFSL holders so that questions that have been previously asked during the AFSL application process have not been repeated in the ACL application process
- the application process has been simplified for the ACL as compared to the AFSL. ASIC has reduced the number of questions asked in the application form by approximately half
- a number of requirements that apply to AFSL holders have not been replicated in the credit regime — most significantly there is no legislative breach reporting requirement and audit requirements apply only to a very limited group of persons (i.e. those who handle client trust monies)
- in consultation with industry, Treasury and ASIC are examining processes for dealing with dual licence holders, and how to deal with any overlapping obligations

- regulations now specifically provide that some key documents can be combined such as the Credit Guide and the Financial Services Guide (ASIC, pers. comm., 28 May 2010).

However, given the MFAA, ABA and Abacus concerns relate to legislation that is prospective in nature — the NCCP Act will commence partial operation in July 2010 reflecting the licensing of credit providers, and full operation in 2011 when responsible lending obligations are implemented — it is beyond the scope of the Commission's terms of reference to conduct an assessment of these concerns in this year's annual review of regulatory burdens on business.

Financial services regulation

The ABA (sub. 17) argues that a number of amendments are needed to the *Financial Services Reform Act 2001* to reduce unnecessary legal complexities and compliance costs. The ABA suggests amendments to the law, regulations and/or regulatory guidance are required to:

- clarify the definition of personal advice
- refine the retail/wholesale distinction and sophisticated investor tests
- improve and rationalise disclosure obligations across Financial Services Guides, Statements of Advice and Product Disclosure Statements.

On 26 April 2010, the Minister for Financial Services, Superannuation and Corporate Law announced the Future of Financial Advice reforms, which address among other things, the definition of personal advice, the retail/wholesale distinction and product disclosure obligations (Bowen 2010c).

As part of these reforms, the Government will examine issues surrounding the provision of simple financial advice. The proposal will seek to address broad issues raised by industry around regulatory barriers to providing low-cost, compliant, simple advice. This work is expected to also address the issue of clarifying the definition of personal advice.

The Future of Financial Advice reform package also includes a review of the definition of sophisticated/unsophisticated investors, that is retail and wholesale clients. The Government will consult with stakeholders on the appropriateness of the current criterion under which a client is classified as retail or wholesale. This distinction has not been reviewed since its introduction in 2001.

The reform package will also continue work already underway by the Financial Services Working Group in simplifying disclosure documentation for financial services products.

Unfair terms in insurance contracts

The National Insurance Brokers Association (NIBA sub. 3) discusses a recent Senate Economics Legislation Committee report (SELC 2009). This report recommends the Australian Government considers what changes are required to the *Insurance Contracts Act 1984* (IC Act) to ensure that it provides an equivalent level of protection for consumers to that provided by the recent *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010* (ACL Act).

Section 15 of the IC Act provides that a contract of insurance is not capable of being made the subject of 'relief' under any Commonwealth or State Act. In effect, this means that the unfair contract provisions of either the ACL Act or the *Australian Securities and Investment Commission Act 2001* do not apply to contracts of insurance covered by the IC Act.

In order to formulate the Government's response to the Senate Committee's recommendations, on 17 March 2010 the Minister for Financial Services, Superannuation and Corporate Law released an options paper seeking comments on options to address unfair terms included in insurance contracts (Bowen 2010b). The five options discussed are:

- status quo
- permit the unfair contract terms provisions of the ASIC Act to apply to insurance contracts
- extend the IC Act remedies to include unfair terms provisions
- enhance existing IC Act remedies
- encourage industry self-regulation to better prevent use of unfair terms by insurers.

NIBA are of the view that the IC Act already provides effective consumer provisions, including a requirement for insurance companies to act in good faith, and that there is no necessity for any change to the IC Act. NIBA will argue for the retention of the status quo in its submission in response to the options paper (NIBA, pers. comm., 22 March 2010).

Given NIBA's concern relates to potentially prospective regulation it is beyond the scope of the Commission's terms of reference to conduct an assessment of the concern in this year's annual review of regulatory burdens on business.

Tax issues

NIBA, ABA and IFSA raise a number of issues concerning Australia's tax system. In particular, these submissions recommend the removal of certain 'nuisance taxes' (e.g. stamp duty) imposed by state tax regimes (subs. 3, 17, 18).

These taxes were recently discussed in the Australia's Future Tax System Review (Henry Tax Review). The Henry Tax Review was established by the Australian Government in 2008 to examine Australia's tax and transfer system, including state taxes, and make recommendations for reform. The Review Panel delivered its final report to the Treasurer in December 2009 and both the final report and the Government's initial response were released on 2 May 2010.

The Henry Tax Review recommended that state tax reform over the long term would be up to the Council of Australian Governments and future intergovernmental agreements:

> Recommendation 119: Reforms to State taxes should be coordinated through intergovernmental agreements between the Australian Government and the States to provide the States with revenue stability and to facilitate good policy outcomes. (AFTS 2009a, p. 103)

The Henry Tax Review suggested that state taxes could be removed entirely under an overhaul that would apply a uniform levy on all companies:

> Recommendation 55: Over time, a broad-based cash flow tax — applied on a destination basis — could be used to finance the abolition of other taxes, including payroll tax and inefficient State consumption taxes, such as insurance taxes. (AFTS 2009a, p. 91)

The Review Panel recommended that state taxes on insurance products be scrapped:

> Recommendation 79: All specific taxes on insurance products, including the fire services levy, should be abolished. Insurance products should be treated like most other services consumed within Australia and be subject to only one broad-based tax on consumption. (AFTS 2009a, p. 94)

Given the tax issues raised by these submissions have been considered by the Henry Tax Review, the Commission has not dealt with them in this year's annual review of regulatory burdens.

Goods and Services Tax arrangements for financial supplies

Abacus (sub. 22) maintains that unless a measure originally introduced to counter the anti-competitive impact of the Goods and Services Tax (i.e. reduced input tax

credit) in the financial service industry is broadened some of its members will suffer ongoing competitive disadvantage relative to the big banks.

In the absence of being able to tax the value added of a financial transaction the GST adopts a 'second best' approach of denying credit for GST on the inputs into the financial supply, hence financial supplies are input taxed. Input taxation, however, is inefficient, resulting in a number of unintended consequences and complexities, including 'self-supply bias' (Sherry 2010).

Input taxing financial supplies means that financial service providers have a 'self-supply bias' for business inputs used to make financial supplies. For example, if a financial service provider undertakes its own credit scoring assessment service, this service would not be subject to GST. However, if the financial service provider outsources this service, in the absence of special rules, GST would be payable on the full value of that service and the financial service provider would not be entitled to an input tax credit. In other words, financial service providers may consider it more cost effective to provide their key services in-house than acquire these services from third parties where they are unable to recover the tax embedded in these supplies (Treasury 2009c).

Without special rules, a higher effective tax burden would be faced by smaller financial providers who outsource proportionally more of their business inputs. Larger market participants generally have a greater ability to self-supply services. Therefore, input taxing financial supplies has important implications for the relative competitiveness of different segments of the financial sector (Treasury 1999).

To mitigate some of the efficiency consequences of input taxing financial services, Australia's GST law includes some additional, complex provisions, such as division 70 of *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). This division provides for a reduced input tax credit (RITC) to apply to the purchase of qualifying services used to make financial supplies. Taxpayers may be able to claim reduced input tax credit equal to 75 per cent (of the full input tax credit) for a number of expenses related to financial supplies that would otherwise be fully input-taxed. The items for which RITCs are available are set out in the GST regulations. They include services that (generally smaller) financial institutions typically outsource (Treasury 2009c).

Abacus suggest that the RITC item 16 'credit union services' needs to be broadened and brought up to date with industry developments in the mutual authorised deposit-taking institution (ADI) sector — including the formation of Abacus — to restore competitive neutrality between banks and mutual ADIs:

> RITC item 16 'Credit union services' currently only applies to supplies to credit unions provided by an entity wholly owned by two or more credit unions. Since the RITC framework was legislated the consumer banking market has undergone significant change, including continuing consolidation among mutual ADIs and the rationalisation of industry support bodies. These changes include the prospect of mergers between credit unions and mutual building societies.
>
> Abacus recommends that RITC item 16 should be amended to cover supplies to a credit union or mutual building society by an entity majority owned by two or more credit unions or mutual building societies. (Abacus sub. 22, p. 8)

In summary, Abacus states that it is difficult for mutual ADIs to claim a RITC for services provided by third party service organisations (such as Abacus) because of the:

- long term trend of consolidation in the mutual building society sector, including proposed mergers between credit unions and mutual building societies
- the narrow definition of item 16 (which limits expenses qualifying for a RITC to acquisitions from organisations wholly owned by credit unions).

Abacus suggests this places mutual ADIs at a competitive disadvantage to other ADIs:

> Services provided by Abacus to mutual ADIs that assist mutual ADIs to compete with major banks carry the full GST burden whereas the same services provided in-house by a major bank do not bear this burden. This further tilts the playing field in favour of big banks. (Abacus sub. 22, p. 8)

On 12 May 2009 the Australian Government announced that it asked Treasury to review the application of the GST to financial supplies. The review was designed to explore opportunities to simplify the operation of the legislation and reduce compliance and administrative costs whilst retaining the existing policy intent. To facilitate discussion, Treasury issued a consultation paper on the review of the financial supply provisions. In response to the paper, Treasury received 16 submissions (of which 14 submissions were made public, including a submission by Abacus) and undertook further consultation with selected parties (Sherry 2010).

On 11 May 2010 the Australian Government announced that it agreed to maintain the current architecture of the financial supply provisions, but also agreed to make a number of changes to clarify the operation of the legislation and reduce compliance and administrative costs, particularly for small businesses. While it did not specifically address the Abacus concern related to RITC item 16 'credit union services', as part of its response the Australian Government did make some changes to the range of expenses qualifying for a RITC:

The range of expenses qualifying for a reduced tax input credit (RITC) will be expanded to:

- include acquisitions related to supplies of life insurance by superannuation funds to their members
- clarifying that RITCs are available for lenders' mortgage reinsurance as well as lenders' mortgage insurance
- add a new item covering transactional fraud monitoring services. (Sherry 2010, p. 5)

The Commission also notes that the recently released Henry Tax Review made a number of findings in relation to the input taxation of financial services under the GST — in particular, that it is 'inefficient, reduces competition and harms Australia's position as a regional financial services centre' (AFTS 2009b, p. 303). The Henry Tax Review also called for a more appropriate method of taxing the consumption of financial services:

> To remove the adverse efficiency costs of input taxation on business and exports, financial services could be removed from the GST (effectively, made GST-free). However, this would have a large revenue cost and inappropriately exempt private consumption of financial services. The Australian Government, in consultation with the financial sector, could further develop an alternative method of taxing domestic consumption of financial services to replace input taxation under the GST, or to complement a cash flow tax, to ensure that consumption of financial services is treated equivalently to other forms of consumption. (AFTS 2009b, p. 313)

Given that the Abacus concern relates to the policy intent of a taxation policy — that has recently been reviewed by Treasury and also (more generally) by the Henry Tax Review — the Commission has not dealt with it in this year's annual review of regulatory burdens on business.

Foreign regulation

The ABA (sub. 17) is concerned about the possible implications for banks of international legislation and foreign court decisions. It listed three examples:

- the UK's Financial Service Authority's Corporate Governance proposals — which the ABA says will affect senior bank executives located outside the UK, but with managerial and decision-making responsibilities within the UK
- amendments to the US Foreign Account Tax Compliance Act — which the ABA says could potentially require Australian banks (even those operating outside the US) to be subject to onerous reporting requirements to the US Internal Revenue Service

- US Supreme Court appeal (in the case of Morrison v National Australia Bank) — which if successful, the ABA says could lead to a situation where an Australian investor could take action against an Australian bank, which has no dealings in the US, which has issued non-US securities in Australia.

Given the ABA's concerns relate to legislation (and court decisions) that are both international and prospective in nature it is beyond the scope of the Commission's terms of reference to conduct an assessment of these concerns in this year's annual review of regulatory burdens on business.

Corporate governance and reporting

The ABA (sub. 17) raises concerns about unnecessary compliance costs arising from a lack of alignment between various corporate governance and reporting obligations across Commonwealth, state and territory legislation. This issue will not be examined in this year's annual review of regulatory burdens on business because it concerns economy-wide generic regulation which is beyond the scope of this year's terms of reference.

Transfer of units – NSW *Duties Act 1997*

The IFSA (sub. 18) complains about the administration cost and time taken in relation to stamp duty assessment processes associated with the transfer of units in unlisted unit trusts where there is no change in beneficial ownership.

This issue relates to state stamp duty regulation and is a matter for the New South Wales Office of State Revenue.

3 Tourism and hospitality related services

Key points

- A number of businesses and peak industry groups involved in the provision of hospitality and tourism related services raised a range of issues. These included the regulation of foreign investment, consumer protection, the importation of animals and superannuation arrangements.
- The monetary threshold at which proposed foreign investment in developed commercial property, including hotels, is subject to FIRB assessment should be indexed on the same basis as the thresholds applying to other types of foreign investment to prevent these arrangements becoming more restrictive over time.
- The lower monetary threshold requiring developed commercial property subject to heritage listing to be assessed by the FIRB is unlikely to provide any additional protection to the heritage values of such properties and should be removed. Heritage listed properties are protected by the relevant legislation irrespective of the nationality of the owner.
- Amendments to the TPA to deal with component pricing apply to certain restaurant and café surcharges, such as those for Sunday and public holiday dining. And other surcharges, such as corkage, remain outside the scope of the amendments. Sunday and public holiday menu surcharges should be outside the scope of the amendments as their inclusion has imposed costs on these businesses without providing any additional benefit to consumers.
- The lack of mutual recognition of responsible service of alcohol training across jurisdictions impacts on labour mobility and imposes additional costs on businesses operating across jurisdictions. COAG should develop and implement such arrangements as soon as possible.
- Greater consistency and clarity between the EPBC Act and the regulations would provide benefits to importers of endangered species.
- The monthly earnings threshold attached to the superannuation guarantee has been in place since 1992. It should be increased through an appropriate process and subject to periodic review, to reduce administrative costs and regulatory creep associated with the scheme.

This chapter discusses concerns raised mainly by participants in the Accommodation and Food Services division and Administrative and Support Services division of the ANSZIC classifications. A wide range of issues were raised by businesses and peak industry groups as well as some government departments. Given their identification with tourism and hospitality related activities, the following chapter discusses these issues in terms of tourism and hospitality related services rather than by distinct ANZSIC classification.

3.1 Travel agents

Consumer protection arrangements

The Australian Federation of Travel Agents (AFTA) (sub. 4) was critical of the current consumer protection regime which requires travel agents to be licensed in each state and territory and subscribe to the Travel Compensation Fund (TCF). These arrangements, known as the 'National Scheme' and enacted in state and territory legislation were introduced in 1986 to provide nationally consistent regulation of travel agents. The focus of the regulation is to:

- ensure quality and competency through licensing, including a 'fit and proper person' test
- provide consumer protection through the compulsory compensation scheme in the event of a licensed travel agent defaulting (CIE 2000, PWC 2010, sub. 4).

AFTA's view was that these arrangements placed travel agents at a disadvantage as other providers of travel services, such as airlines and cruise operators, were not covered by these arrangements and, in particular, were not required to subscribe to the fund.

> The current regime for consumer protection which is effectively funded by travel agents by way of a subscribed fund is not satisfactory. The current compensation fund does not cover pure supply activity and leads to an anomalous situation for consumers where a failure to account for services by an airline or other travel principal is non-compensable. (sub. 4, p. 2)

AFTA called for new arrangements consisting of:

- a national regulator to manage accreditation arrangements replacing state based licensing, which would cover all entities involved in the sale of travel and related services
- positive licensing arrangements conducted by the regulator to ensure quality of service and management of prudential requirements

- replacing the current fund and allowing consumers to take out insurance against loss of monies due to insolvency of travel principals. (sub. 4)

Assessment

These arrangements were initially reviewed as part of the National Competition Policy legislative review program in 2000 (CIE 2000). The review recommended retention of a licensing scheme, removal of the qualifications and experience requirements for travel agency licence holders and opening up of the TCF's compensation role to private insurers.

However, the Ministerial Council on Consumer Affairs rejected these recommendations on public interest grounds, its principal concern being that the review had given insufficient weight to the intangible benefits of existing regulation.

A further review of the travel industry consumer protection arrangements has been commissioned by the Ministerial Council on Consumer Affairs and is being undertaken by Price Waterhouse Coopers. It is tasked with:

- identifying the effectiveness of, or need for, consumer protection measures in the travel and travel related services market
- considering the effectiveness and viability of the current regulatory scheme with a particular focus on the TCF
- identifying and considering regulatory and non-regulatory options within a cost/benefits framework to address consumer protection issues.

The review is to report in June 2010. Given the focus and reporting date of the review, any further examination of these issues should await the findings of the current review.

3.2 Overseas investment issues

International hotel management companies in Australia

The Tourism and Transport Forum (sub. 5) drew attention to the requirement under the *Foreign Acquisitions and Takeovers Act 1975* for overseas hotel management companies to gain approval from the Foreign Investment Review Board (FIRB) when entering into a management agreement with an Australian hotel property. Under these arrangements international hotel operators, such as Accor and

InterContinental, provide the brand and enter into an agreement with the property owner to provide marketing and distribution, reservation systems and operation of the building as a hotel (sub. 5).

As these management agreements often included a share of revenue for the hotel operator as part of the overall fee structure, the Tourism and Transport Forum (sub. 5) noted that:

> This share of revenue has recently been interpreted by the FIRB as constituting a property interest similar to a lease and therefore covered by the FIRB process. (sub. 5, p. 13)

It went on to say:

> We believe that the current system [of having to seek approval from the FIRB] is unnecessarily burdensome as it creates uncertainty, unnecessary paperwork and legal expenses. (sub. 5, p. 13)

Assessment

The Australian Government policy on foreign investment is to encourage foreign investment consistent with community interests. The *Foreign Acquisitions and Takeovers Act 1975* provides the legislative framework for scrutiny of proposed foreign purchases of Australian businesses and real estate and to block, or place conditions on, such purchases where they are considered to be contrary to the national interest (FIRB 2008).

Monetary thresholds are in place to remove compliance costs relating to lower value foreign investment proposals. In regard to proposed overseas investment in developed non-residential commercial real estate such as hotels, assets valued below $50 million are not subject to assessment by the FIRB. For United States investors, the current threshold is $1004 million as a result of the Australia – United States Free Trade Agreement. A lower threshold applies to developed non-residential commercial properties subject to heritage listing. This is discussed below.

As to the interpretation of the arrangements between hotel operators and building owners, the *Foreign Acquisitions and Takeovers Act 1975* explicitly applies to the sharing of profits or income from the use of Australian urban land — subject to the value of the asset being in excess of the threshold (FIRB 2008).

The *Foreign Acquisitions and Takeovers Act 1975*, *s*ection 12A (1)(d), requires that arrangements to share profits or income from the use of, or dealings in, Australian urban land, such as those between overseas hotel operators and building owners are

subject to scrutiny by the FIRB. However, what is relevant in a regulatory burdens context is that such applications by overseas hotel operators are scrutinised in a timely and efficient manner. To this end, realistic statutory timelines relating to the examination of proposals and the notification of decisions should provide some certainty to investors. The legislation requires a decision from the Treasurer within 30 days of the application being made and the relevant parties to be notified of the decision within a further 10 days or the proposed acquisition can proceed without conditions. The 30 day examination period can be extended up to a further 90 days through an interim order (FIRB 2008).

The Commission notes that a number of changes were made to the monetary thresholds relating to overseas investments in Australian businesses and offshore takeovers in 2009. These included annual indexation of the relevant thresholds to avoid these arrangements becoming more restrictive over time (Swan 2009)[1]. Similar indexation applies to the threshold applying to United States investment in developed non-residential commercial property.

However, there is no indexation of the thresholds applying to overseas investment in developed commercial real estate other than that from the United States. Extending indexation to the thresholds applying to all overseas investment in developed non-residential commercial real estate, particularly given the large price increases associated with such assets, would avoid these arrangements becoming more restrictive over time.

DRAFT RECOMMENDATION 3.1

The Australian Government should index monetary thresholds applying to all overseas investment in developed non-residential commercial real estate on the same basis as the thresholds applying to other types of overseas investment in Australian businesses.

Thresholds for the acquisition of heritage listed properties

A further issue was the different threshold in place for developed non-residential commercial properties subject to heritage listing. At present, a FIRB assessment is required where an overseas investor is seeking to acquire a heritage listed developed commercial property worth $5 million or more, whereas for similar non-heritage listed properties the threshold is $50 million (as noted above higher thresholds apply to United States investors).

1 These thresholds are to be indexed on 1 January each year to the GDP price deflator in the Australian National Accounts for the previous year.

The Department of Resources Energy and Tourism (DRET) (sub. 15) pointed to the potential for the lower threshold on heritage listed property to impose additional costs on foreign investment in heritage listed accommodation, restaurants, museums and art galleries.

Moreover, DRET noted that there was some ambiguity about the community benefits of the different treatment of these properties given that they were subject to heritage listing which protected the heritage value of the property irrespective of the nationality of the owner (sub. 15).

Assessment

The lower threshold applying to heritage listed commercially developed property is unlikely to provide any additional protection to the heritage values of such properties.

The *Foreign Acquisitions and Takeovers Regulations 1989* refer to the threshold applying to properties on land included on the Register of the National Estate (RNE). The RNE, which does not place any legal constraints or controls on the owner of places included on the register, is no longer operational and is being phased out. In the absence of such constraints or controls, the FIRB process provides an opportunity to place conditions on foreign ownership to protect the heritage values of properties included on the RNE. However, places and properties included on the RNE have been, or will be, transferred to Australian Government and state and territory government heritage lists (see box 3.1).

The heritage values of properties included on either the Australian Government's or a state or territory governments' heritage list are protected under the relevant legislation. In particular, there are substantial controls surrounding any proposed development or changes that may have impacts on the cultural value of such properties. For example, places on the Australian Government's National Heritage List are protected under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) which requires that approval be obtained before any action takes place which could have a significant impact on the national heritage value of a listed place. State and territory governments have control over the development of places and buildings included on their heritage registers and lists, including obligations on owners to conserve heritage aspects and requirements to submit any proposed changes for approval (PC 2006a). These controls apply regardless of the nationality of the owner.

Box 3.1 Australia's heritage conservation system and the Register of the National Estate

Australia's system of heritage conservation has specific roles for Australian, state, territory and local governments. This system is based on a 1997 COAG agreement that each tier of government should be responsible for protecting heritage at the appropriate level. The difference between each tier of government's heritage system is related to the significance and scope of a place's heritage value.

In 2004, the Australian Government established a new national heritage system under the *Environment Protection and Biodiversity Conservation Act 1999*. It is based on a National Heritage List to recognise and protect places of heritage value to the nation, and the Commonwealth Heritage List to protect places of heritage value on Australian Government owned or leased land.

These arrangements superseded the Register of the National Estate (RNE) established in 1975 under the *Australian Heritage Commission Act 1975* as a list of natural, Indigenous and historic places throughout Australia. The RNE was frozen in 2007 and no additional places can be added, or removed. The RNE will continue as statutory register until 2012 to allow the Australian Government and state and territory governments to complete the task of transferring places to the appropriate heritage registers and amend legislation where necessary that refers to the RNE as a statutory list. After 2012, the RNE will be maintained as an archive.

Many places on the RNE are already included on other statutory lists at the state and territory level and on the National Heritage List and the Commonwealth Heritage List.

The Commission (PC 2006a) in its inquiry into the Conservation of Australia's Historic Heritage Places noted that the RNE did not place any legal constraints or direct controls over the actions of private owners or state and territory governments. Given this, the FIRB assessment processes could have been used to place conditions on properties and places listed on the RNE to preserve their heritage values prior to their inclusion on heritage listings with legislative protection. However, such 'protection' would have been limited to those properties purchased by overseas investors.

Source: DEWHA (2010); PC (2006a).

This legislation is the most effective means to protect such heritage values. Although the *Foreign Acquisitions and Takeovers Act 1975* could be used to place conditions on potential foreign owners to preserve certain aspects of a commercially developed property, it does not apply to any potential domestic owners.

The lower threshold for such properties may assist in informing the potential purchaser that the property is heritage listed. However, such a listing should come to the potential purchaser's attention in the course of title and other searches conducted as part of a normal commercial property transaction.

Given there is no clear purpose or benefit in imposing a lower monetary threshold for heritage listed non-residential commercial property, and this is likely to impose additional costs on potential investors, this threshold should be removed.

DRAFT RECOMMENDATION 3.2

The Australian Government should remove the monetary threshold applying to proposed overseas investment in heritage listed non-residential commercial property. Such properties should be subject to the same threshold at which Foreign Investment Review Board assessment is required for proposed investment in developed non-residential commercial property not subject to heritage listing.

DRET (sub. 15) acknowledged that recent changes to the foreign investment regulations announced by the Treasurer in late 2009 (Swan 2009), would remove many of the regulatory costs of the current regulatory regime. Nevertheless, it called for the Commission to examine the broader costs of the foreign investment regime on business and consider any improvements to streamline its operation.

However, a detailed examination of Australia's foreign investment review regime is outside the scope of the terms of reference for this review and would need to be undertaken as a 'stand alone' exercise.

3.3 Trade Practices Act — clarity in pricing amendments

In May 2009, amendments to section 53C of the *Trade Practices Act 1974* came into force requiring businesses to provide a single total price in any representation to consumers, rather than a price based on component parts. Businesses can continue to use component pricing in advertising, provided that a single total price is also displayed as prominently as any component price. The purpose of these amendments was to ensure that consumers were aware of the actual price that was to be paid for a good or service and were not misled by advertisements that only covered part or a component of the price (Bowen 2009c).

The Australian Hotels Association (AHA) (sub. 10) commented that these amendments had impacted on restaurants by imposing extra costs in regard to their menus. Previously, restaurant menus could indicate that there was a percentage surcharge on Sundays and/or public holidays. However, following the amendments a total price, including the surcharge, had be provided for each item on the menu. This involved businesses having to:

- print and distribute a different menu for these days, or

- show two or more lists of prices on the same menu
- undertake changes to the blackboard menu (sub. 10).

This imposed extra costs and complications on these restaurants and cafés. In addition, the AHA was of the view that customers in food and beverage areas were fully able to understand the price they were to be charged as any surcharges were presented in a clear and unambiguous manner. In addition, customers were accustomed to calculating a tip for service on many occasions and as such were capable of calculating any Sunday or public holiday surcharge (sub. 10).

The AHA requested that the ACCC be given the ability to exempt restaurants from the clarity of pricing requirements, where it could be demonstrated that the costs to business outweighed the benefit to the customer.

Assessment

The initial moves to amend the TPA began in 2005 in response to various concerns regarding businesses that offered a 'cheap' price to consumers which was then increased with taxes, further fees and/or additional charges when payment was required.

The motor vehicle industry, the airline industry and the rental car industry were 'singled out' for particular criticism (Pyburne 2008). This involved the advertising of new and used motor vehicles which failed to include the additional on-road costs and dealer charges and advertised rental car charges which did not include the additional fees and charges which consumers 'discovered' on collecting their vehicle. A particular concern at the time was the advertising of 'cheap' air fares where various additional fees and charges included in fine print disclaimers could be greater than the price of the airfare highlighted to consumers (Bowen 2008).

The surcharges on restaurant meals on Sunday and/or public holidays were not a focus of the original concerns raised in regard to component pricing. In any case, a number of exemptions from the requirements to provide a single total price were included in regard to:

- postage and handling charges
- representations between businesses
- financial services
- certain contracts providing for periodic payments over the life of the contract.

No regulation impact statement (RIS) was prepared on the proposed amendments. The reason put forward was that there would be minimal compliance costs to business from any changes as most price representations by business were already in compliance with the proposed amendments to the legislation (Stephens 2008). However, some submissions from peak business groups on the draft legislation, such the Business Council of Australia (BCA), were critical of the absence of any cost-benefit analysis of the proposed amendments (BCA 2008). Similarly, the Australian Chamber of Commerce and Industry (ACCI) noted that as the proposed amendments would have a clear impact on business, a RIS should be prepared in keeping with regulatory guidelines (ACCI 2006).

Following the amendments coming into force, the ACCC conducted a number of meetings with the hospitality sector and produced a publication outlining how the amendments would impact on the sector. The guidelines indicated that although a menu which does not provide a single price to include any percentage surcharge for Sundays or public holidays is likely to be in breach of s53 of the TPA, other restaurant type charges are not affected.

For example, corkage charges on a per bottle basis are not considered as a quantifiable component of a total price as the final cost of corkage depends on how many bottles were consumed at each table. Also, were a restaurant to apply a flat per dollar per head charge on a Sunday or public holiday, the surcharge would not be considered a quantifiable component of the single price as the charge is a 'one off' irrespective of whether one item off the menu is ordered or more (ACCC 2009).

Similarly, a range of other non-menu surcharges remain outside the scope of the amendments. For example, a Darwin restaurant recently placed a 'thongage' related footwear charge on customers choosing to dine in thongs to create a more formal dining atmosphere (*NT News*, 31 March, 2010). Of course, such charges need to be made clear to consumers prior to dining to comply with broader trade practices obligations.

As no RIS or cost-benefit analysis was undertaken, it is not clear as to how the costs and benefits compare across different industry sectors.

In the case of restaurants and cafés, there would be costs to such establishments in providing separate menus or having two or more lists of prices on the same menu to address any Sunday or public holiday surcharge. The benefits to consumers, in line with the objective of the amendments, is in avoiding 'any surprises' by ensuring consumers are aware of the actual price they will have to pay for the good or service.

When eating in a restaurant, be it a fast food chain establishment or a Michelin star restaurant, consumers are making multiple purchasing decisions when reading the menu. Menus act as the price list for a range of options and consumers are aware that the total price will depend on how many items on the list they have ordered as well as any applicable supplementary charges, such as corkage. Consumers are generally accustomed to dealing with component pricing in their transactions with restaurants and cafés and will have calculated an estimation of the total price of their meal from the menu, including any additional charges prior to ordering.

It is not clear that the use of separate menus or additional lists of prices in existing menus for Sundays and public holidays will provide any greater benefits to consumers than the other consumer protection provisions in the TPA to ensure that they are aware of all applicable charges and that restaurants and cafés indicate such charges clearly and unambiguously.

On balance, it appears that the application of the clarity in pricing amendments to Sunday and public holiday menu surcharges used by restaurants and cafés have imposed costs on these businesses without providing any significant additional benefit to consumers.

DRAFT RECOMMENDATION 3.3

The Australian Government should amend the Trade Practices Act 1974 to have restaurant and café menu surcharges for specific days placed outside the scope of the component pricing provisions of that legislation.

3.4 Responsible service of alcohol training

The Australian Hotels Association (sub. 10) raised concerns with the lack of mutual recognition of responsible service of alcohol (RSA) training across jurisdictions. It is mandatory in all jurisdictions for staff serving liquor to have completed a responsible service of alcohol course prior to being able to serve liquor.

Consequently, training has to be replicated for staff working across jurisdictions which impedes labour mobility and results in additional costs to employers. The AHA said:

> The different state regulatory bodies have different requirements surrounding regulatory compliance with Responsible Service of Alcohol (RSA) which mainly relate to knowledge of the local licensing laws. The actual responsible service training is by and large consistent. The differences across State and Territory borders can present a significant obstacle to the ability to employ trained staff in hotels. Employees of licensed hospitality venues are unable to obtain a portable RSA certification to work in

the industry across Australia. This leads inevitably to additional costs in each jurisdiction as training must be replicated, and is a significant obstacle to the mobility of labour across borders. (sub. 10, pp. 10-11)

Assessment

The lack of recognition of RSA training across jurisdictions appears to be an ongoing problem. In 2006, the Ministerial Council on Drug Strategy (2006), indicated that the establishment of consistent RSA training recognised and accepted across jurisdictions was a priority for its National Alcohol Strategy. This was also included in its National Strategy on Binge Drinking submitted to COAG for consideration (COAG 2008a).

Consistency in the actual training of responsible alcohol service across jurisdictions does not appear to be at issue, but rather that such training is able to incorporate knowledge of local requirements. One possible approach, as suggested by the New South Wales Department of Arts, Sport and Recreation (2009), would be to address any specific local knowledge requirements, such as local licensing requirements, via an on-line or face-to-face learning module in RSA training.

Clearly, the lack of mutual recognition impacts on labour mobility and imposes additional costs on those businesses operating across jurisdictions. Given that the Ministerial Council on Drug Strategy has indicated the need to have RSA training accepted across jurisdictions, COAG should develop and implement such arrangements as soon as possible.

DRAFT RECOMMENDATION 3.4

The Council of Australian Governments should develop and implement mutual recognition arrangements in respect of Responsible Service of Alcohol training as soon as possible.

3.5 Zoos and the regulation of imported animals

Australian zoos are subject to a complex regulatory environment that features both Commonwealth and state and territory regulation. Regulation is also partially based on international treaties to which Australia is a signatory, including the Convention on International Trade in Endangered Species and Wild Fauna and Flora (CITES).

Issues raised in this area focussed on the restrictive conditions placed on imported specimens listed in Appendix I of CITES (CITES I), the onerous approval requirements that must be met in order to import a new species into Australia,

inconsistent and ambiguous terminology in the regulations governing the import of specimens as well as the licensing and compliance inconsistencies across jurisdictions.

Import restrictions on CITES I animals

A number of participants to this review raised concerns relating to the conditions placed on the importation of species listed in CITES I. Industry considered that the current import regulations surrounding the importation of CITES I specimens were too restrictive and did not adequately take into account the role of zoos in conserving endangered species.

For example, the Tourism and Transport Forum (sub. 5) suggested that the current regulations ignored the important role that zoos played in increasing the awareness of the plight of endangered species in the wider community when these species were used for exhibition purposes:

> … the EPBC Act fails to recognise the significant contributions Australian zoos make to conservation outcomes through the exhibition of a species for community education and awareness. Often exotic and endangered species held in zoos act as an ambassador for the conservation and protection of the species in the wild. (sub. 5, p. 16)

Assessment

Under the EPBC Act, a CITES I specimen can only be imported into Australia for a limited number of non-commercial purposes, including for conservation breeding, research or education.

The import restrictions placed on CITES I specimens are largely reflective of Australia's international obligations as a signatory of the CITES treaty. CITES I species are those deemed to be threatened with extinction, and therefore trade in these species is highly regulated. The convention is binding and as such, all parties to CITES (of which there are 175 member nations) are expected to enforce the import restrictions on animals included in Appendix I.

This issue was examined by the Independent Review of the Environment Protection and Biodiversity Conservation Act (2009). The final report found that:

> The Act's prohibition on importation of CITES Appendix I animals for exhibition purposes is stricter than CITES requirements. This policy should be reviewed unless it can be shown to have conservation benefits (Independent Review of the Environment Protection and Biodiversity Conservation Act, 2009, p. 244).

The decision to impose stricter conditions on the import of CITES I specimens than what is required as a signatory to the CITES agreement and the role of zoos in conserving these animals is ultimately a policy decision for the Australian Government and therefore beyond the terms of reference of this review. However, the Commission understands that this issue is likely to be addressed in the Government's response to the Independent Review into the EPBC Act, expected to occur in the middle of 2010 (Garrett, 2009).

Onerous approval requirements when new importing species into Australia

Concerns were also raised with regard to the multiple approval processes required to import a new species and the resulting burden on businesses (sub. 5).

Currently, those seeking to import a new species into Australia must go through several processes. In instances where relevant risk management procedures have not previously been established — as is typically the case when a species is imported into Australia for the first time — the importation of animals is subject to an Import Risk Analysis (IRA) prepared by Biosecurity Australia. The IRA is used to assess the risk of the species introducing disease into Australia, with appropriate requirements then placed on the import to control for these risks. This might include sourcing the species from a particular area, or applying treatment or medication prior to importation.

The animal must then be placed on the 'List of Specimens Taken to be Suitable for Live Import' which is administered through the Department of the Environment, Water, Heritage and the Arts (DEWHA). As part of this process, DEWHA seeks the approval from the National Vertebrate Pest Committee (NVPC), who assess the risks associated with the species forming feral populations and becoming environmental pests.

Upon being placed on the list, approval is then required from the relevant state based vertebrate pest committee, despite the fact that there are state representatives on the NVPC.

If the animal is a CITES listed species, or is placed on 'Part 2' of the 'List of specimens taken to be Suitable for Live Import', the importer must also apply to DEWHA for a permit to import a specimen into Australia.

Industry also perceived there was unnecessary burden associated with having a species added to the 'List of Specimens taken to be Suitable for Live Import' when

other similar species (particularly species of the same genus) were already on the list.

Assessment

Regulating the circumstances in which animals may enter Australia plays an important role in shielding Australia from overseas pests and diseases that could prove damaging to Australia's natural fauna and agricultural industries.

Having said this, the Commission is mindful that these regulations impose a cost on businesses, and that these costs are heightened by the need for businesses to liaise with several government agencies in order to gain approval to import a new species into Australia.

In 2008, a review into Australia's quarantine and biosecurity arrangements recommended the establishment of a National Biosecurity Authority to, amongst other roles, maintain Australia's biosecurity status (Beale, Fairbrother, Inglis and Trebeck, 2008). The Government has since agreed in principle to this recommendation. In 2009, the Independent Review of the Environment Protection and Biodiversity Conservation Act was asked to explore the possibility of incorporating many of the environmental biosecurity functions that currently operate under the EPBC Act — including control of live animal and plant imports — into the jurisdiction of the National Biosecurity Authority. In conditionally recommending this, the Review noted that:

> Moving the live import function to the new Authority would allow for a simplified Government approach, with the new authority having primary responsibility for all biosecurity-related imports and exports (a 'single face' at the border). It would also reduce regulatory burden for importers and avoid administrative duplication (Independent Review of the Environmental Protection and Biodiversity Conservation Act, 2009, p. 370).

The review also recommended a single permit process along with a proposal that a 'quick yes' and a 'quick no' option be made available to regulators when considering whether or not a species should be placed on the 'List of Specimens Taken to be Suitable for Live Import'. This would mean that, where circumstances permitted, decisions regarding whether a new species should be imported into Australia could be made expediently and without the need for a full environmental risk assessment, resulting in a lower administrative burden on business. (Independent Review of the Environmental Protection and Biodiversity Conservation Act, 2009, p. 221).

The Government is expected to respond to these recommendations in mid-2010 (Garrett, 2009).

Inconsistency and lack of clarity in the Act and regulations

The Tourism and Transport Forum (sub. 5) raised the inconsistent and ambiguous use of the terms 'commercial', 'non-commercial' and 'not primarily for commercial purposes' in the Act and regulations:

> Under Section 303FF of the EPBC Act and Section 9A.12 of the EPBC Regulations an animal may be imported for the purpose of conservation breeding so long as the import is not '*primarily* for commercial purposes'. The Department of Environment, Water, Heritage and the Arts (DEWHA) requires the importer seeking approval for a Cooperative Conservation Program to declare the imported species 'will not be used for *commercial* purposes'. The discrepancy in what constitutes 'primarily commercial purposes' and 'commercial purposes' requires clarification (sub. 5, p. 16)

Assessment

Inconsistency or a lack of clarity associated with the terms 'not primarily for commercial purposes' and 'not for commercial purposes' may result in confusion for zoos and related businesses.

For example, the Act refers to allowing imports and/or export of CITES specimens for conservation breeding or propagation if the import and/or export is not 'primarily for commercial purposes'. Whereas, under the regulations, an approved conservation breeding program refers to the requirement that a specimen in the program is' not to be used for commercial purposes'.

The Commission understands that some clarification of the terms 'commercial' and 'non-commercial' is provided in the EPBC Act and the explanatory memorandum to the EPBC Act. However, the different terms used in the Act and in the regulations regarding the commercial use of CITES specimens were seen by the industry as being ambiguous and lacking a clear and concise definition.

Given this, the Commission can see merit in revising the EPBC Act, and its subsequent regulations and memoranda to ensure consistency between the Act and regulations in regard to the commercial use of these animals. This would allow importers of animals greater certainty and clarity in what activities they were permitted to use an imported specimen for, and assist them to make informed decisions.

The Department of Environment, Water, Heritage and the Arts should revise the Environment Protection and Biodiversity Conservation Act and its relevant regulations and memoranda to ensure that reference to the commercial use of imported specimens is consistent and clearly defined.

Licensing and compliance inconsistencies across jurisdictions

The Tourism and Transport Forum (sub. 5) also expressed concern at the differing licensing and compliance standards for zoos across different jurisdictions, which could complicate the transfer of animals between parks. It said:

> A zoo may develop a compliant facility approved by the relevant state agency but be deemed non-compliant when assessed at a federal level. Such inconsistencies have significant impacts on zoo resourcing and the potential to participate in regional breeding programs. (sub. 5, p. 17)

Assessment

At present, standards in zoos are regulated by the Australian Government and the state and territory governments. These regulations operate concurrently with self-regulation at a national level, whereby the Zoo and Aquarium Association impose requirements on institutions as a condition of membership that include accreditation procedures and compliance with a code of practice and a code of ethics. In some circumstances, zoos also face different requirements depending on how they operate — for example, in some jurisdictions, government run zoos face different requirements to privately operated zoos.

The Department of Agriculture, Fisheries and Forestry (DAFF) has recognised the variation in standards across jurisdictions and the need to standardise these requirements as part of the Australian Animal Welfare Strategy (DAFF 2007). In June 2009, after consultation with the industry and other stakeholders, DAFF released the draft *Australian Animal Welfare Standards and Guidelines: Exhibited Animals*. The intention is that these standards will ensure that animals will be kept in uniform conditions regardless of where they are exhibited in Australia.

A range of issues are covered in the standards, including staffing responsibilities, enclosure requirements, dietary requirements and quarantine. Upon further input from stakeholders, these standards and guidelines will be finalised and presented to the states and territories for formal adoption. After being implemented for 5 years,

the standards will be reviewed, and added to or amended after further consultation with relevant parties.

The Commission considers that the finalisation and ratification of these standards will contribute to a convergence of zoo standards and requirements across jurisdictions, and encourages DAFF to continue to liaise with stakeholders as it proceeds towards the implementation of these standards.

3.6 Employment related issues

Superannuation guarantee

The Restaurant and Catering Australia (sub. 8) put forward concerns surrounding the compliance burden related to the superannuation guarantee. The key concern was the monthly income threshold which required those employees earning $450 per month to be included in the superannuation guarantee arrangements. This threshold was considered inappropriate as the:

- industry has a transient workforce, with many staff working casually for short periods and then leaving
- threshold has not increased while award wages have increased
- administrative burdens on small business associated with making very small payments to many staff are significant while the benefits to staff are questionable (sub. 8)

The Restaurant and Catering Australia (sub. 8) suggested applying a time threshold of three months employment before an employee was included in these arrangements, or an increase in the value of the threshold.

Assessment

Adjustments to the threshold would reduce the compliance costs associated with the superannuation guarantee. The Commission notes that the earning threshold of $450 a month was introduced in 1992 as part of the arrangements to reduce administration costs and, although wages have grown significantly since then, the $450 threshold has not been increased.

To reduce compliance costs for employers and for funds administrators, the Regulation Taskforce (Australian Government 2006) recommended increasing this threshold to around $800 a month — this represented approximate indexation to

average weekly ordinary time earnings since the introduction of compulsory superannuation in 1992 — and subjecting it to periodic review.

The Commission examined this issue in its review of regulatory burdens on the Primary Sector (PC 2007). It acknowledged that increasing the superannuation guarantee exemption threshold would reduce superannuation guarantee coverage and may disadvantage some long-term casual and part-time workers. However, the Commission is still of the view that increasing the threshold and further periodic review is warranted as the compliance costs in these instances may be disproportionate to the benefit received by the employees. In many cases, younger transient workers tend to generate multiple unclaimed superannuation accounts containing small amounts.

Increasing the threshold would mitigate the effects of inflation on the exemption and reduce the regulation associated with the arrangements from expanding over time. It would also be consistent with the original intention of the arrangements to reduce administration costs. Determining the appropriate increase to the threshold will require a process that balances the need to protect the retirement savings of low income employees with the compliance costs associated with the arrangements.

DRAFT RECOMMENDATION 3.6

The monthly earnings threshold of the superannuation guarantee should be increased through an appropriate process and subject to periodic review established by the Treasury.

Information campaigns on industrial relations changes

Restaurant and Catering Australia (sub. 8) noted the importance of industry associations in providing advice to small businesses on employment matters. It called for the Australian Government to adequately resource the implementation of industrial relations reform through an information campaign with industry associations.

Having adequate information available to businesses concerning proposed changes to the industrial relations arrangements is important. However, the resourcing of any information campaign is a matter of Government policy and outside the scope of this review.

Administration surrounding apprenticeships and traineeships

Restaurant and Catering Australia (sub. 8), drawing on comments from focus groups attached to the National Skills Shortages Strategy, raised concerns about the administrative burden attached to employing apprentices and trainees. These comments recognised that although registered training organisations were undertaking much of the paperwork on their behalf, a significant workload remained for employers. However, the paperwork attached to apprentices and trainees was a drawback to recruitment and a concern for small businesses lacking the resources to manage these employees.

A further issue involved the incentive payments surrounding the employment of apprentices and trainees. Restaurant and Catering Australia (sub. 8), drawing on problems reported through the Office of Small Business, noted that some employers were unable to access the initial incentive payments for an apprentice as earlier studies undertaken by the apprentice had been deemed to be part of the apprenticeship. A further possible problem was that if an apprentice was 'poached' or left to work for another business, the original employer could miss out on the payment/s despite having invested in the apprentice's previous training.

It suggested that there be a review of administrative and employer incentive arrangements surrounding the New Apprenticeship Scheme.

Assessment

Excessive administration surrounding the employment of an apprentice or trainee is a disincentive for an employer to employ such workers. Although, registered training organisations, as recognised by employers, undertake much of the required paperwork, the residual administrative requirements can be a burden to smaller businesses. In employing a trainee or apprentice there will be a certain amount of administration required on the part of the employer. However, it is important, particularly in the case of smaller businesses, that this administrative workload is appropriately balanced between the employer and training organisation.

Determining the conditions for access to incentive payments for employing trainees or apprentices is a policy matter for the Australian Government, as well as for the state and territory governments offering incentives in this area. Nevertheless, a widespread inability of employers to access such incentives could be detrimental to the overall objective of these schemes.

The Department of Education, Employment and Workplace Relations (DEEWR) commented that the Australian Apprentices Incentives Program is structured to

encourage employers to provide employment to apprentices through to the completion of their apprenticeship. The Government has recently discontinued the sharing of incentive payments for completion of the apprenticeship between employers due to complexities in the process, the lack of take up of the incentives and to encourage employers to retain their apprentices through to the completion of their training.

It also noted that there were eligibility requirements to the Australian Apprentices Incentives Program, which is aimed at assisting individuals to attain their first qualification or a higher qualification than that already held. Consequently, employers of apprentices holding prior qualifications at a higher level are not entitled to receive such incentives. In addition, DEEWR pointed out that the Government in conjunction with the Australian Apprenticeship Centres — the agencies contracted to deliver support services to employers and apprentices — are currently reviewing the administrative arrangements surrounding the Australian Apprenticeships with a view to implementing further efficiencies (DEEWR pers. comm. 6 April 2010).

It does not appear that a broad ranging review is required. A Taskforce was established by COAG in 2009 to investigate and make recommendations to support the engagement and retention of apprentices. The Taskforce proposals were considered by COAG and framed as actions to be implemented through the Ministerial Council on Training, Education and Employment (MCTEE). They included the implementation of a more seamless apprenticeship system with regard to access, re-entry, deferral and support of apprenticeships. COAG further agreed to undertake an immediate review to re-prioritise apprenticeship and trainee incentives. The MCTEE is to report on the outcomes of these agreed actions prior to the end of 2010 (Australian Apprentices Taskforce 2009).

OHS

Restaurant and Catering Australia (sub. 8) acknowledged that the Government was working towards OHS harmonisation across jurisdictions. To this end, it suggested industry associations be used to ensure consistency across industry groupings. Although such organisations are likely to have an important role to play in this area, the scope and scale of their involvement is a matter for these associations and the Government.

3.7 Travel related charges

The Tourism and Transport Forum (sub. 5) raised concerns regarding the Passenger Movement Charge and the cost of particular visas. These charges and fees were seen as impacting on the relative competitiveness of Australia as a tourist destination.

Passenger Movement Charge

The Passenger Movement Charge (PMC) was introduced in 1995 to replace the Departure Tax. It places a charge on all passengers leaving Australia which is collected by airlines and shipping companies and passed on to the Australian Government. These charges were introduced to meet the costs of providing immigration, customs and quarantine services.

The Tourism and Transport Forum (sub. 5) is critical that there is no assessment of the costs the PMC was purported to cover as the PMC receipts go into consolidated revenue. It called for a transparent mechanism for determining the costs of providing immigration, customs and quarantine services to ensure the PMC did not exceed these costs. In addition, it suggests that the PMC be examined by the Australian Government in light of the recent review of Australia's Tax System ('The Henry Review').

These issues were raised by the aviation sector in the Commission's 2009 Review of Regulatory Burdens on Business (PC 2009a). The Commission concluded that whether the PMC operates on a cost recovery basis or as a general revenue raising instrument is a policy issue for the Australian Government and outside the scope of the review process.

Visa charges

The Tourism and Transport Forum (sub. 5) noted that international delegates to conventions and exhibitions required a business visa when entering Australia. Delegates from the European Union and other European countries were eligible for an online electronic visa at no charge and other prescribed nations could obtain and electronic travel authority for $20. However, international convention delegates from other locations such as the Middle East, China and India had to apply for a 456 business visa at a cost of $105. Similarly, the Student Guardian Visa currently costs $450 and the processing time was longer for some regions and countries of origin such as the Middle East and India.

The TTF (sub. 5) considers that these arrangements placed Australia at a disadvantage in winning bids to host conventions and in the growing the market for overseas students.

The Commission notes that these variations in visa arrangements and charges reflect the different processing times required for arrivals from particular destinations, which in turn reflects the relative risk of non-compliance with visa requirements and immigration regulations associated with arrivals from these destinations. Other differences are a result of agreements between the Australian Government and other countries relating to visa and entry requirements.

Tourist Refund Scheme

The Tourist Refund Scheme (TRS) is seen by the Tourism and Transport Forum (sub. 5) as providing a confusing and limited service for travellers. The TRS enables both overseas visitors and Australian travellers to have the GST refunded on certain purchases at the airport or wharf prior to their departure. The TRS applies to goods taken out of Australia that are worth more than $300 and are on a single invoice from the one store. The goods must be worn or carried on board the departing aircraft or ship.

The Tourism and Transport Forum (sub. 5) called for the scheme to be widened to enable international visitors to claim a refund on the GST on all goods and services, including restaurants and accommodation, purchased in Australia for which they held a receipt.

Although such a change would clearly provide benefits to international visitors, any widening of the TRS is a matter for tax policy and is outside the scope of this review.

3.8 Environmental related issues

Dual approval process and uncertainty for tourism development

The Tourism and Transport Forum (sub. 5) commented that tourism developments are often in areas of environmental or heritage significance. This often results in duplicate and uncertain approval processes where such developments required both Australian Government and state government approval. In particular, such issues included:

- the complex jurisdiction of the EPBC Act
- time delays due to Australian and state governments involvement
- a highly politicised process between governments, stakeholders and tourism proponents (sub. 4).

DRET (sub. 15) suggested that state and territory environmental regulations were preventing the development of tourism in ecologically sensitive areas. It also called for the Commission or COAG to request the Business Regulation and Competition Working Group to examine the opportunity and compliance costs arising from state and local government environmental approval processes.

The complexities of approving projects in relation to the EPBC Act and the overlap and duplication with state and territory processes have been raised in previous reviews of regulatory burdens on business undertaken by the Commission, such as those dealing with mining operations. In response to these issues, the Commission highlighted the lack of progress in negotiating bilateral assessment agreements to overcome duplication and overlap between the EPBC Act and state and territory approval processes (PC 2007).

In response to a wide range of concerns about the operation of the EPBC Act, the Australian Government commissioned an independent review of the Act. This review was asked to examine a range of issues including simplifying the regulatory burden on people, businesses and organisations while maintaining appropriate and efficient environmental standards.

It made a number of recommendations to improve regulatory efficiency in respect of delays and uncertainty in the development of major infrastructure and other projects. These included:

- greater reliance on and accreditation of state and territory processes, subject to meeting appropriate standards
- improvements to the project approvals and environmental impact assessment processes
- earlier engagement of the Commonwealth in decision-making through the use of strategic assessment and regional planning (Independent Review of the EPBC Act 2009).

The Property Council of Australia (PCA) (sub. 21) welcomed the reforms proposed by the Independent Review, in particular the proposals to streamline and simplify approval processes, which demonstrated a commitment to cutting red tape and making sensible decisions on the environment. However, the PCA was concerned with the application of the Act and its potential impact on business. As an example,

it pointed to the potential for public interest litigation to target certain businesses and create costly and unnecessary delays due to vexatious claims brought before the courts (sub. 21).

In conclusion, the Commission notes that the report was tabled in Parliament in December 2009 and the Government has not yet responded. Although it is not clear whether such changes, if implemented, will overcome industry concerns, it is unlikely that they will be able to completely alleviate the inherent conflict between competing interests regarding tourist developments in areas of environmental or heritage significance.

Duplication of environmental surveys

The Australian Hotels Association (AHA) (sub. 10) commented that the National Greenhouse and Energy Reporting (NGER) requirements duplicated the same information as the ABS Energy and Water survey. It said:

> These surveys duplicate the information required by the NGERS reporting scheme, in that the NGERS data is a subset of the ABS requirements. …
>
> The ABS forms are differently formatted and laid out, but essentially require the same information. (sub. 10, p. 6)

The Commission understands that the ABS survey was a 'one-off' in 2008-09 and is not part of an ongoing series. The overlap of information was used to identify differences in coverage between the surveys and differences in populations. In the future, such information would be obtained from the National Greenhouse and Energy Reporting data.

Legislative objectives for the management of Australian Government Reserves

The Tourism and Transport Forum (sub. 5) proposed including sustainable tourism as a management objective for Australian Government reserves in the EPBC Act.

The benefit or otherwise of including such objectives in the EPBC Act are beyond the scope of this review. Including such an objective in the legislation is a broader policy issue that would need to balance commercial objectives and environmental concerns.

3.9 Other issues

Planning and zoning issues

DRET (sub. 15) called for the Commission to examine a number of planning and zoning related issues impacting on the tourism sector. These included:

- assessing the impact of planning codes on the tourism sector
- examining the compliance costs arising from state and local government planning approval processes and the extent to which they should be streamlined
- the interaction between the Australian Government's oversight of certain land planning arrangements in the ACT and the ACT Government's planning system.

Such issues are beyond the scope of this review. Planning and zoning arrangements, in the main, are under the control of state and territory governments and given the breadth and complexity of such issues a detailed examination would require a stand alone review. Also, COAG has recently requested the Productivity Commission to undertake a performance benchmarking review of state and territory planning and zoning systems and development approval processes.

In regard to the interaction between the Australian Government's oversight of land planning in the ACT and the ACT's land planning systems, a Parliamentary inquiry was conducted by the Joint Standing Committee on the National Capital and External Territories into the role of the National Capital Authority in 2008. This inquiry was tasked with reducing duplication between Australian Government and ACT planning authorities. To this end, the Committee recommended delegating certain planning functions to the ACT Planning and Land Authority. In its response, the Australian Government (2008) said that it did not consider this would achieve a reduction in the complexities in planning and land management responsibilities. It also announced its intention to establish an intergovernmental committee to determine how best to simplify the land planning and management responsibilities that are divided amongst several stakeholders in the ACT.

Indigenous land title

DRET (sub. 15) noted that as Indigenous land title in the Northern Territory was community based, traditional land owners were unable to use their equity in their land to fund commercial ventures including tourism related enterprises. DRET (sub. 15) called for the Commission to examine the impact of Indigenous land rights on the Indigenous tourism sector.

The issues surrounding Indigenous land title and the development of Indigenous enterprises are outside the scope of this review.

Revisiting the Inquiry into the Conservation of Australia's Historic Heritage Places

DRET (sub. 15) called for the Commission to revisit the key recommendations of its 2006 inquiry into the Conservation of Australia's Historic Heritage Places to assess if the regulation continues to impose costs on private owners.

These issues are beyond the scope of this review and such an assessment would need to be conducted in the context of a review similar to the 2006 inquiry.

GST and FBT related issues

The Tourism and Transport Forum (sub. 5) also raised two GST related issues. The first related to the process of reclaiming GST on the business related travel expenses incurred in taking part in a conference or business event. It suggested creating a standard methodology to enable GST to be reclaimed for the entire business event or conference as opposed to reclaiming individual inputs such as accommodation and venue hire

The second issue concerned the application of the GST to serviced apartments. The Tourism and Transport Forum (sub. 5) commented that the uncertain or non-application of GST to serviced apartments was providing serviced apartments with a price advantage in the short term accommodation market relative to hotels and motels which universally applied the GST. It called for all short term letting of rooms to be subject to GST.

The Australian Hotels Association (AHA) (sub. 10) raised the issue of an Australian Taxation Office (ATO) ruling on GST payments having to be made on deposits for services. The previous policy allowed hotels to make the GST payments on deposits when the service had been delivered. However, since 2007, when payments are accepted as a security deposit, GST must be paid on the total amount of supply, not the amount paid as the deposit. Although formal representations have been made to the ATO, by the tourism and hospitality sectors, the ATO has ruled against such appeals (sub. 10).

Under the ruling GSTR/2006/2, a security deposit held as an assurance to perform an obligation is not subject to GST. Such a deposit only becomes subject to GST if it is forfeited or applied as a part-payment. Part-payments are subject to GST. How

GST is to be paid on a part-payment depends on the accounting basis used. For non-cash or accrual accounting, GST is to be reported on the full value of the supply on receiving a part-payment. For cash accounting, GST is payable on the part-payment in the period the payment was received (ATO 2010).

Restaurant and Catering Australia (sub. 8) noted the complexity of compliance with the FBT arrangements and that it was an obstacle to having employers and employees utilise flexible remuneration arrangements to meet their needs. It called for the removal of expenditure on business meals from FBT coverage and for this expenditure to be made non-deductible.

These concerns are related to specific applications of the GST and FBT. Such issues concern tax policy and are outside the scope of this review. However, the Commission notes that the ATO and the Board of Taxation have undertaken to regularly review the compliance and administration costs associated with the GST as part of reducing compliance costs and removing anomalies (Board of Taxation 2008, Bowen 2008)

Food safety regulation

Restaurant and Catering Australia (sub. 8) raised concerns with regard to the food safety plans required by businesses in Victoria due to the significant resources required for monitoring and record keeping. It went on to call for a new approach to be developed as part of the review of the Food Ministers Guidelines on food safety plans.

The issues associated with food safety plans are related to state government regulation and outside the scope of this review

Transport related issues

Taxis

DRET (sub. 15) noted that state and territory government regulation limiting the number of taxis was likely to result in higher prices, longer waiting times and lower levels of customer service, which had negative impacts on the tourism sector. While acknowledging that deregulation was not a simple issue for state and territory governments, particularly due to issues surrounding compensation of existing licence holders, it called on the Commission to consider options for reform.

The Commission has undertaken research in this area. In its research paper on regulation in the taxi industry, the Commission (PC 1999) found that the removal of regulations that restrict the number of taxis would result in significant benefits for consumers through lower prices, shorter queues or a combination of both. However, it would also result in large losses for current licence holders by eroding most of the premium currently being paid for a licence.

It also found that because of differences between taxi markets and associated administrative arrangements in different parts of Australia, questions of compensation and adjustment assistance may require different responses by individual state and territory governments. To this end, the research paper set out a framework to assist governments in deciding on the nature and extent of any such transitional assistance. The Commission notes that since the release of the research paper most jurisdictions have undertaken some form of pro-competitive reform to their taxi industries.

International aviation agreements

DRET (sub. 15) also suggested that the Commission examine means to increase competition in international passenger air services through the use of multi-lateral arrangements.

The Commission undertook an inquiry related to this matter in 1998 (PC 1998). These issues have been the subject of ongoing policy consideration and were more recently canvassed in the Australian Government's Aviation White Paper (Australian Government 2009f) which outlined the Governments policy to pursue more liberalised air service agreements with like minded partners where it was in the national interest.

Ministerial Guidelines and permits under the Navigation Act

A further suggestion by DRET (sub. 15) was to have the Commission consider the development of the tourism cruise shipping industry in the context of the Ministerial Guidelines relating to the issuing of permits under Part VI of the *Navigation Act 1912*. This legislation sets out the licensing arrangements applying to coastal shipping. These provisions require foreign flagged vessels to obtain a licence and employ crew under Australian pay and conditions when operating in Australian waters. They also set out the conditions under which the Minister is able to issue permits for non-licensed vessels.

The role of the Ministerial Guidelines in developing the tourism cruise shipping industry, as opposed to issues of regulatory burden, is outside the scope of this review.

4 Regulatory barriers for occupations

Key points

- The requirement that architects must register and pay a separate registration fee in each state and territory that they wish to practise in, acts as a barrier to architects working across jurisdictions. A national register, based on mutual recognition principles, should be implemented so that architects that satisfy the requirements in any one jurisdiction would automatically be permitted to practise in all jurisdictions within Australia.
- Lawyers wishing to practise as migration agents must comply with both the Australian Government regulatory scheme for migration agents and legal profession regulation under state and territory laws. This creates a disincentive for lawyers to practise migration law, and has perverse effects for consumers. Existing regulation of the legal profession affords adequate consumer protection and lawyer agents should be exempt from the Migration Agents Registration Scheme.
- Different regulatory treatment of the administration of personal insolvency and corporate insolvency imposes an unnecessary regulatory burden on insolvency practitioners and is impeding the efficient conduct of the insolvency regime. A reform taskforce should be established to identify provisions and processes that could be aligned. The Government should also examine the case for making one regulator responsible for both areas of insolvency law.
- Inconsistent state and territory real property laws are creating an uncertain business and consumer protection environment. COAG's Business Regulation and Competition Working Group, in consultation with relevant Ministerial Councils, should oversee the development of a Uniform Real Property Act for adoption in all Australian jurisdictions.
- Audit firms can be subjected to audit inspections and quality reviews by multiple domestic and international inspection bodies. ASIC should expedite and expand its current work exploring opportunities to rationalise and streamline inspection processes for audit firms.

This chapter assesses various concerns about regulations impacting on particular occupations and business activities classified to ANZSIC Division L (Rental, Hiring and Real Estate Services) and Division M (Professional, Scientific and Technical Services). More specifically the occupations discussed are:

- Architects (section 4.2)
- Lawyers/migration agents (4.3)
- Accountants/auditors (4.4)
- Insolvency practitioners (4.5)
- Property services-related occupations (4.6).

4.1 Introduction

The Commission has, over many years and in several reviews and inquiries, identified occupational regulation as an area where there is substantial scope to reduce regulatory burdens and improve economic efficiency (see for example PC 2000, 2005, 2008a). In broad terms, unnecessary burdens in this area can arise from three main sources:

- government regulation of a particular occupation that is unnecessary and should be abolished — regulation of the activity may be more appropriately left to generic regulation, such as competition and occupational health and safety laws, sometimes in conjunction with industry self-regulatory schemes
- differences in regulation of particular occupations *across jurisdictions* that increase transaction costs and act as a barrier to labour mobility and/or the provision of services across state and territory borders
- specific aspects of the regulatory controls applying *within a jurisdiction* that are poorly designed and/or overly restrictive — this includes regulation that does not satisfy national competition policy principles and overlapping or inconsistent laws applying to the same occupation.

The Commission's *Review of Australia's Consumer Policy Framework* (PC 2008a) found that there were several hundred, mainly state and territory laws, covering a large number of occupations, including many in building trade related areas, credit providers, vehicle sales, travel agents, pawnbrokers and second-hand dealers, and various professional occupations. Some occupations are also regulated, either primarily or to some extent, through Australian Government regulation or National regulatory schemes.

An important feature of many occupational-specific regulatory schemes is some sort of registration or licensing requirements (the term licensing is often used to also broadly cover mandatory registration systems) that control entry to, and the standards of practice within, a particular occupation. Occupational registration and licensing systems have developed in different ways in each jurisdiction and, depending on the jurisdiction and occupation in question, licensing may be focused on different objectives, including consumer protection, occupational health and safety or public safety.

With respect to consumer protection objectives, occupational licences and associated requirements can help to overcome problems arising from information asymmetries that make it difficult for consumers to judge the quality of a service before or after its provision.[1] While the case for the licensing and stringent regulation of certain activities is clear, the net benefits of regulation of some other occupations are less apparent. Legislative reviews under National Competition Policy (NCP) found that in many cases the benefits of occupational regulation were questionable or outweighed by the anti-competitive effects of associated barriers to market entry, such as higher prices and reduced choice for consumers.

Although many of the unjustified anti-competitive elements of regulatory arrangements were addressed through reforms in response to the recommendations of NCP legislative reviews, some remain a concern. The National Competition Council (PC 2008b, p. 489) found that more than 30 licensing regimes did not comply with national competition policy principles. In these cases unnecessary barriers to entry are the main concern and the regulation typically affords significant benefits to incumbent businesses and professions (that outweigh any associated compliance costs for those activities). It is potential entrants to the activity and consumers that are generally disadvantaged by the regulatory regime.

Recognising such potential costs, the Commission, in its 2008 review of consumer policy, emphasised the importance of not overusing licensing. Moreover, it was the Commission's view that the significant differences across jurisdictions in the use of occupational licensing (the Commission found that, of the nearly 100 occupations licensed by states and territories, more than 30 were licensed in only one or two jurisdictions), raised doubts about the need for licensing of those occupations. The Commission recommended the rationalisation of occupational licences, whilst retaining the necessary protections for consumers. It pointed out that, since occupational licensing mainly applies to small business operators, the removal of

[1] Information asymmetries occur when one side to a transaction has access to less or less accurate information about the nature of the product or service being exchanged than the other side.

unnecessary requirements and the national consolidation of others could provide substantial savings to small business.

Even where the continuing regulation of an occupation is justified, there can be scope to improve the efficiency of that regulation so as to minimise the compliance costs for those subject to the regulation and any unnecessary costs for consumers or other groups in the community. Differences across jurisdictions in occupational regulation can be a major source of unnecessary costs and a barrier to practising an occupation across state and territory borders. There are often significant differences in the regulation of the same licensed occupation, including in relation to the scope of activities covered, eligibility and conduct requirements, disciplinary arrangements, licence fee structure, nomenclature and duration.

The Mutual Recognition Agreement (MRA) was implemented in 1992 with the aim of improving the mobility of licensed individuals (and goods) across Australian jurisdictions. Under the MRA, registration to practise an occupation in one state or territory jurisdiction is sufficient grounds for registration in the equivalent occupation in any other of those jurisdictions.[2]

In 2003, the Commission undertook an Evaluation of the Mutual Recognition Schemes (PC 2003). It found that mutual recognition had generally been effective, but identified some improvements that could be made to the design of the schemes in relation to their operation, coverage and scope. Various initiatives were introduced, as part of COAG's response to the Commission's Report, to enable people with qualifications to move more freely across borders without the need for additional testing and registration.

The Report of the Taskforce on Reducing Regulatory Burdens on Business, in 2006, found that mutual recognition had not been fully implemented. While recognising COAG's work on improving the effectiveness of the national training system in trade-related occupations, the Taskforce considered this could be extended to include the professions and para-professionals. The Taskforce recommended that:

> COAG should consider measures to align the national training system with occupational licensing and registration regulations, including the development and adoption of minimum effective national standards for licensing and registration across a range of industries and sectors (Regulation Taskforce 2006, p. 43).

Two important areas of COAG's current National Reform Agenda aim to reduce unnecessary barriers to entry to certain occupations and barriers to trade across state

[2] In 1998, the Trans-Tasman Mutual Recognition Arrangement (TTMRA) extended the mutual recognition principle to the practice of equivalent occupations between Australia and New Zealand.

and territory borders for those occupations. The first involves rationalising the number of occupational licenses in operation with particular reference to those occupations which are licensed in only one or two jurisdictions. The second involves a national licensing system for specified occupations (box 4.1).

Box 4.1 National Licensing System

The April 2009 *Intergovernmental Agreement for a National Licensing System for Specified Occupations* has the following objectives:

- ensure that licences issued by the national licensing body allow licensees to operate in all Australian jurisdictions
- ensure that licensing arrangements are effective and proportional to that required for consumer protection, and worker and public health and safety, while ensuring economic efficiency and equity of access
- facilitate a consistent skill base for licensed occupations
- ensure that effective coordination exists between the national licensing body and relevant jurisdictional regulators
- promote national consistency in:
  - licensing structures and policy across comparable occupational areas
  - regulation affecting the conduct requirements of licensees
  - the approaches to disciplinary arrangements affecting licensees
- provide flexibility to deal with jurisdiction or industry specific issues
- provide access to public information about licensees.

Source: COAG (2009a, p. 4).

The National Licensing System is to be implemented in a phased approach, with:

- the first tranche of occupations — electrical, air conditioning and refrigeration, plumbing, gas fitting and property services — to be included by 1 July 2012
- the second tranche of occupations — building and building-related occupations, land transport (passenger vehicle and dangerous goods), maritime occupations, conveyancers and valuers — to be included by 1 July 2013 (COAG 2009b).

The states and territories separately committed to establishing a national registration scheme for the nine health professions that are registered in all jurisdictions.[3] This

[3] The *Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions* (COAG 2008b) was signed in March 2008 and covered physiotherapy, optometry, nursing and midwifery, chiropractic care, pharmacy, dental care, medicine, psychology and osteopathy.

followed a recommendation made by the Commission in a study of the health workforce (PC 2005).

The Commission conducted a second review of mutual recognition schemes during 2008-09. The final report (PC 2009b), released in April 2009, found that overall mutual recognition of registered occupations was working reasonably well, but a range of issues were preventing realisation of the full benefits of the schemes. Some of the key findings of the report, in relation to registration of occupations, are set out in box 4.2.

Box 4.2 Review of mutual recognition schemes

Key findings of the Commission's 2009 *Review of Mutual Recognition Schemes* with respect to occupational registration, included:

- uncertainty about the types of occupational regulation covered by the schemes remains and the coverage should be clarified
- greater clarity on a range of provisions of the mutual recognition legislation would improve the effectiveness of the schemes, for example:
  - the legislation is ambiguous with respect to the conditions that can legitimately be imposed to achieve equivalence
  - it is unclear whether ongoing requirements, for example, relating to continuing professional development, can be included as a condition of renewal for registrations granted under mutual recognition
- differences between jurisdictions in the scope of activities covered by licences have the potential to impede mutual recognition and labour mobility — Ministerial Declarations have gone some way towards resolving this problem
- national licensing will reduce, but not eliminate, the need for mutual recognition
- regulator expertise around mutual recognition could be significantly improved.

Source: PC (2009b).

4.2 Architects

The Australian Institute of Architects (AIA sub. 11) is concerned that, notwithstanding the provisions of the *Mutual Recognition Act 1992*, there are barriers to architects working in different states and territories. Currently, architects must complete separate registration processes and pay multiple registration fees in order to practise across jurisdictions.

To reduce unnecessary regulatory burden and cost to architects, the Institute supports the establishment of a national register for architects, where architects register once only and pay a single fee in their home state, which automatically entitles them to work in all Australian states and territories.

Assessment

In each state and territory it is a legal requirement that any person using the title 'architect' or offering services to the public as an architect, must be registered with the Architects' Board in that jurisdiction. The requirements for registration as an architect are essentially:

- a recognised academic qualification in architecture or a pass in the National Program of Assessment, or a pass in the relevant registration board prescribed examinations, where offered
- a period of training through experience followed by successful completion of the Architects Accreditation Council of Australia Architectural Practice Examination
- payment of fees determined by the Architects' Board in the state or territory in which the person is seeking to practice and provision of information as required by the Board.

Consistent with the provisions of the Mutual Recognition and Trans Tasman Mutual Recognition legislation, an architect registered in any Australian jurisdiction, or in New Zealand, may apply for registration in any other jurisdiction within Australia or in New Zealand. Before commencing work, the architect must forward details of his or her registration in the home jurisdiction to the Board in the jurisdiction in which second or subsequent registration is sought, which then has one month to grant or refuse registration. The architect's registration in their home jurisdiction would usually be sufficient grounds for registration in the host jurisdiction, particularly since requirements for initial registration of architects are largely harmonised across Australia.

The Mutual Recognition legislation does not, however, exempt an architect moving into a jurisdiction from paying any initial or ongoing registration fees required by that jurisdiction.

The Commission endorses the AIA's call for a national register for architects in Australia, as a way to avoid the payment of multiple fees for architects who operate or move across state borders. While the Commission continues to see merit in more substantial deregulation, as recommended in its 2000 *Review of Legislation Regulating the Architectural Profession* (box 4.3), in the absence of such reform a

national register that eliminated the burden of multiple registration requirements would contribute to lower costs and enhance labour mobility.

Box 4.3 **Productivity Commission review of architects legislation**

Under the Competition Principles Agreement, all Australian governments were obliged to review and, where appropriate, reform legislation that restricts competition. As part of this legislative review program, the Commission conducted a review of state and territory legislation regulating the architectural profession. The final report was released by the Australian Government in November 2000. The Commission's preferred option was for the repeal of the architects acts after an appropriate notification period that would allow the profession to introduce self regulation, involving a national, non-statutory certification and course accreditation system.

A national working group comprising representatives of all states and territories was set up to recommend a consolidated response to the Commission's Report. The working group supported the Commission's broad objectives, but rejected the review's recommended approach. It recommended instead, adjusting existing legislation to remove elements deemed to be anticompetitive and not in the public interest.

Source: PC (2000) and NCC (2005).

Under the scheme, registration in the home jurisdiction would be sufficient for inclusion on the national register and, hence, operation in the host jurisdiction without payment of additional fees. However, the national register would not remove the obligation of interstate architects to meet the ongoing registration requirements (outside of fees) of any host jurisdiction (for example, Continuing Professional Development [CPD]).

The AIA are concerned that individual Boards can impose conditions on mutual recognition registrants, such as compliance with CPD requirements, irrespective of the CPD requirements applying in the registrants' home state or territory. This is the case even though the academic and practical experience requirements for initial registration as an architect are harmonised, in a practical sense by adoption by the Boards in each state and territory of the same National Competency Standards.

> … it seems illogical that another set of requirements, such as individual state and territory CPD requirements, could override that harmonisation. (AIA sub. 11, p. 3)

Clearly, harmonisation of initial registration requirements does not currently extend to harmonisation of ongoing registration requirements and there are substantial differences in relation to CPD requirements between the jurisdictions. The AIA's submission to the Commission's *Review of Mutual Recognition Schemes* notes, for instance:

> … NSW requires 20 hours of mandatory CPD, compared to Victoria where architects do not need to meet mandatory CPD to maintain registration. (sub. DR79, p. 2)

The Commission, in the final report of that review (PC 2009b), recommended that the mutual recognition acts should be clarified and amended to make it clear that requirements for ongoing registration apply equally to all persons registered within an occupation, including those registered under mutual recognition. The Commission maintains that view in relation to archictectural practice, but any jurisdiction-specific requirements should have to be justified based on particular factors that require up-to-date local knowledge.

DRAFT RECOMMENDATION 4.1

The Australian Government should work with state and territory governments to implement a national register for architects.

For the final report the Commission is seeking further information from interested parties in relation to the differences between jurisdictions in CPD and other ongoing registration requirements and the basis for those differences.

4.3 Lawyers/migration agents

A major process of reform of regulation of the legal profession is currently underway. The National Legal Profession Reform Taskforce has been advising COAG on the creation of a national regulatory framework for the profession through the development of uniform and simplified legislation and regulatory standards. Extensive consultation on a draft model Legal Profession Bill is continuing. The reform process has the aim of achieving more effective and efficient regulation and ensuring that legal practitioners can move freely between Australian jurisdictions. In light of this parallel reform process, the profession has chosen not to raise concerns about the existing regulatory framework.

The Law Council of Australia (LCA subs. 23 and 27) did, however, raise the issue of 'dual regulation' for lawyers that practise in the area of migration law. In addition to legal profession regulation, these lawyers must also comply with the Australian Government regulatory scheme for migration agents. It is argued that this is an unnecessary and costly burden, creates a major disincentive for lawyers to practise migration law, and has perverse effects for consumers.

Assessment

Under the *Migration Act 1958*, immigration assistance can only be provided by registered migration agents. Lawyers can, however, provide immigration 'legal assistance' without being registered.[4] The Department of Immigration and Citizenship (DIAC) has noted that there is some confusion around the respective scope of the definitions of these activities in the Act, so 'in practice it is often difficult to determine whether the assistance being provided is immigration assistance or immigration legal assistance' (DIAC 2008, p 71).

The regulatory framework for migration agents — the Migration Agents' Registration Scheme (MARS) — was introduced in 1992, in response to consumer protection concerns arising from the increasing number of unregulated agents operating in what was considered a complex administrative and legal environment. Migrants using the services of agents are often in a particularly vulnerable position with language difficulties and little understanding of legal processes and the role of relevant authorities.

The legal profession has raised concerns about the inclusion of practising lawyers since MARS was first established. In 1994, lawyer agents, supported by the LCA, were unsuccessful in a High Court challenge to the constitutional validity of the regulation of lawyers within the scheme.

The MARS is now administered by the Office of the Migration Agents' Registration Authority (the Office of the MARA), which is a discrete office within DIAC. The regulatory scheme has various elements (box 4.4), but essentially it is designed to reduce the risk to clients of receiving sub-standard advice and from exploitation by 'rogue' agents. The Office of the MARA does not have the capacity to discipline lawyers who provide immigration 'legal' assistance (as opposed to immigration assistance — see above).

The regulatory scheme makes some concessions for lawyers who hold a current legal practising certificate. In particular, the knowledge requirement for initial registration and indemnity insurance requirements are deemed to be satisfied so a lawyer agent is not required to complete the Graduate Certificate (box 4.4) or take out additional indemnity cover. Some continuing legal education activities undertaken by lawyers as part of their practising requirements may also be counted as CPD for repeat registration.

4 There are a few other exceptions, including public officials, sponsors, close family members and parliamentarians.

Box 4.4 **Regulation of migration agents**

The key elements of the Migration Agents' Registration Scheme are:

- registration requirements
  - payment of an annual registration fee (currently around $1800)
  - a fit and proper person test
  - professional indemnity insurance
  - knowledge requirements — for initial registration, completion of the Graduate Certificate in Australian Migration Law and Practice, and continuing professional development (CPD) requirements
  - having access to a professional library (evidenced by a subscription to a Commonwealth law website)
  - having a satisfactory level of English language competency
- compliance with a Code of Conduct
- complaints handling and disciplinary procedures.

Source: DIAC (2007) and Office of the MARA (2010).

The legal profession is regulated by state and territory laws, common law and by the courts (which have the jurisdiction to regulate court officers). Law societies, bar associations and statutorily independent complaints-handling bodies (Legal Services Commissioners) are empowered under the relevant legislation in each jurisdiction to regulate the profession.

The states and territories, except for South Australia, have made progress in harmonising their laws, based on model provisions, but inconsistencies in rules across jurisdictions remain. Broadly, the regulations in each jurisdiction cover matters such as entry to the profession, entitlements and conditions, professional conduct and various other aspects with a consumer protection focus, including complaints handling and discipline procedures.

> Practitioners may be struck off the roll or have their practicing certificate suspended if they are found to have engaged in conduct that would amount to grave impropriety affecting their professional character. Practitioners may also be subject to a cost or compensation order if a court finds that a practitioner has acted improperly to the detriment of an individual or entity. (LCA sub. 23, p. 34)

Over the years the MARS has been the subject of a number of reviews and various changes have been made. The most recent consideration of the 'dual-regulation' issue was by the *2007-08 Review of Statutory Self-Regulation of the Migration Advice Profession*. The review was conducted by the Department of Immigration and Citizenship under the guidance of a four person External Reference Group. The

Review recommended that lawyer migration agents continue to be included in a revised regulatory scheme, but also acknowledged that 'many of the arguments for and against the continued inclusion of lawyer agents could be the subject of ongoing dispute' (DIAC 2008, p. 76).[5]

The arguments that have been made to justify inclusion of lawyers agents in the regulatory scheme (see DIAC 2007 and 2008) essentially relate to the benefits of consistent treatment and a perceived need for additional protection for consumers over and above that provided through regulation of the legal profession. More specifically, the arguments in favour of maintaining the status quo include:

- consumers benefit from a uniform approach to regulation of migration agents and consistent expectations of conduct and service
- it helps to ensure lawyer agents maintain relevant knowledge — practising lawyers are not necessarily experienced or knowledgeable in migration law and policy, which are very complex and change frequently
- a significant number of complaints are made against lawyer agents (although the evidence suggests that they are less likely to engage in misconduct than other migration agents)[6]
- state and territory law societies may not always action complaints about lawyer agents in a timely manner
- the Office of the MARA is able to address complaints against lawyer agents that state law societies might not consider sufficient to warrant disciplinary action — DIAC point out that the Office of the NSW Legal Services Commissioner considers that 'the definition of "immigration assistance" and "immigration legal assistance" under the *Migration Act 1958* precludes it taking any action against lawyers who provide "immigration assistance" unless it is so egregious that it goes towards their capacity to operate as a lawyer' (DIAC sub. 25, p. 1).

Specifically in relation to the last two points the LCA states:

> Despite requests to the Department, the Law Council has not been provided with a single example of a complaint referred to legal services regulators, which was not duly investigated or other appropriate action taken. (sub. 23, p. 14)

5 One member with a professional legal background dissented.

6 LCA point out that, although DIAC claim that 18 per cent of MARAs sanction decisions since 1998 have been against lawyer agents with a legal practising certificate, migration lawyers actually make up around 29 per cent of all registered migration agents (sub. 23, pp. 13-14). And, in terms of complaints received, in the three year period ending 31 March 2010, 17% were regarding lawyer agents (sub. 27, p. 1).

Notwithstanding, that the MARS imposes fewer requirements for practising lawyers than other migration agents, the LCA is concerned about what they perceive to be an unnecessary duplication of regulation for lawyer agents. The arguments that have been raised in the LCA submission to the Commission, and with previous reviews, to support the case for exemption of lawyer agents from the MARS, include:

- regulation of the legal profession is already comprehensive and includes adequate complaint handling and disciplinary procedures for misconduct — 'dual regulation has no [positive] impact on consumer protection, because consumers are already much better protected under legal profession regulation' (sub. 27, p. 2)
- 'dual regulation' — including compliance with two codes of conduct and two registration fees — increase compliance costs for lawyer agents and creates a disincentive for lawyers to practise migration law, which may work against the interests of consumers and the migration advice industry as a whole. A related concern is that it restricts the capacity of community legal advice centres to provide advice because they have difficulty attracting experienced lawyers.
- lawyers practise in many specialised areas of law, in which legislation and government policy is frequently changing and evolving (for example, family law, industrial relations, corporations, taxation, conveyancing or any specific area of administrative law), without a requirement for separate regulation
- where lawyers provide services along side non-legal practitioners, for example in the area of conveyancing or tax advice, they are typically exempt from any separate registration requirement that may apply — lawyers can provide tax agent services as a legal service without being registered, but not services consisting of preparing or lodging tax returns[7]
- the current regime creates uncertainty and confusion, including in relation to matters such as (see LCA sub. 23, pp. 6-7):
  - the difference between 'immigration assistance' and 'immigration legal assistance', a distinction made to try to accommodate lawyers in the scheme
  - which body is the most appropriate to address misconduct
  - whether a client's communications with their adviser are confidential and subject to client legal privilege
  - whether law societies' fidelity funds cover clients of lawyer agents providing immigration assistance

7 This restriction is outlined in section 50-5 of the *Tax Agent Services Act 2009*.

  - whether clients are covered by their lawyer's professional indemnity insurance policy
- the Office of the MARA may deregister a 'rogue' lawyer in relation to provision of immigration assistance, but currently these individuals may escape sanction by the relevant Law Society or Legal Services Commission — on the other hand the LCA is also concerned about lawyer agents being subject to "double jeopardy", being investigated and disciplined by two regulatory authorities for the same conduct
- there is no distinction made between lawyer agents and non-lawyer agents and some non-lawyer agents hold themselves out to clients as lawyers
- Australia is the only Western country that subjects lawyer agents to dual regulation (LCA sub. 23, p. 8).

In relation to the last point, the Commission notes that the New Zealand Department of Labour decided to exclude lawyer agents from their recently established scheme for the following reasons:

> … the legal profession regulatory scheme would provide appropriate protection for clients using lawyers; … inclusion in the scheme would involve unnecessary compliance costs; and … it could cause confusion and dissatisfaction amongst consumers arising from having two avenues of complaint. (DIAC 2008, p. 74)

Although the 2007-08 Review by DIAC recommended that lawyer agents continue to be included in the regulatory scheme for migration agents, it also found there was a case for greater cooperation between the Office of the MARA and other regulators such as the Legal Services Commissioners. Further, it recommended:

> That complaints about lawyer agents be referred to relevant Legal Services Commission/Ombudsman for investigation. Resulting decisions from investigations to be subject to review by the migration advice regulator. As the requirement of the migration advice regulator to allocate resources to address complaints about lawyer agents would decrease, the registration fees payable by lawyer agents be decreased as appropriate. (DIAC 2008, p. 77)

In relation to the concern about non-lawyer agents holding themselves out to clients as lawyers, the Commission supports the Review's recommendation that the public register of migration agents provide for all agents to have relevant qualifications listed (including a legal practising certificate and/or specialist accreditation from a Law Society, where relevant). The Commission is not aware that any action has been taken to implement this or any of the other recommendations of the 2007-08 Review relevant to the issue of the inclusion of lawyer migration agents in the Migration Agents' Regulatory Scheme.

The LCA acknowledge that the Office of the Legal Services Commissioner in NSW now takes the approach of referring all complaints falling within the definition of 'immigration assistance' to the Office of the MARA for investigation (LCA sub. 27). While DIAC argue that this means that 'in NSW, and any other jurisdiction which opts to take the same interpretation, the impact of dual regulation is seen to be minimal' (sub. 25, p. 1), the LCA consider that it creates confusion and uncertainty and 'migrants are even more vulnerable in NSW than in any other jurisdiction' (sub. 27, p. 2). It further submits:

> If the approach in NSW is adopted in all jurisdictions, the existence of protections, which ordinarily apply by virtue of the lawyer/client relationship, will depend on whether the conduct falls within ss 276 or 277 of the Migration Act 1958. … most clients will be unaware of the definitions in those sections, and will be much less able to determine whether certain conduct falls into either section.
>
> It is further noted that there appears little prospect that legal services regulators [in other jurisdictions] will adopt the approach taken in NSW. (sub. 27, p. 3)

Conclusion

While the issue has been highly contentious, there appears to be an absence of firm evidence to support the position that an exemption of lawyer migration agents from the Migration Agents' Registration Scheme would be likely to result in reduced protection for clients of those agents.

On balance therefore, the Commission considers that lawyer agents should be exempt from the regulatory scheme. Legal practitioners are bound by strict codes of ethics and conduct and existing regulation of the legal profession should be able to offer consumers a level of protection at least as high as that afforded under the migration agents scheme. At the same time, the current arrangements create a costly additional regulatory burden for lawyer agents and lead to some uncertainty and confusion for clients and regulators.

There is a strong argument for legal regulators to have sole responsibility for the discipline of lawyer agents. To the extent that there are any issues with the current legal profession complaints handling or disciplinary procedures there is the potential for these to be addressed through refinements to practices or through more rigorous and consistent implementation of current procedures. The current work on developing national uniform regulation of the legal profession provides an opportunity to consider and address any perceived shortcomings.

Lawyer agents would need to continue to provide a consistently high standard of practice in the provision of immigration assistance and therefore be expected to maintain their knowledge of the area and undertake relevant CPD. This is no

different to the expectations of lawyers practising in other areas of law. However, if there are particular concerns around CPD in the area of migration law, this should be monitored closely by the profession and appropriate action taken where there is evidence of unsatisfactory outcomes.

The Commission's preferred approach would be for lawyer agents to be exempted from the Migration Agents' Regulatory Scheme as soon as practicable. The legal profession regulators and DIAC could monitor outcomes over a period of time, say three years, and then the case for maintaining the exemption could be reassessed. Any assessment would need to objectively analyse the performance of lawyer agents under the new regime compared to the outcomes under the current rules. This would include an evaluation of evidence regarding their knowledge of migration law and policy, and standards of conduct. It would also need to consider the effectiveness and efficiency of complaints handling and disciplinary procedures under the legal profession regulatory framework.

An alternative option, not preferred by the Commission, would be to adopt a staged approach to reform. This would be consistent in some respects with the approach recommended by the 2007-08 Review. Initially, compliance costs for lawyer agents could be lowered through greater recognition of aspects of the legal profession regulatory scheme that overlap with, or achieve the same ultimate objective as, elements of the migration agents' regulation as well as a more flexible approach to CPD requirements. Disciplinary procedures would become the primary responsibility of the legal regulators, but during a transition 'confidence-building' phase the Office of the MARA could continue to have some oversight of (or authority to selectively review) outcomes. Where compliance with relevant legal profession regulation is deemed to satisfy migration agent regulation there should be scope to reduce registration fees payable by lawyer agents. The effectiveness of these reforms could then be evaluated and the case for progressing to the second stage, involving full exemption, reconsidered.

Under the second option, the Commission recognises that the existing inconsistencies in regulation of the profession across jurisdictions may make the reform process more difficult. Therefore, providing satisfactory progress is being made toward uniform national regulation, and with a view to minimising transition costs and further confusion, there may be an argument for delaying commencement of the first stage of reform of regulation of lawyer migration agents until national legal profession regulation has been agreed.

The Australian Government should amend the Migration Act 1958 to exempt lawyer migration agents from the Migration Agents' Registration Scheme. An independent review of the performance of lawyer agents, complaints handling and disciplinary procedures should be conducted three years after an exemption becomes effective.

4.4 Accountants and auditors

While accountants must comply with various generic areas of Commonwealth, state and territory law (including corporations, competition and industrial relations law), the provision of general accounting services is largely self-regulated (box 4.5) by the major professional associations — CPA Australia, the Institute of Chartered Accountants in Australia (ICAA) and the National Institute of Accountants (NIA).

However, accountants undertaking certain activities or supplying certain services (for example, tax, audit, insolvency and investment/superannuation advice) must be registered and/or meet additional regulatory requirements.[8]

High quality independent audits are critical to ensuring the credibility and reliability of financial statements and to the efficient operation of markets. Audit activities are subject to an extensive regulatory regime under the Corporations Act. This includes auditor registration, independence requirements and a disciplinary framework, administered and enforced by the Australian Securities and Investments Commission (ASIC).

While the professional bodies set professional standards for members, technical standards are the responsibility of the Australian Accounting Standards Board (AASB) and the Auditing and Assurance Standards Board (AUASB). The Financial Reporting Council provides broad oversight of the process for setting standards as well as monitoring the effectiveness of auditor independence requirements. Australia has harmonised its technical standards with international standards.

[8] Regulation of insolvency practitioners is discussed separately in section 4.5.

Box 4.5 Self-regulation of the accounting profession

CPA Australia and ICAA, together with the NIA, seek to ensure the quality of services provided by members, through the setting of minimum ethical and professional standards. Although the bodies remain separate, they undertake some activities jointly and generally work in close cooperation.

Some of the key elements of the self-regulatory arrangements for the profession are:

- minimum tertiary education requirements and completion of a professional accreditation program to qualify for membership and members must undertake continuing professional development and education
- accountants working in public practice must undergo periodic quality reviews
- members must abide by a professional code of conduct and are subject to disciplinary processes — sanctions for non-compliance with the code of conduct can include the removal of the certificate of public practice and exclusion from membership.

However, membership of the professional bodies is voluntary and there are no laws that dictate that a person calling themselves an accountant must meet the standards set by these bodies. Moreover, some of the services provided by accountants are also supplied by individuals and businesses which do not hold themselves out as accountants (for example, investment advisers, tax agents, management consultants).

Registration of foreign auditors

In their joint submission (sub. 16), CPA Australia and ICAA suggest that the requirements that foreign accountants wanting to become a registered company auditor (RCA) in Australia must satisfy are time consuming and excessively complex. It is argued that this acts as a deterrent to foreign accountants wishing to practise as auditors in Australia and makes it difficult for firms that could benefit from access to their services.

Assessment

The regulatory requirements that must be satisfied for an individual to be eligible for registration as an RCA are set out in the *Corporations Act 2001*. The requirements, administered and enforced by ASIC, relate to the qualifications, skills and capabilities of the applicant. The same broad criteria must be met regardless of whether the individual is applying as an Australian citizen, or from overseas. A summary of the eligibility requirements is provided in table 4.1.

Table 4.1 **Eligibility requirements for registration as a RCA**

Qualifications	*Skills*	*Capable, fit and proper*
Under s1280(2) of the Corporations Act, an individual must:		
• have the prescribed academic qualifications AND have completed a prescribed course in auditing OR	• satisfy all the components of an ASIC-approved competency standard OR	• be capable of performing the duties of an auditor AND
• have other qualifications and experience that ASIC considers equivalent to both these requirements.	• have the prescribed level of practical experience OR experience that ASIC considers equivalent.	• be a fit and proper person to be registered as an auditor.

Source: ASIC (2010e, p.4).

The objective of these requirements is to ensure that minimum standards in competency and integrity are met. This includes ensuring that individuals seeking to practise as RCAs have sufficient knowledge and familiarity with Australia's accounting and auditing standards. Typically, foreign accountants who wish to register as an RCA in Australia would not have completed a course in auditing that has been prescribed by ASIC, or have satisfied all the components of an ASIC-approved competency standard and therefore must rely on the recognition by ASIC of their overseas qualifications and experience.

Evidence must be provided that the individual has at least three years of practical experience in company auditing in a country that ASIC considers to have standards equivalent to those used in Australia. ASIC recognises these countries to be:

- the United States
- those countries whose professional accountancy bodies are members of the International Federation of Accountants (IFAC) and who apply all, or substantially all, of the International Standards on Auditing issued by the IFAC's International Auditing and Assurance Standards Board (IAASB).

Also, as outlined in *Regulatory Guide 180 – Auditor Registration* (ASIC 2010e), an individual wishing to register as an RCA:

- if relying on an overseas auditing course as evidence of qualification, may have to provide an assessment letter from one of the Australian bodies that conducts such courses in Australia, confirming the comparability of this course and the course conducted by the Australian body
- if relying on an overseas accounting and legal qualification, may have to provide an assessment letter from an authorised assessing authority of the National Office of Overseas Skills Recognition to confirm the comparability of the

individual's qualifications and an Australian undergraduate degree in accounting and law from a prescribed university or institution

- if relying on an overseas qualification, may have to complete an appropriate conversion course.

An individual may be refused registration on the grounds that they are not a resident in Australia.

ASIC's Service Charter for the registration area requires the assessment and determination of an application for registration as an RCA to be performed within 28 days of receiving a *complete* application. In recent times, this requirement has been met in 95 per cent of cases (ASIC pers. comm., 16 June 2010). Actual elapsed times from receipt of the application will vary depending on how complete the initial application is and, where there are gaps, the time taken for further information to be submitted to ASIC.

ASIC recently undertook a review of *Regulatory Guide 180* to ensure the processes outlined for auditor registration were appropriate and the documentary requirements for applications were clear. The ICAA, CPA Australia and the National Institute of Accountants were consulted as part of this process (ASIC pers. comm., 16 June 2010).

The Commission encourages ASIC — in consultation with professional bodies — to continue to explore ways to streamline the process to register overseas accountants as RCAs, particularly where an applicant has practised in countries that have adopted international financial reporting and accounting standards.

Overlapping inspection processes for audit firms

CPA Australia and ICAA (sub. 16) raised the issue of overlapping inspection processes for audit firms. Larger audit firms can be subjected to audit inspections and quality reviews by ASIC, the ICAA, the European Union, the United States Public Accounting Oversight Board, and other international audit inspectors.

Assessment

Through its membership of the International Organisation of Securities Commissions and the International Forum of Independent Audit Regulators, ASIC has been an active participant in international cooperative efforts in relation to audit

oversight.[9] This has involved countries sharing experiences and promoting best practices, with the objective of reducing inefficiencies and costs.

ASIC has also been open to entering into cooperative audit oversight arrangements with particular foreign audit regulators, as permitted (with the consent of the Minister) under its legislation. ASIC entered into such an arrangement with the United States Public Company Accounting Oversight Board (PCAOB) in 2007. It provides for ASIC and the PCAOB to undertake joint audit inspections of Australian audit firms registered in the US, resulting in significant cost savings for those firms. ASIC considers that the cooperative arrangement with PCAOB 'has been extremely effective and successful' (Treasury 2010, p. 21) and is working on a similar approach with the Canadian Public Accountability Board.

Under European Union directives a Member State can exempt (wholly or partially) a third country audit firm from audit oversight requirements (including audit inspections) if the audit firm is subject to equivalent systems of public oversight, quality assurance, investigations and penalties in its home country. The EU has been carrying out equivalence assessments on third country audit regulation systems and in this context ASIC has been liaising with the EU Commission in relation to Australia's audit regulation framework.

ASIC is also currently seeking to strengthen audit oversight cooperation with Japan. More generally, ASIC has committed to:

> Continue to work with our international audit regulation counterparts in order to reduce any regulatory overlap. Where possible, we will concentrate on maximising cross-border recognition opportunities and establishing regulatory cooperation arrangements. (ASIC 2010f, p. 44)

As well as continuing to pursue cooperative mutual recognition arrangements with overseas oversight bodies, ASIC should explore the scope for greater cooperation with domestic professional bodies so as to further streamline audit inspection processes and reduce costs for domestic audit firms.

[9] ASIC chairs the International Cooperation Working Group of the International Forum of Independent Audit Regulators.

DRAFT RECOMMENDATION 4.3

The Australian Securities and Investments Commission should expedite and expand its current cooperative efforts with international audit and inspection bodies and explore opportunities to work with relevant domestic bodies, to rationalise and streamline inspection processes for audit firms. Wherever inspections overlap, consideration should be given to greater coordination and recognition of the findings of audit and inspection processes conducted by other bodies.

Audit rotation requirements

CPA Australia and ICAA (sub. 16) consider that the current requirement that audit partners rotate off listed entity audits after five years may not be optimal, that is, a longer period of time may be preferable, and recommend it be reviewed.

Assessment

The auditor rotation requirements are contained in the Corporations Act and were introduced as part of the CLERP 9 Act Auditor independence reforms in 2004. The reforms implemented the recommendations of the review on *Independence of Australian Company Auditors* (the Ramsay Report) and the relevant recommendations of the HIH Royal Commission.

The rules, administered by ASIC, require that:

- an individual who has played a significant role in the audit of a particular listed company or listed registered scheme (audited body) for five successive financial years is not eligible to continue to play a significant role unless the individual has not played such a role for at least two successive financial years (the time out rule)
- an individual may not play a significant role in the audit of a particular audit body for more than five out of seven successive years (the 5/7 rule) — this rule prevents an individual from avoiding the time out rule, for example, by playing a significant role for four years, resigning for one year, and then resuming for another four years.

The rules do not require that the audit firm or authorised audit company rotate, only the relevant individual auditor and the review (not necessarily a partner) auditor (if any).

The policy objective of the rotation requirements is to promote auditor independence. Using the same senior audit personnel on an audit engagement over a long period of time may create a familiarity threat, allowing inappropriate ('too cosy') relationships to develop between management of the audited body and the auditor.

While the need to maintain independence is vital, rotation can also potentially have the effect of reducing audit efficiency and the quality of the audit. This is because the new auditor is likely to have less specialist knowledge of the audited body. From this perspective, the benefits of longer periods of audit tenure may be greater the larger the audited body and/or the more complex its operations or the regulatory environment it operates in. Any disadvantage associated with rotation can, however, usually be largely addressed through succession planning, for instance through overlapping terms and efficient handover procedures. Importantly, ASIC also has a limited 'relief power' to modify the rotation requirements where it is satisfied that, without modification, the requirements would impose an unreasonable burden (box 4.6).

Canada, the United States, and the United Kingdom all currently require rotation after five successive years, although there are differences, including for example in relation to the scope of exemptions and the length of the 'time-out' requirement. The United Kingdom has recently introduced some additional flexibility into rotation requirements, permitting the five years to be extended to a maximum of seven years under certain unusual or exceptional conditions. The European Union requires rotation after seven years.

The Treasury is currently conducting a Strategic Review of Audit Quality in Australia, including an examination of the appropriateness of the audit rotation requirements. In its consultation paper, Treasury found that the current requirements constituted an appropriate balance between continuity, the familiarity threat and audit quality. The Treasury stated:

> This view is reinforced by the fact that the time-out period in Australia is two years while a more onerous time-out period of five years applies in Canada, the UK and the US.
>
> Treasury proposes to continue to monitor developments on auditor rotation in overseas jurisdictions but does not consider that it would be appropriate for Australia to unilaterally move from a five- to a seven-year rotation period. Such a change should only be considered if similar changes to the existing requirements were to be made in Canada, the UK and the US. Treasury considers that any move to increase the existing five-year rotation period in Australia, would raise the question of whether the existing two-year time-out period should also be increased. (Treasury 2010, p. 25)

Box 4.6 **ASIC relief power**

ASIC can grant relief (under s342A of the *Corporations Act 2001*) only if it is satisfied that compliance with the rotation requirements will impose an unreasonable burden on the audited body; the registered company auditor; or the audit firm or authorised audit company. ASIC cannot provide relief for a period of more than two or less than one financial year(s), or give an exemption or impose conditions on their relief.

ASIC's Regulatory Guide 187: *Auditor Rotation*, provides guidance on what might constitute an unreasonable burden. ASIC will consider, *inter alia*, the nature and extent of the economic or other detriment (if any), including administrative costs, that would result from compliance. Some examples of the factors that ASIC will consider when assessing what is an unreasonable burden, include:

- whether the requirements prevent the audited body being audited by an auditor with the necessary specialist knowledge
- special audit requirements, for example, requirements that the audit must be conducted by an auditor approved by a specific regulatory body and no other auditor can comply with these requirements
- the nature of the audited body is such that it cannot access an alternative auditor who is capable of producing an audit report of the required quality
- the extent to which the requirements will increase audit costs for the audited body
- size and location of the auditor's practice (and location of its clients) — ASIC is of the view that Parliament intended that it particularly consider granting relief for small audit firms, authorised audit companies and auditors, or those operating in rural and remote areas
- a succession plan can no longer be implemented for reasons outside the auditor's control.

In addition to the limited specific relief power outlined above, ASIC does have a general power to give relief in exceptional or special circumstances under s340 or s341 of the Corporations Act, but 'will generally not consider using … general relief powers … to grant relief from the rotation requirements' (ASIC 2007c, p. 5).

Source: ASIC (2007c).

In light of Treasury's parallel examination, its preliminary findings and stated intention to monitor future developments, together with the absence of any compelling evidence presented in support of a change, the Commission does not recommend any action in response to this concern.

Duplication between Australia and New Zealand standard-setting bodies

CPA Australia and the ICAA called for the Australian and New Zealand governments to establish a single body to set accounting standards for both countries and another body to set auditing and assurance standards for both countries. They argue that duplication between the bodies currently operating in each country 'dilutes the technical experience in accounting and auditing — an outcome not consistent with delivering enhanced quality of regulation' (sub. 16, p. 2).

Assessment

In 2004, the Australian Accounting Standards Board (AASB) and the Financial Reporting Standards Board of New Zealand entered into a protocol for cooperation. The two bodies agreed, amongst other things, to minimise differences between accounting standards in the two countries, exchange information, develop a joint work programme, and to share staff resources to the extent practicable. The chair of the AASB is a member of the New Zealand standards-setting body and the chair of the New Zealand body is a member of the of the AASB. Similar arrangements exist between the oversight bodies in each country.

Currently, the standards in both Australia and New Zealand are essentially identical to the International Financial Reporting Standards and the International Standards on Auditing with only minor additions for local circumstances.

Given the convergence towards international standards by both countries and the broader commitment to the concept of a Single Economic Market, in principle there could be some merit in creating single Trans Tasman standard-setting bodies — one responsible for accounting standards and the other auditing and assurance standards. However, while there might be some efficiencies and cost savings associated with merging the boards, there are also likely to be potential disadvantages, including sovereignty issues and the loss of an Australian voice on proposed international standards. It could also reduce expertise in each country, although the Commission's is unclear about the likely magnitude of any such impact.

In conclusion, the Commission has not been presented with evidence that would justify a move to Trans Tasman standard-setting bodies.

Multiple bodies setting audit and assurance standards

CPA Australia and the ICAA (sub. 16) have suggested that having more than one government agency involved in the setting of auditing and assurance requirements is 'wasteful and causes confusion in the community' (sub. 16, p. 2).

While the Auditing and Assurance Standards Board (AUASB) is the primary agency responsible, other Australian, state, territory and local government bodies also have had a role in developing audit and assurance standards in Australia. Examples include:

- Department of Climate Change and Energy Efficiency — audit regulations and determination (including proposed audit guidelines) to be made under the *National Greenhouse and Energy Reporting Act 2007*
- Bureau of Meteorology — assurance standards in relation to water reporting
- Queensland Building Services Authority — audit and review requirements contained in the Financial Requirements for Licensing.

CPA Australia and the ICAA suggest that the AUASB should be explicitly tasked with developing standards for *all* auditing and assurance requirements across all levels of government in Australia.

Assessment

The AUASB is an independent statutory authority with the power to make legally enforceable auditing standards under the Corporations Act, as well as assurance standards and guidance for other purposes (that is, not just relating to the audit or review of historical financial information).

Given the scope and expertise of the AUASB, the Commission considers that it is appropriate that it continue to be the primary body responsible for the setting of audit and assurance standards in Australia. That said, there are also likely to be efficiencies in certain circumstances from having other bodies involved in the development of auditing and assurance standards, for example where such standards require a high degree of specialised or technical knowledge. However, where other bodies are involved in the setting of standards, it is important that they cooperate closely with the AUASB and seek to ensure that, wherever possible, there is consistency with existing principles, standards, and procedures.

Excessive reporting requirements for not-for-profit grantee entities

CPA Australia and ICAA consider that acquittal reporting requirements imposed by government grantors on not-for-profit grantee entities are, on occasions, excessive when compared to statutory reporting requirements.

> The additional costs imposed by acquittal reporting are often significant. This is not a good outcome as an increasing portion of the grant is spent on the acquittal process and not for the purpose of the grant. (sub. 16, p. 2)

The professional bodies call for the acquittal processes of Commonwealth, state, territory and local governments to be aligned with the grantee's statutory reporting obligations.

Assessment

The Commission has previously examined this issue in its recent study of *The Contribution of the Not-for-Profit Sector* (PC 2010a). The concern about the compliance burden related to acquittal and performance reporting was raised in several submissions to that study, including by CPA Australia. The Commission reported on various actions that had already been taken by governments to address the regulatory burden, including new Australian Government guidelines for grants administration (DFD 2009) that apply the principle of proportionality to reporting and other processes. The Commission went on to recommend that:

> Australian governments funding service provision or making grants should … not impose conditions associated with the general operations of the funded organisation, beyond those essential to ensure the delivery of agreed funding outcomes. (PC 2010a recommendation 11.3, p. 296)

4.5 Insolvency practitioners

The Insolvency Practitioners Association (IPA sub. 7) are concerned that the different regulatory treatment of the administration of personal insolvency (commonly termed bankruptcy) and corporate insolvency of companies (commonly termed liquidation or winding up) is impeding the efficient conduct of the insolvency regime and imposing an unnecessary regulatory burden on insolvency practitioners. The IPA highlights in particular:

> … the costs of dealing with separate regulators — … ITSA [Insolvency and Trustee Service Australia] and ASIC — and keeping up-to-date with changing compliance and reporting requirements of both; and the costs of practitioners setting up compliance systems, collecting information, preparing and checking reports, form-filling, document storage, for both. (IPA sub. 7, p. 5)

IPA recommend that steps be taken to harmonise the relevant laws and regulations, where possible. Some of the areas identified by the IPA as being particularly suitable for harmonisation, included:

- the claiming and fixing of remuneration and any court review of that process
- the process for convening and holding meetings of creditors
- proofs of debt
- provisions for payment of a dividend
- time limits.

The IPA identified various other provisions in the corporate and personal insolvency law that have the same legal effect, but use a different approach or wording.

Assessment

Australian insolvency laws are based on the s 51(xvii) power under the Constitution — 'bankruptcy and insolvency'. The Commonwealth *Bankruptcy Act 1966* deals with personal insolvency and chapter five of the Commonwealth *Corporations Act 2001* deals with corporate insolvency.[10] The *Cross-border Insolvency Act 2007* applies to both personal and corporate insolvencies. There are also a range of insolvency provisions for specific entities in various State and Commonwealth laws — for example, for partnerships,[11] cooperatives, associations, banks and insurance companies.

The IPA point out the separation of corporate and personal insolvency law is more the result of historical evolution, than policy or legal reasons. It considers that the 'reference in the Constitution to "insolvency" as being confined to corporate insolvency is antiquated' (sub. 7, p. 2). and, in principle, it has always been possible to have a single Commonwealth insolvency statute.

The Attorney General's Department is responsible for the administration of bankruptcy policy and its practice by the profession is regulated by ITSA. Corporate

10 Regulations, court rulings and ITSA and ASIC Guides support these Acts. Also relevant are the IPA Code of Professional Practice for Insolvency Practitioners and the Accounting Professional and Ethical Standards Board's professional standard covering Insolvency Services. These professional standards apply to both personal and corporate insolvency practitioners.

11 Although some partnerships can also be wound up under the Bankruptcy Act or Corporations Act.

insolvency policy is administered by Treasury and the practice of corporate insolvency is largely regulated by ASIC.

> An insolvency practitioner may be a person registered by ITSA as a trustee in bankruptcy, and at the same time be registered by ASIC as a registered liquidator. A trustee is then regulated by ITSA and is subject to regulation and discipline processes under the Bankruptcy Act. Corporate insolvency practitioners — liquidators, administrators, receivers — are registered and regulated by ASIC and are disciplined by processes under the Corporations Act. (IPA sub. 7, p. 2)

The issue of the merits of harmonising or merging corporate and personal insolvency law has been considered by various reviews over the last two decades, including:

- 1988 Australian Law Reform Commission *General Insolvency Inquiry* (Harmer Report)
- 1992 (the former) Trade Practices Commission *Study of the Professions: Legal*
- 1997 *Review of the Regulation of Corporate Insolvency Practitioners*
- 2004 Report of the Parliamentary Joint Committee (PJC) on *Corporations and Financial Services Corporate Insolvency Laws: A Stocktake*.

These reviews recognised that there were some advantages in having more uniform regulation, but none went as far as recommending full harmonisation or a single regulatory framework. The most recent, the 2004 PJC Report, recommended that the Government 'ensure, particularly when contemplating changes to the law, that the two streams of Australia's insolvency laws, personal bankruptcy and corporate insolvency, harmonise where possible' (Recommendation 59, p. 228)

This was consistent with the earlier Harmer Report (although overall the report considered the lack of uniformity to be 'not a major issue'):

> … as far as possible and necessary, the Commission [Australian Law Reform Commission] has sought in the Report to promote the uniformity of the substance of the provisions relating to individual and corporate insolvency. Moreover, to the extent that future reforms proposed for the law relating to either individual or corporate insolvency touch matters which are common to both (particularly where those reforms affect procedural matters), it is the Commission's view that corresponding reforms should be made to both sets of laws. (ALRC 1988, p. 14).

The Government's response to the 2004 PJC Report supported the recommendation 'in principle', but noted:

> There are different policy considerations in corporate insolvency and personal bankruptcy, which may give rise to necessary variations in the legal frameworks.

> There are arrangements in place for securing cost savings and streamlining the administration of corporate and personal insolvency law. … ITSA and ASIC have entered into a Memorandum of Understanding. … and will continue to consult in the development of insolvency/bankruptcy policy. (Australian Government 2004, p. 24)

Various arguments in favour of greater harmonisation of corporate and personal insolvency laws have been advanced in previous reports and submissions to reviews, as well as the IPA's submission to this review. These include:

- practitioners operating in both areas would benefit from time and cost savings as a result of having to understand and deal with only one set of common provisions, and procedures
- there would be less complexity and scope for error
- government cost savings in a unified scheme, including the potential for consolidating regulatory responsibilities and a single system for the registration of practitioners within a single department or agency
- there is often a significant interaction or overlap (and/or common issues to consider) between personal and corporate insolvency, particularly when dealing with small or micro businesses
- the current system can also pose difficulties for members of the public, especially creditors (most frequently institutional creditors) that need to be aware of the differing rules between corporate and personal insolvency depending on the sort of administration of which they are creditors
- many aspects and fundamental concepts of insolvency are common to both the corporate and personal areas and insolvency law can be viewed as a distinct field of law, rather than a part of company or commercial law.

The Commission also notes that a unified approach to personal and corporate insolvency is a feature of some overseas regulatory frameworks, including in the United Kingdom, Canada and the United States.

That said, arguments have also been made in favour of maintaining some separation of corporate and personal insolvency law, including:

- different policy considerations between corporate and personal insolvency — reflecting fundamental differences between natural and corporate persons — necessitate some differences in approach
- personal insolvency laws must balance the needs of consumer bankruptcies with the needs of business bankruptcies, whereas for corporate insolvency there is a need to balance the different needs of small and large enterprises

- corporate insolvency law is arguably an integral feature of corporate law and a unified personal and corporate insolvency law could result in fragmentation of corporate law
- practical difficulties and costs associated with making the necessary changes — for example, the process for determining which provisions could appropriately be harmonised and the subsequent drafting of unified legislation are both likely to be complex and resource intensive exercises
- transition costs for business and regulators associated with moving to any new regime.

Some submissions to the PJC review also argued that the current separate structure for personal insolvency posed no significant difficulties in practice and therefore there was no pressing need for reform. Furthermore, many practitioners operate in only one area, particularly those who practise only in corporate insolvency. This could explain what the IPA perceive as the low priority the Government has given to acting on the recommendations of previous reviews. The IPA suggest, however, that the lack of reform is more likely the result of there being no area of government with responsibility for both areas of insolvency.

In principle, there are likely to be efficiencies in having a single regulator take responsibility for both areas of insolvency law. These would include pooling of regulatory resources, greater consistency in decision making and the benefits for business of dealing with one regulator. However, there could also be various complexities, costs or risks associated with a merger. Some of these would be dependant on the merger option chosen. If the single regulator was not a specialist insolvency regulator (for example if ITSA was merged into ASIC) there is a risk of a loss of focus or transfer of resources to other regulatory activities. On the other hand, the creation of a specialist regulator (for example by merging ASIC insolvency functions and responsibilities into ITSA) may not produce the same cost savings or administrative efficiencies. It should also be noted that ITSA currently has a range of non-insolvency functions, such as administering Child Support and Proceeds of Crime Orders and it is also intended that ITSA will acquire additional administrative responsibilities in relation to personal property security regulation.

In conclusion, while certain fundamental differences between personal and corporate insolvency may mean that a full merger or complete harmonisation of rules and processes is not appropriate, there is clearly scope for greater harmonisation or alignment of provisions, including the use of common legislative wording and approaches. This could occur whilst maintaining separate legislation or a single law could be considered. Importantly, a single law would not necessarily require the merger of all elements of the laws.

While the Commission acknowledges the existing commitment by ITSA and ASIC to work toward streamlining the administration of corporate and personal insolvency law, the concerns raised by IPA suggest that more needs to be done. The Commission endorses the suggestion of the IPA that a reform task-force be set up to identify possible areas for harmonisation of existing personal and corporate insolvency provisions.

Where there is a clearer case for harmonised provisions (perhaps in relation to such procedural matters as hiring and firing practitioners, setting and reviewing remuneration, record keeping and reporting, holding of meetings and determining voting entitlements) changes should be implemented as soon as practicable, rather than waiting for agreement to be reached in relation to more complex or controversial matters.

In a similar vein, and as recognised by previous reviews, it is also particularly important that, at any time when changes to either legal framework are contemplated, the scope for greater harmonisation or alignment of provisions and processes is always considered. The current broad ranging Senate Economics Committee Inquiry into Liquidators and Administrators, presents one such opportunity. Although focused on the area of corporate insolvency, the Inquiry has touched on a number of inconsistencies between personal and corporate insolvency regulation and the issue of a single insolvency system has been raised. For example, some participants in the inquiry identified aspects of ITSA's regulation of bankruptcy trustees that could be a good model for ASIC to adopt in its regulation of corporate insolvency practitioners. The Inquiry is due to report at the end of August 2010.

In parallel with the deliberations of the reform taskforce that the Commission has proposed, the Government should examine the case for making a single regulator responsible for both areas of insolvency law, including the registration of insolvency practitioners.

DRAFT RECOMMENDATION 4.4

A taskforce should be established to identify personal and corporate insolvency provisions and processes that could be aligned. The taskforce should comprise officials from the Attorney-General's Department and the Treasury and should also work closely with the Insolvency and Trustee Service Australia and the Australian Securities and Investments Commission. The case for making one regulator responsible for both areas of insolvency law should also be examined.

4.6 Property services

The Real Estate Institute of Australia (REIA) and the Property Council of Australia (PCA) both raised the issue of inconsistent state and territory real property laws.[12] Any organisation operating in more than one jurisdiction must be familiar with and abide by a variety of different requirements. The PCA point out that this affects 'the timing of property deals and necessitate[s] the use of a range of legal representatives' (sub. 21, p. 25). The PCA further stated:

> If Australia is to continue to be attractive to international investors, our antiquated approach to property law needs to be overhauled. (sub. 21, p. 26)

According to the REIA, the inconsistencies are 'creating an uncertain business and consumer protection environment' (sub. 12, p. 2).

The REIA and the PCA are calling for uniformity in the laws governing property transactions and suggest that this could be achieved through the adoption by state and territory governments of a Uniform Real Property Act and nationally consistent conveyancing legislation.

The REIA and PCA also raised a number of concerns about generic (and/or prospective) regulatory burdens and process issues. Many of these issues are strictly out of scope for this review, because they do not particularly impact on the business and consumer services sector or they do not relate to existing regulation. Specific concerns about regulatory impact analysis are covered briefly in chapter 6.

Assessment

There are eight different versions of the Torrens Title system operating in Australian states and territories. The REIA highlighted two particular examples of areas where real property laws vary significantly across jurisdictions:

- recovery of land tax from a tenant — whether it is recoverable or not and the circumstances under which it is recoverable differs across Australia
- consequences of failure to register a lease — in some jurisdictions a lease does not achieve indefeasibility until it is registered, therefore, registration of a subsequent interest or sale of the freehold can affect the tenant's rights to the

[12] Real property (as distinct from personal property) generally refers to land and buildings and other immovable improvements made to that land.

land.[13] Other jurisdictions are less strict, granting the tenant some rights where the lease is unregistered.

Property procedures and leasing practices also vary significantly between jurisdictions.

Such differences are creating unnecessary regulatory burdens. Some of the inefficiencies associated with the current arrangements, include:

- costs associated with understanding, and keeping abreast of changes to, different regulatory systems
- companies and individuals dealing with property transactions are often required to employ practitioners with local knowledge, rather than service providers they may have used for transactions in another jurisdiction
- complexity, uncertainty and increased scope for mistakes
- longer timeframes for transactions
- a disincentive for local and overseas companies to expand their operations beyond one state.

The burden of the fragmented regulatory system is borne by property operators, legal advisers, valuers and real estate agents that operate in more than one Australian jurisdiction, as well as vendors, purchasers, lessors and lessees.

As noted in the introduction to this chapter, property services are amongst the first tranche of occupations to be included in the National Licensing System, by 1 July 2012. The REIA acknowledge that progress toward addressing inconsistent *licensing* regulation of property services is likely to come as a result. More generally, the REIA also acknowledge that there has been some work toward standardising and harmonising property dealings nationally, but progress has been slow.

Both the PCA and the REIA are members of the Property Law Reform Alliance (PLRA). The PLRA is a national coalition of peak legal and industry associations committed to bringing about uniformity in Australian property laws and procedures. The PLRA has been making representations on this issue, over a number of years, to state and Federal Government Attorneys-General and officials. More recently, the PLRA has been drafting a Uniform Torrens Title Act as the basis for further consideration by governments.

13 'Indefeasibility' essentially refers to immunity from an adverse claim to land or retrospective invalidation of title.

The Commission supports the work underway to harmonise state and territory real property laws. Greater consistency in laws and procedures would lower property transaction costs, make it easier for companies, professionals and individuals to move between and operate within different jurisdictions and as a consequence facilitate increased property investment.

DRAFT RECOMMENDATION 4.5

COAG's Business Regulation and Competition Working Group should, in consultation with relevant Ministerial Councils, oversee the development of a Uniform Real Property Act. The provisions of the Act, once agreed, should then be adopted in all Australian jurisdictions, with any variations to be kept to a minimum and subject to a public interest test.

5 Building and planning regulation

Key points

- State and territory government variations to the Building Code of Australia (BCA) are creating significant inconsistencies in regulation across jurisdictions. While addressing variations has been a reform priority for many years, governments need to reassess the effectiveness of current strategies and consider providing additional resources to expedite reforms.
- Hotels are increasingly competing with serviced apartments in the short-stay tourist accommodation market, but are classified differently within the BCA and are therefore subject to different standards, for example in relation to disabled access and fire safety. The ABCB should consider whether the current variation in standards is appropriate where the buildings are used for similar (especially tourist accommodation) purposes.
- Concerns about disability access standards and their application to hotels were taken into account during extensive consultation on the new Access to Premises — Building Standards. Any reconsideration of the appropriateness of the standards is now best left to the scheduled review in approximately five years.
- All users of the BCA should be able to access a free on-line copy. The Commission urges governments to make the necessary funding available when the issue is reconsidered by the Building Ministers Forum in three years time.

This chapter assesses various concerns about building and planning-related regulations, that impact on certain professional, technical, property-related and accommodation services. These include:

- state and territory variations in building regulations (section 5.1)
- local government requirements that create further inconsistency across jurisdictions (5.2)
- differences in building standards, within the Building Code of Australia, applying to similar use buildings (5.3)
- disability building access standards that are set too high (5.4)
- the high cost of accessing the Building Code of Australia and referenced standards (5.5).

5.1 State and territory variations in building regulations

The Australian Institute of Architects (AIA sub. 11) and the Tasmanian Government (sub. 19) are concerned that state and territory government variations to the Building Code of Australia (BCA) are creating significant inconsistencies in regulation across jurisdictions. The AIA submits:

> … some state and territory jurisdictions have developed additional, appended requirements which have the effect of a parallel building code. In the Institute's view, this undermines the efficiencies derived from the move to nationally consistent regulation under the ABCB [Australian Building Codes Board], and creates an unnecessary business cost to architects (and the industry) who work across jurisdictions (sub. 11, p. 1).

The AIA suggests that the Australian Government should 'lead a renewed and consistent focus on benchmarking state and territory requirements to ensure uniformity of regulation wherever practicable' (sub. 11, p. 1).

Assessment

The BCA has been developed as a uniform set of minimum necessary technical standards for the design and construction of buildings and other structures throughout Australia. Broadly, the standards cover building structure, fire resistance, access, services and equipment, and energy efficiency. The BCA is given legal effect through individual state and territory building legislation.

The Australian Buildings Codes Board (ABCB) is responsible, on behalf of each of the state and territory governments and the Australian Government, for producing, maintaining and amending the BCA. The ABCB was established under an Inter-Government Agreement (IGA) signed in 1994.

The BCA endeavours to accommodate some local environmental requirements through its provisions for issues such as wind speeds and cyclone requirements. In addition, states and territories remain able to make building and construction related laws separately from the BCA, some of which are included in schedules of state or territory variations to the Code. While some variations have a sound underlying policy rationale, addressing particular geographical, geological or climatic factors, other differences in standards are undermining national consistency without a clear policy justification.

The Commission was asked to assess the contribution of building regulation reform (essentially the pursuit of a nationally consistent regulatory framework) in 2004. The Commission's Research Report *Reform of Building Regulation* found that the

ABCB had reduced the number of jurisdictional variations in the BCA, but significant inconsistencies remained, particularly in relation to energy efficiency regulations that had recently been introduced. The report made a number of recommendations, including that the Australian and state and territory governments commit to a new building regulation reform agenda, with a reconfirmation of governments' commitment to national consistency, through a revised IGA. The current *Intergovernmental Agreement for the Australian Building Codes Board* was signed by all governments in 2006. One of the commitments included in the IGA was to remove state-based variations to the BCA.

Nationally consistent building and plumbing regulation is a key reform on the current COAG National Reform Agenda. Two reform milestones are particularly relevant to the assessment of the concerns that have been raised with this review:

- the development of a National Construction Code (NCC) which will consolidate building and plumbing standards — as a first step, with possible later expansion to electrical and telecommunications standards — into one code to be applied across Australia. The intention is to establish an IGA for the NCC that replaces the current IGA for the ABCB
- all jurisdictions are to eliminate or validate all variations from the BCA by the end of 2011.

In 2009, an independent *Review of the Intergovernmental Agreement for the Australian Building Codes Board* was conducted by the Allen Consulting Group (ACG). ACG reviewed the effectiveness of the current IGA and made suggestions for the composition of the next IGA, having regard to the introduction of a NCC.

The ABCB's current Strategic Plan has the goal of eliminating all state and territory variations in the BCA by 2011 and it is implementing a Variation Reduction Strategy to deliver on this goal. The ABCB's 2009 National Technical Summit (NTS) was focussed entirely on variation reduction to assist in meeting the 2011 target.

The ABCB IGA requires that the ABCB report to state and territory Building Ministers annually on jurisdictional variations from the BCA. According to the ABCB's 2009 Annual Report to Ministers, the Variation Reduction Strategy has achieved reductions in the number of variations in the current edition of the BCA, however, there remain a number of state and territory specific variations in the Code. The report concludes that 'it would appear that, based on progress to date and the outcomes of the NTS, the achievement of no state and territory variations to the BCA by 2011 will not be achieved' (ABCB 2009, p. 4).

In its *National Partnership Agreement to Deliver a Seamless National Economy: Report on Performance 2008-09*, the COAG Reform Council recommended that COAG:

1. notes that reform is being implemented within the BCA as agreed but that it may not be achieving the objective of a more nationally consistent system of building regulation due to regulation being pursued outside the BCA
2. agrees that the development, consideration and implementation of proposals to deal with such regulation should remain a priority for governments (COAG Reform Council 2009, p. 48).

COAG supported the Council's recommendations and then, in July 2009, agreed to defer the finalisation of a new intergovernmental agreement for a national construction code by 12 months 'in order to allow the Building Ministers Forum to adopt a phased implementation strategy for a number of COAG initiatives' (COAG 2009d, p. 2). COAG stated that the revised timeframe 'will allow the integration of energy efficiency measures agreed separately by COAG to be introduced into the National Construction Code' (COAG 2009d, p. 2).

Addressing inconsistency in building regulation across Australia has clearly been a reform priority for many years, but recent progress has been disappointing. Governments need to reassess whether current strategies are likely to deliver on agreed goals. If necessary, consideration should be given to alternative approaches that may be successful in reducing state and territory variations more quickly, and importantly preventing new variations being introduced. The development of an IGA for the new NCC, if this reform proceeds, would be an opportunity for jurisdictions to reconsider the variation reduction strategy.

The Commission notes that eliminating state and territory variations to the BCA and establishment of the NCC are not amongst the priority COAG National Reform milestones that are subject to reward payments for successful implementation. The Australian Government may need to consider whether the provision of additional resources could assist in expediting reforms. This could, as one option, take the form of an offer of an increased Australian Government contribution to the funding of the ABCB — or its replacement, once the NCC is implemented — dependent on satisfactory progress toward eliminating variations.

5.2 Local government requirements create further inconsistency

The following concerns have been raised in relation to local government planning and development laws:

- there is a propensity for planning and other statutes to undermine national consistency in building regulation without any requirement for impact assessment (Property Council of Australia (PCA) sub. 21)
- local government planning and development approvals are a 'mish mash' and national guidelines are required (AIA sub. 11).

Local government regulations generally fall outside the scope of this review. However, given their interaction with national building regulations, the issues raised are discussed briefly below.

A number of planning and zoning-related issues impacting on the tourism sector were also raised by the Department of Resources Energy and Tourism (sub. 15) and these are covered in chapter 3.

Assessment

Local governments continue to impose building requirements — relating to matters such as access for people with disabilities, property protection from bushfire, water, waste and salinity management, and energy efficiency — via their planning approval processes.

Whilst the Commission recognises that in some cases local governments may be better placed to respond in a timely manner to perceived community needs, such responses are also, in some cases, contributing to further inconsistencies in building regulation across jurisdictions, undermining national building reform efforts.

A particular concern, as highlighted by the PCA (sub. 21), is that local governments usually do not conduct adequate impact analysis of their regulations. As a result there is an increased risk that new regulations may be introduced that impose excessive compliance burdens on business, and more generally that impose costs on the broader community that outweigh the benefits.

In its 2004 Research Report *Reform of Building Regulation*, the Commission made a number of suggestions to address the problem of local government requirements creating inconsistencies. These included:

- subjecting changes to a suitably rigorous justification process involving impact analysis, via the originating state
- maintaining a register of state regulation impact statements undertaken for local government building regulations
- pursuing national agreement over a delineation between regulation-making powers relating to planning and building

- assessing the feasibility of requiring any local government requirement that is inconsistent with the BCA to be approved by the responsible State Minister.

The Commission understands that little progress has been made in relation to the first two of these points, but there have been some positive developments in relation to delineation of planning and building regulation and Ministerial approval of local government requirements that are inconsistent with the BCA.

A Building/Planning Delineation Joint Working Group, established by the ABCB in 2007, has been considering delineation and streamlining of local government processes as part of a broader consideration of issues arising from building regulation occurring outside the BCA.[1] A pilot study commissioned by the Joint Working Group found that local government building regulations could add up to 14 per cent to the cost of building a house (ABCB 2008).

Another important initiative is the 'gateway project' developed by the ABCB and the Local Government and Planning Ministers' Council (LGPMC), with 'in-principle' support from the Building Ministers' Forum. The project aims to delineate and streamline local government processes, based on the Victorian model of local government planning regulation. In that jurisdiction, consistent with the Commission's 2004 recommendation, decisions that affect matters covered by the BCA are required to receive ministerial approval prior to being applied.

The BMF and the LGPMC have also been giving consideration to guiding principles for managing local government interventions.

The Commission is currently conducting a separate benchmarking study on the operations of state and territory planning and zoning systems, including in particular their impact on business compliance costs, competition and the overall efficiency and effectiveness of the functioning of cities. An Issues Paper for the study was released in May 2010 (PC 2010b). The Commission has been asked to report to the Business Regulation and Competition Working Group by the end of the year.

Given this parallel activity the Commission does not intend to make further comment on the specific local government concerns raised with this study.

1 The Joint Working Group comprises ABCB, government representatives, the Energy Efficiency Working Group, the Australian Local Government Association and industry representatives.

5.3 Differences in standards applying to similar use buildings

The Tourism & Transport Forum (TTF sub. 5) and the Australian Hotels Association (AHA sub. 10) are concerned that hotels, which are increasingly competing with serviced apartments in the short stay tourist accommodation market, are classified differently within the BCA and are therefore subject to different standards, for example in relation to disabled access and fire safety. TTF and AHA argue that because there is not a 'level playing field', in terms of the BCA standards, hotels face significantly higher construction and ongoing costs than serviced apartments.

Assessment

Applicable building standards depend on the intended use of the building at the time of construction. The relevant classifications in the BCA are outlined in table 5.1.

Table 5.1 **Selected building classifications in the BCA**

Single dwellings	**Class 1A**	**Class 1B**
	Houses, town house, terrace	Boarding house, hostel, lodge (< 300m^2 & ≤ 12 occupants)
Building with multiple dwellings	**Class 2**	**Class 3**
	Sole occupant units, incl. apartments	Hotels and motels etc

Key differences in the BCA standards between Class 1B and Class 3 buildings and those for Class 1A and Class 2 buildings relate to disabled access and fire safety standards. The different standards can add significantly to construction and ongoing operational costs for Class 1B and Class 3 buildings.

While traditionally properties used in the provision of services to tourists have fallen within the Class 1B and Class 3 building classifications, TTF make the point that short term tourism accommodation can occur in all of the above classes. A particular concern relates to the growth in serviced apartments as a major form of tourist accommodation, 'representing at least 30 per cent of all short stay accommodation rooms in Australia' (TTF sub. 5, p. 9).

Within the BCA, all apartments in a multi-apartment building are subject to the requirements set out for Class 2 buildings. Some of these apartment buildings (or individual apartments) are then used as serviced apartments competing closely with

hotels and other forms of commercial tourist accommodation, but having a significant cost advantage by way of the lower building standards. The apartments may have been built with the intention of servicing the tourism market, providing a mix of tourism and residential accommodation, or solely for residential purposes. At any time, subject to local government requirements, the use of an apartment may change.

The inconsistency appears to have been recognised in some jurisdictions. The TTF notes that there is variation across jurisdictions in the interpretation of the BCA, in terms of the requirements that should apply to serviced apartments:

> In different state and local government areas, Class 2 has been interpreted to include serviced apartments. In more jurisdictions, serviced apartments have been considered Class 3, but this has not been enforced. As a result, a significant proportion of Australia's tourist accommodation stock is in Class 2 Buildings purpose built for residential use and converted to tourism use. (TTF sub. 5, p. 9)

One important difference between hotels and apartments that makes this issue more complex is that all rooms within a hotel building are typically commonly owned, whereas apartments may either be individually owned or the whole apartment building may be owned by a company, individual or group. Serviced apartments will often be part of a building where all apartments are used for that purpose, but they may also be part of a building that has a mix of uses.

TTF suggest that a separate new Class be created in the BCA for serviced apartments, which includes appropriate building standards for this use, and that residential apartments that do not comply with these standards would not be permitted to be used on the short term accommodation market.

If Class 3 equivalent building standards were to apply to serviced apartments this would involve a certain proportion of apartments in a building being required to meet higher access requirements (see separate discussion below). This would make the application of such standards to buildings constructed with the intention of sale by way of separate unit titles (and therefore multiple individual owners and potentially multiple initial and subsequent uses) problematic.

While, in principle, there may be some merit in TTF's suggestion, the costs and benefits would need to be carefully weighed before such a change could be considered. As well as adding to construction costs, which would flow through to higher apartment prices and charges for accommodation, it would create some inefficiencies by reducing the flexibility of owners to vary the use of their properties. Also, although the AHA and TTF are most concerned about the discrepancy in standards between hotels and serviced apartments because of the growing share of the market held by the latter, short term tourism accommodation

can occur in other residential classes as well, so there is a wider classification issue that may need to be examined. Moreover, any examination must carefully consider the different design characteristics of the building types and, for example, whether differences in room size, occupant density, or typical length of stay may justify differences in building standards.

The Commission notes that the classification and use issue for Class 2 and Class 3 Buildings was a project on the ABCB's 2008-09 work program. The Board sought advice on the issue from the Building Codes Committee and consulted with the states and territories, but a consensus view on the need for change was not reached. The Board resolved in February 2009 that the current provisions were adequate and that no further work would be undertaken until evidence was produced to the contrary. One of the key considerations identified during the consultation process was the complexity of the issue and the implications of any change for the fundamental classification and structure of the BCA.

Notwithstanding the recent examination by the Board, the Commission considers that the classification issue may benefit from a more comprehensive examination of the costs and benefits of options for change relative to maintaining the status quo. The Commission recognises, however, that the ABCB is subject to funding constraints and already has a lengthy list of competing project priorities. Therefore, the Commission suggests that the ABCB should review the classification of buildings in the BCA as resources and competing priorities permit. The review would need to specifically consider whether the current variation in standards between Class 2 and Class 3 buildings is appropriate, where the buildings are used for similar (especially tourist accommodation) purposes.

5.4 Disability access standards are excessive

The TTF (sub. 5) and the AHA (sub. 10) both raise the following concerns relating to disability access standards:

- the current BCA disability access requirements for hotels (Class 3 buildings) are excessive, resulting in unnecessary additional construction and ongoing operational costs, that discourage investment in this type of tourist accommodation. The problem is exacerbated by the less stringent requirements imposed on serviced apartments that compete with hotels:

  > The adverse effects on the industry of the higher accessible room requirement include lost revenue from lower occupancy rates, lost revenue from the floor space given over to accessible rooms, and opportunities lost to Class 2 buildings which are competing in the market without having to maintain the same room standards. (AHA sub. 10, p. 8)

- the new Disability (Access to Premises — Building) Standards will further increase the standards and the competitive disadvantage for hotels.

The TTF and AHA call for:

  - a reduction in the current BCA ratio of accessible rooms in Class 3 buildings to 2 per cent of rooms
  - inclusion of the 2 per cent ratio in the proposed Disability (Access to Premises) Standards
  - application of the Standards to Class 2 buildings where they are engaged in marketing and letting apartments in the short-term accommodation market.

The Commission has assessed the issue of the different treatment of hotels (Class 3) and serviced apartments (Class 2) separately in section 5.3.

Assessment

Currently, the BCA Class 3 standards require all hotels to be built with a certain number of 'accessible rooms'. The accessible rooms should accommodate all disabilities, but are primarily built for wheelchair access and thus require more floor space than non-accessible rooms.

The number of rooms that must be accessible varies depending on the total number of rooms in the property. The proportion of accessible rooms to total rooms varies, depending on the size of the establishment, from around 3.5 per cent to up to 100 per cent for smaller hotels (see table 5.2).

Based on their national survey of accommodation properties, conducted in February 2010, TTF and the AHA argue that there is a significant oversupply of accessible rooms:

> While there is an average demand of 0.47% accessible rooms per accommodation establishment, the BCA currently requires a supply of approximately 3.5%. (TTF sub. 5, p. 11)

Revised access standards will come into effect from May 2011 with the implementation of the Disability (Access to Premises — Building) Standards, (the *Premises Standards*). The technical provisions of the Premises Standards are to be adopted under the *Disability Discrimination Act 1992* (DDA) and mirror provisions will be included in a revised BCA.

The standards codify the general duty imposed by the DDA, not to discriminate against persons with disabilities. Compliance with a standard constitutes a defence

to any complaint of discrimination. By aligning the requirements of the DDA in relation to premises and the BCA, building designers and building owners will benefit from substantially improved certainty as to their compliance with the DDA.

Table 5.2 **BCA accessible room requirements (Class 3)**

Total rooms	*Accessible rooms*	*Proportion accessible*
1-20	1 accessible room	100% - 5%
20-45	2 accessible rooms	10% - 4.4%
46+	2 accessible rooms plus 1 additional accessible room for every additional 30 rooms. For example:	
	3 rooms from 46 to 75	6.5% - 4.0%
	4 rooms from 76 to 105	5.3% - 3.8%
	5 rooms from 106 to 135	4.7% - 3.7%
	6 rooms from 136 to 165	4.4% - 3.6%
	13 rooms at 350	3.7%
	19 rooms at 550	3.5%
	34 rooms at 1000	3.4%

Source: Based on BCA 2010, Volume One, p. 218.

Incorporation of the Premises Standards will expand the range of access issues addressed in the BCA, as well as increasing the stringency of a number of existing measures. This includes an increase in the required number of accessible rooms in hotels. The TTF submitted that:

> … the proposed disability standards would require a supply of 4.5%. This is approximately ten times the number of accessible rooms sought by guests. (TTF sub. 5, p. 11)

The new standards were finalised after a long and very extensive consultation and regulatory impact analysis process. The views of the TTF and the AHA were specifically taken into account, including in the course of a Parliamentary Inquiry into the Draft Premises Standards. The Inquiry Report examined the particular concerns raised here about under utilisation of existing accessible rooms and the proposed increase in the room ratio being excessive.[2] In evidence presented to the Committee, the ABCB stated:

[2] The Report, *Access All Areas*, of the Inquiry into the Draft Disability (Access to Premises — Buildings) Standards, by the House of Representatives Standing Committee on Legal and Constitutional Affairs, was tabled on 15 June 2009.

> [A]s part of the process of reviewing the provisions, [the Building Code room ratios] were looked at to see whether they were adequate. They were changed slightly and the change is more about the trigger point when you have to require an additional room, rather than a wholesale general increase. That proposal was put out for public comment and through that process we got the same sort of feedback that the Committee is now getting. Some people thought it was not enough. Some people thought it was too much. But, generally, the consensus through the [Building Access Policy Committee] process was that we probably got the numbers about right. (HRSCLCA 2009, pp. 96-97)

The Committee concluded that the 'modest increases' in the number of accessible rooms 'are not excessive or unjustified' (HRSCLCA 2009, p. 99).

Whilst the survey evidence on supply and demand for accessible rooms that has been presented to the Commission was not available at the time of the Parliamentary Inquiry into the Draft Disability Standards, the Commission notes the following comments by the Committee:

> It is clear that the hotel sector has not been able to maximise utilisation of existing accessible rooms. The Committee does not believe that this is primarily due to a lack of demand. Rather, on the evidence before the inquiry, it is apparent that many of the issues complained of by the Tourism and Transport Forum could be ameliorated or eliminated through careful design of accessible rooms, better marketing to older people as well as people with a disability, staff education, and through consultation with the disability sector. (HRSCLCA 2009, p. 99)

The Premises Standards are to be reviewed five years after their commencement (and every five years after the initial review). The review will cover the effectiveness of the Premises Standards in achieving their objectives, including identification of any necessary amendments.

The Commission encourages the TTF and AHA to monitor utilisation of accessible rooms, explore mechanisms for improving demand levels, and if their current concerns continue, to consider raising them again at the time of the scheduled review of the Premises Standards.

5.5 Cost of accessing the Building Code and referenced standards

The AIA (sub. 11) has concerns about the cost of purchasing the BCA and referenced Australian Standards:

> The Building Code in effect, regulates the building sector, however in order to comply with its requirements, architects and others working in the building sector, are required to purchase the Code, its revisions and relevant Australian Standards referred to within the Code (the Code currently refers to over 140 Standards). This is an ongoing cost for

the profession with regular revisions of the Code to be purchased and represents a burden on the industry, particularly for sole traders and small to medium enterprises.

In the Institute's view, the Building Code should be available free online, as with most government regulation, and the ABCB should be adequately funded by government to enable this. (AIA sub. 11, p. 2)

Assessment

The Commission considered this issue in some detail in its 2004 *Reform of Building Regulation* Research Report (PC 2004b) and, in relation to the issue of referenced Australian Standards, in the 2006 *Standard Setting and Laboratory Accreditation* Research Report (PC 2006b).

In the Building Regulation Report the Commission found that the cost of the BCA appeared to be a barrier to improving access, awareness and usage of the Code and recommended (see recommendations 8.6 and 8.7):

- that sufficient funding should be provided to enable a minimum level of access to the BCA (including online access to the full code) free of charge
- the ABCB should continue to work towards minimising the number of referenced standards in the BCA
- the Australian Government could review the broader issue of access to standards referenced in legislation/regulation. As part of this review, consideration could be given to the possibility of free access to any standards retained in the BCA.

In the Standard Setting and Laboratory Accreditation Report, the Commission found that a large number of participants — especially, but not confined to building designers, architects and other building industry interests[3] — had concerns about:

- the cost (which some described as prohibitive) of purchasing Australian Standards that are referenced in regulation
- the large number of such referenced standards
- the need to regularly purchase updates.

Mindful of the fundamental principle of transparency and accessibility of legal requirements, the Commission recommended (recommendation 7.3 and 7.4) that governments should:

- fund free or low-cost access to Australian Standards made mandatory by way of regulation

[3] This included a submission from the Royal Australian Institute of Architects, as the AIA was then known.

- seek to minimise the number of standards referenced in regulation as well as the number of cross references to other standards that make it necessary to purchase multiple Australian Standards documents.

There was no formal Government response to the Commission's specific recommendations (although, in the case of the Building Regulation Report, many of the (other) recommendations were reflected in the revised Inter Government Agreement on building regulation reform, in 2006).

While, in principle, there appears to be wide spread support within government for free or low-cost access to standards referenced in regulation, the Commission understands that funding constraints have been an obstacle to progressing this reform.

Specifically in relation to the BCA, the Allen Consulting Group's Final Report of the *Review of the Intergovernmental Agreement for the Australian Building Codes Board* (ACG 2009), recommended that it be freely available on-line, with any consequent funding shortfall to be made up by a proportional increase in contributions from all governments. In response, the Building Ministers' Forum supported free Code access 'in-principle', but acknowledged that the current fiscal climate did not make this possible in the immediate future and decided that the issue should be reconsidered in financial year 2013-14 (ABCB 2010).

The Commission recognises that the ABCB has implemented various initiatives to improve access to the BCA, including:

- provision of hard copies, for free 'public viewing', to over 450 Local Councils across Australia
- provision to tertiary institutions and public libraries of an additional BCA online user licence to assist students, teachers and individuals requiring access to BCA information
- the ABCB technical enquiry service, in which enquirers can be provided with a free 7-day online user licence to access BCA information if required.

Nevertheless, the Commission continues to hold the view that all users should be able to access a free on-line copy of the BCA, and urges governments to make the necessary funding available when the issue is reconsidered in three years time.

6 Other issues

Key points

- The Anti-Money Laundering/Counter Terrorism Financing (AML/CTF) legislation was considered by some businesses as being overly prescriptive and lacking an overarching risk based approach. Others, such as small bookmakers and hotel operators involved in property management schemes, considered that the arrangements placed a disproportionate burden on their businesses relative to the risk of the activities they undertake being used for money laundering or terrorism financing.
- Larger firms have the resources and, particularly in the case of financial institutions, the experience in managing risk and as such prefer less prescriptive obligations. In contrast, smaller firms without such resources and experience, are likely to face difficulties in developing and maintaining risk-based systems, as required by the legislation, to address money laundering and terrorism financing. In many instances, smaller entities prefer prescriptive regulation as opposed to having to develop their own arrangements to meet the required regulatory outcomes or obligations.
- The AML/CTF exemptions policy provides the means to assess the requirements placed on smaller on-course bookmakers, including the use of a turnover threshold, to reduce the compliance costs of operating an AML/CTF program against the increased risk of money laundering and terrorism financing activity. Similarly, requiring transaction monitoring of certain property management schemes appears to be disproportionate to the risk of such arrangements being used for money laundering or terrorism financing activities and consideration is being given to exempting such schemes from these requirements.

Specific concerns raised by participants which did not fall within the broad areas covered in previous chapters are addressed in the chapter.

6.1 Anti-money laundering and counter-terrorism financing (AML/CTF) legislation

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF) is aimed at addressing the risk of money laundering and the financing of terrorism in Australia. It builds on the anti-money laundering obligations of the *Financial Transaction Reports Act 1988* and sets out the arrangements for Australia to meet its international obligations with regard to the standards set by the intergovernmental Financial Action Task Force on Money Laundering (FATF). As business is obliged to take into account the adequacy of other countries AML/CTF arrangements in dealing with their foreign counterparts, it enables Australia's financial sector to maintain its international relationships and protects the reputation of individual Australian companies and Australian financial markets (Ellison 2006).

The first tranche of the legislation enacted between 2007 and 2009 covered:

- the financial sector including banks, building societies and credit unions, foreign exchange dealers, superannuation funds, asset management companies and issuers of travellers cheques
- the gambling sector including bookmakers, casinos, TABs, pubs and clubs, and internet and electronic gambling service providers
- bullion dealers.

The second tranche, which is yet to be implemented, will cover real estate agents, dealers in precious metals and stones, lawyers, accountants and trust and company service providers.

Businesses covered by the legislation are identified as designated reporting entities. These entities are required to undertake various reporting and other obligations, including:

- developing and maintaining a business specific AML/CTF program using a risk-based approach to identify and mitigate any potential money laundering or terrorist financing activity
- requirements to identify customers prior to providing a service
- reporting on certain transactions including suspicious transactions and transactions above a certain threshold

- record keeping in regard to customers' financial records.

Industry concerns

The focus of concerns in respect of the AML/CTF legislation related to the regulatory approach underpinning the legislation and the disproportionate burden placed on certain businesses relative to the risk of the activities they undertake being used for money laundering or terrorism financing.

Lack of an overarching risk-based approach

According to the Australian Bankers' Association (ABA) (sub. 17), the major problem was the lack of an overarching risk-based approach in the AML/CTF legislation. The Association said:

> While the AML/CTF Act adopts a risk-based approach for many obligations, there is no overarching risk-based approach. This means that where an obligation is not expressly stated to be risk-based it must be performed, regardless of a risk assessment. (sub. 17, p. 8)

It noted that the mandatory obligations included the identification of customers and beneficiaries and the requirement to collect minimum customer information as part of know-your-customer requirements. These prescriptive obligations added significant costs and complexity to customer identification and were not consistent with the risk-based approach adopted by financial institutions.

It went on to say:

> If there were an overarching requirement that the regime be risk-based, it would be left to banks to perform a risk assessment and determine the extent to which such actions would need to be undertaken, depending on the level of risk identified. (sub. 17, p. 8)

The ABA (sub. 17) considered that such an approach was in line with international best practice and drew attention to the FATF recommendations in regard to record-keeping and customer due diligence which provided for the financial institution to determine the extent of such measures based on a risk analysis of the type of customer, business relationship and the transactions undertaken.

Abacus – Australian Mutuals (sub. 22) made similar comments about the level of prescription:

> The AML/CTF regime is intended to have a "risk-based" approach, but there is a considerable element of prescription that gives rise to unintended consequences. (sub. 22, p. 6)

An Abacus – Australian Mutuals (sub. 22) member commented:

> The legislation is becoming more and more prescriptive over time. While all the original intent was to be less prescriptive and rely on risk assessments of reporting entities, recent new and draft rule changes are moving these goalposts. This increased prescription make it all the more difficult to understand and comply with the added complexity. (sub. 22, p. 6)

The ABA (sub. 17), in concluding, recommended that Government insert a provision in the legislation, which would also cover the AML/CTF rules, to require all obligations placed on business to be subject to an over-arching risk-based approach. This was supported by Abacus – Australian Mutuals (sub. 22).

In response, AUSTRAC (sub. 26) commented that the AML/CTF arrangements adopted a risk-based approach to compliance to provide businesses with the flexibility to develop procedures according to the different risks they faced. However, there were mandatory minimum requirements for customer identification.

> It is government policy that all customers of designated services should at the very least provide their full name, their date of birth and their residential address, and that at least their name and either their date of birth or address be verified. Similar requirements apply to customers which are not individuals. (sub. 26, p. 10)

AUSTRAC (sub. 26) went on to say that Australia had actually 'been criticised by FATF to the extent to which it applied a risk based approach in its legislation … ' (p. 11). In addition, AUSTRAC pointed to the extensive consultation processes undertaken by the Government with industry, and the ABA directly, over a long period of time to find the correct balance between minimum required activities and the overarching risk-based approach. It further noted that this consultation with industry, including the ABA, continues in the development of the AML/CTF rules (sub. 26).

Assessment

Much of the AML/CTF regime provides a risk-based approach to meeting the mandatory obligations placed on reporting entities.

The AML/CTF obligations placed on a reporting entity are divided into two parts:

- Part A requires a reporting entity to put in place an AML/CTF program to identify, mitigate and manage the risk of money laundering or counter terrorism that the entity may reasonably face in undertaking its business activities. The AML/CTF program is not required to be lodged with AUSTRAC, but may be required to be produced on request.

- Part B deals with customer identification. It contains a number of mandatory obligations and minimum information requirements that reporting entities must collect.

There are also a number of reporting obligations placed on reporting entities including reporting of suspicious transactions, transactions over certain thresholds and international funds transfers.

The AML/CTF arrangements generally reflect the FATF recommendations that provide for financial institutions and designated professions and businesses to meet their obligations through a risk-based approach. For example, all reporting entities are required to have ongoing customer due diligence systems in place — these entail transaction monitoring and customer information and if required an enhanced program — and such systems should be proportionate to the AML/CTF risk identified by the reporting entity.

Clearly, larger firms have the resources and, particularly in the case of financial institutions, the experience in managing risk and as such prefer less prescriptive obligations. In contrast, smaller firms without such resources and experience, as noted by the New South Wales Bookmakers Co-operative (sub. 14), are likely to face difficulties in developing and maintaining risk-based systems to address money laundering and terrorism financing. Indeed, in many instances smaller entities prefer prescriptive regulation as opposed to having to develop their own arrangements to meet the required regulatory outcomes or obligations.

Much of the concern surrounding prescriptive regulation relates to the customer identification requirements in the AML/CTF legislation. Inserting a provision into the AML/CTF legislation as suggested by the ABA (sub. 17), to require all obligations to be subject to an overarching risk-based approach could reduce the requirements placed on reporting entities particularly regarding customer identification. On the other hand, lessening the specific requirements in regard to customer identification could undermine the integrity of the AML/CTF arrangements and in meeting the Government's policy objectives in this area.

It is not clear as to where the balance should lie between removing specific requirements to reduce the burden on business and ensuring the effectiveness of the AML/CTF arrangements. However, in accordance with good regulatory practice, effective consultation processes should continue between the industry and the regulator to minimise the cost to business of meeting the policy objectives of the regulation.

Assisting reporting entities to meet their customer identification obligations

Abacus – Australian Mutuals (sub. 22) pointed out that its members had not been provided with the means to carry out their obligations in regard to verifying customer identity and ongoing customer due diligence. It suggested that reporting identities would be better able to meet their obligations in these areas if they were able to access the National Documents Verification Service to verify the documents provided by their customers. To this end, Abacus - Australian Mutuals (sub. 22) recommended that the Australian Government ease the AML/CTF compliance burden by enabling reporting entities to have access to the National Documents Verification Service.

It also suggested that reporting entities could be assisted through centralising relevant information on the AUSTRAC website. This would include information from the Reserve Bank of Australia's website regarding sanctions against individuals and countries and information from the Department of Foreign Affairs and Trade website concerning proscribed persons and entities (sub. 22).

Assessment

The National Document Verification Service is being developed to provide a secure, real time, on-line check of the authenticity and accuracy of a proof of identify document presented by an individual applying for a high value government service or benefit. At present passports, visas and drivers licences can be verified using the system.

The system does not store personal information and requests to verify are encrypted and sent via a secure pathway to the document issuing agency. A 'yes' or 'no' response is then transmitted to the agency initiating the inquiry.

The system has been designed to be used by Australian Government and state and territory government agencies and its use is progressively being taken up by these agencies. There is the potential for the system to be used by the private sector as well. However, the future use of the system will need to take into account privacy impacts (Attorney-General's Department 2010).

Provided that privacy issues can be managed appropriately, having reporting entities being able to access the system could assist these entities in meeting their AML/CTF customer identification obligations and strengthen the AML/CTF identification process. The potential for reporting entities to be able to access the National Identification Verification System should be considered as the system is further expanded.

As to the suggestion that information from other agencies, such as the Reserve Bank and the Department of Foreign Affairs and Trade, regarding the financial sanctions placed on countries and individuals be provided on the AUSTRAC website, the Commission notes that this information is published in information circulars available on the AUSTRAC website (sub. 26).

The burden placed on bookmakers is disproportionate to the risk

The New South Wales Bookmakers' Co-operative (sub. 14) considers that the requirements placed on on-course bookmakers — the development of a AML/CTF risk-based program, the requirements for customer identification and due diligence, record keeping and suspicious and threshold transaction reporting — were disproportionate to the relative risks inherent to on-course bookmaking activities.

It noted that given the small turnover of many of its members — over three-quarters of its members had an average turnover per race meeting of less than $20 000 with just over half having a turnover per meeting of less than $10 000 — the majority of bookmaker's operations did not present a risk of being used for money laundering or counter terrorism financing.

The New South Wales Bookmakers' Co-operative (sub. 14) acknowledged that all bookmakers should be subject to certain 'one-off' compliance obligations such as reporting above threshold transactions (transactions in excess of $10 000) and suspicious transactions, but were of the view that only the higher turnover bookmakers should be subject to all the ongoing AML/CTF provisions.

Assessment

The issue for on-course bookmakers is to lessen the compliance burden of the AML/CTF legislation on low turnover or small scale bookmakers. As noted above, there are larger costs to smaller businesses in developing and maintaining an ongoing AML/CTF program.

In recognition of this, AUSTRAC has been trialling a draft guide with a number of smaller bookmakers to assist in the development of their AML/CTF programs. When finalised the guide will assist bookmakers in developing their AML/CTF program, including customer identification and verification and enhanced customer due diligence programs (sub. 26).

Another approach would be to put in place a betting turnover threshold below which bookmakers would be exempt from having to operate an ongoing AML/CTF program, but still required to report suspicious and above threshold transactions.

However, any threshold linked exemption enabling bookmakers to opt out of an ongoing AML/CTF program would need to be set at a level to mitigate the risk of money laundering and terrorism financing.

The Act provides for exemptions in recognition that there will be occasions when the requirements placed on businesses may be excessive and go beyond the intention of the legislation. To this end, the AUSTRAC CEO is able to provide exemptions and will consider the case for an exemption where the burden imposed on business is likely to be greater than is warranted by the risk. Under the AML/CTF Act, the AUSTRAC CEO or delegate can make rules exempting designated services from the Act or certain provisions of the Act or exempt a specified person from one or more of the provisions (AUSTRAC 2010). At present, there are 56 active exemptions and 11 modifications that have been approved by the AUSTRAC CEO (sub. 26). The factors taken into account in providing an exemption are outlined in box 6.1.

These provisions would enable an assessment of the requirement for all on-course bookmaking activities to be subject to an ongoing AML/CTF program. The use of, and level of, the threshold required to reduce the compliance burden on the lower turnover bookmakers against any increased risk of money laundering and terrorism financing activities from such a threshold could also be assessed. The 'one-off' reporting obligation relating to suspicious or above threshold transactions, as supported by the industry, would not need to be assessed.

The Commission notes that exemptions to mitigate compliance burdens have been provided to on-course bookmakers and TABs in relation to maintaining transaction records in respect of receiving bets. Also, bookmakers representatives have indicated to AUSTRAC through consultative forums that they intend to lodge an application for the introduction of an exemption for small bookmakers (sub. 26).

In conclusion, the existing exemptions policy already provides the means to assess removing or adjusting the AML/CTF program requirements on on-course bookmakers to reduce compliance costs against the increased risk of money laundering and terrorism financing activity.

Low risk property management schemes

The Australian Hotels Association (AHA) (sub. 10) raised concerns about the coverage of managed investment schemes under the AML/CTF legislation, in particular the arrangements under which apartment owners lease back their apartments to a hotel operator who in turn provides these apartments to their guests.

The revenue is pooled and shared amongst the scheme members, with the operator deducting the required operating costs.

Box 6.1 Assessing applications for exemptions from AML/CTF regulation

Decisions regarding the issuing of exemptions are based upon the facts and circumstances of each application. Factors that may be considered by the CEO or his delegate in deciding whether to issue an exemption include:

- the nature of the exemption, including the impact it will have on the market-place or the integrity of the AML/CTF and FTR Acts;
- whether granting the exemption would be consistent with the intent and purpose of the FTR Act, AML/CTF Act and AML/CTF Rules;
- the risk-profile of the applicant, the designated service, or the circumstances in which the designated service is provided;
- issues of competitive neutrality (i.e. whether the exemption would create unfair advantage for the applicant or disadvantage to third parties); and
- the level of regulatory burden to which the applicant is being subjected.

In determining whether to issue an exemption, the CEO or his delegate may consider it necessary to consult as appropriate with:

- regulated entities or their representatives;
- one or more of AUSTRAC's partner agencies (which includes designated and non-designated Commonwealth agencies); or
- the Privacy Commissioner.

Other considerations for AUSTRAC in assessing exemption applications include any Ministerial Directions or Policy Principles given under the AML/CTF Act by the Minister.

If an application for exemption by Rules is successful, draft Rules will be published on the AUSTRAC website for comment. Rules will also be subject to Parliamentary scrutiny and may be disallowed.

Source: AUSTRAC (2010).

Although the AML/CTF legislation was originally drafted to cover managed investment schemes, such schemes were not originally captured by the legislation due to unintended interaction between the *Corporations Act 2001* and the provisions of the AML/CTF legislation. Regulations were then put in place to ensure that businesses issuing interests in managed investments schemes were subject to AML/CTF obligations from the end of January 2008 (Attorney General's Department 2008).

The AHA (sub. 10) commented that the transaction monitoring requirements were significantly more onerous than the previous AML/CTF obligations of collecting and verifying customer identification.

It said:

> Transaction monitoring for example requires a dedicated data collection and monitoring system to be implemented. This functionality is currently not required for the purposes of managing the scheme effectively and few hotels have the data integration and the sophisticated systems that can be updated for transaction monitoring purposes. (sub. 10, p. 7)

The AHA (sub. 10) view was that these schemes represented a negligible risk as the income generated for the owner is 'clean' as it comes from the guests staying in the apartment. Other than changes to personal or banking details, all the transactions in the scheme accounts are under the control of the hotel operator in the form of payments from hotel guests. Investors in these schemes do not control the account they only receive the rental income into their nominated bank account.

As the compliance burden was disproportionate to the negligible risk of such schemes being used for money laundering, the AHA (sub. 10) called for these schemes to be exempted from the requirements placed on managed investment schemes. Such an exemption would be similar to the exemptions provided to other low risk property management schemes (sub. 10).

Assessment

The requirements raised by the AHA (sub. 10) in regard to transaction monitoring of property management schemes appear to be disproportionate to the risk of such arrangements being used for money laundering or terrorism financing activities.

Such schemes would appear to be fairly low risk. To the extent these property management schemes operate under the low risk arrangements discussed above, consideration should be given to exempting such schemes from transaction monitoring requirements. The Commission notes that the AHA lodged an application for an exemption in April 2010, which is currently being considered (sub. 26).

Concerns about the second tranche

The Real Estate Institute of Australia (REIA) (sub. 12) is unsure about the impacts of the AML/CTF legislation as the second tranche of the legislation which would include real estate agents is yet to be implemented. However, the REIA (sub. 12)

noted that based on the compliance costs placed on small businesses from the first tranche, compliance requirements were likely to be quite onerous. Also, there would be significant costs for small business from training which would, in part, result in a wider public benefit. In light of this, the REIA suggested that the Australian Government provide assistance to offset this cost.

Assessment

The Commission is unable to comment on the impact of the second tranche that will cover real estate agents, dealers in precious metals and stones, lawyers, accountants and trust and company service providers as it is yet to be implemented. Also, the implementation arrangements have not been finalised, consultation with business is still ongoing and a further discussion paper on the implementation of the second tranche is to be released.

Different proof of identity requirements

Association of Superannuation Funds of Australia (ASFA) (sub. 20) noted there were different proof of identity requirements for the AML/CTF arrangements and for the superannuation industry and called for a single universal proof of identity requirement.

The different proof of identity requirements reflect the different purposes of the AML/CTF and superannuation supervision regimes. However, there are significant similarities with both regimes using driver's licences, passports, certified copies of citizenship documents and birth certificates as acceptable proof of identity for individuals. AUSTRAC has indicated that, if required, it would be willing to look at greater harmonisation between the two regimes (sub. 26).

6.2 Extension of the Do Not Call Register

The Do Not Call Register allows people who do not want to receive unsolicited telemarketing calls to list their home and mobile telephone numbers on a register. It then becomes illegal for telemarketers to make unsolicited calls to those numbers unless the person has given their consent, express or implied, to receiving a call, or the call is exempt.

The Australian Direct Marketing Association (ADMA) (sub. 9) has raised concerns about the operation of the Do Not Call Register (the Register) and the potential

impact of the proposal to extend the scope of the Do not Call Register to business, government, fax and emergency service numbers. ADMA's concerns are that:

- although the approach to enforcement of the existing legislation is improving, ADMA continues to receive reports of heavy handed enforcement by the Australian Communications Media Authority
- although the Register is currently limited to numbers that are primarily used for domestic purposes, the direct marketing industry has also been subject to scrutiny for calling business numbers, leading to higher compliance costs
- the process used to develop legislation to extend the Register has been opaque, the compliance costs have not been adequately identified, and no Regulation Impact Statement has been prepared in relation to the proposal.

Concerns about the administration of the Register or the impact on business of the proposed extension of the Register were also raised by the Australian Bankers Association (sub. 17) and the Tasmanian Government (sub. 19).

Assessment

During last year's review ADMA expressed concern about what it considered to be the overly prescriptive and legalistic interpretation of regulations by the Australian Communications and Media Authority (ACMA) and the cost to its member of co-operating with investigations. The concerns of ADMA, and the response by ACMA, are outlined in the Commission's Report (PC 2009a).

In its submission this year ADMA (sub. 9) restated its concern but noted that 'there are heartening signs that the Australian Communications and Media Authority is adapting its approach to enforcement'.

ADMA also raised concerns last year about the proposed extension of the Do Not Call Register to business, government, fax and emergency service numbers. At that time the Commission observed that as the issue related to a proposed expansion of the policy objectives of the Register, rather than the regulatory burden imposed by the existing legislation, it seemed to be outside of the scope of the review. The Commission went on to comment that the concerns raised by ADMA would be more appropriately dealt with through a Regulation Impact Statement (RIS) (PC 2009a).

The *Do Not Call Register Legislation Amendment Bill 2009* was introduced into the House of Representatives on 26 November 2009. When introducing the Bill the Minister for Infrastructure, Transport, Regional Development and Local Government indicated that the compliance costs associated with the Bill are

expected to be in line with the costs that telemarketers incurred with the introduction of the original Register, and are not expected to be large (Albanese 2009). However, the Explanatory Memorandum which accompanied the Bill did not incorporate a RIS setting out the costs and benefits of the proposal.

The Government's guidelines on regulation required that 'all proposals that will have a significant impact on business and individuals or the economy' should be subject to in-depth analysis, documented in a Regulation Impact Statement (Australian Government 2007). The Commission understands that in September 2008 the preliminary assessment prepared by the Department of Broadband, Communications and the Digital Economy (DBCDE) concluded that the impact of the proposal would be low, and this conclusion was endorsed by the Office of Best Practice Regulation.

The direct marketing industry raised concerns about the possible impact of the proposal over an extended period of time and repeatedly called for an analysis of the impact on businesses of the proposal. In the absence of a RIS developed by the DBCDE, ADMA engaged Access Economics to prepare a report on the economic impacts of the proposal (sub. 9). The report by Access Economics in January 2010 identified a wide range of impacts. It estimated that there would be establishment costs of $23.7 million and total ongoing costs of between $47.4 million and $84.2 million per annum. Further, there would be unquantifiable costs from changes to employment, declines in market efficiency, and flow-on effects. The benefits were estimated to be lower than the costs at $34 million to $47 million per annum (box 6.2).

While the estimates prepared by Access Economics may be the subject of debate, they suggest that preliminary assessment process failed to identify the full impacts of the proposal. The scale of the impacts estimated by Access Economics, and the possibility that the costs may outweigh the benefits, argue strongly for a RIS to have been prepared to either confirm or refute such assertions.

In April a media release issued by the Minister for Broadband, Communications and the Digital Economy, stated that the Government 'would not proceed with the proposal to extend the Register to include business numbers' but that 'the Government is keeping an open mind on this issue and intends to do further research and consultation with stakeholders' (Conroy 2010). If the proposal to extend the reach of the Register to business numbers does proceed at a later date it should be accompanied by a RIS which fully explores the costs and benefits of the proposal.

Box 6.2 **Estimated costs and benefits of expanding the scope of the Do Not Call Register**

Table i: Summary of costs and benefits of expansion of the DNCR to B2B calls

Impacts		Costs/Benefits	
Low	Call washing costs	***Cost***	$1.4 - $2.2 million per annum
Moderate	Compliance – increased costs to business of complying with legislation (in addition to washing)	***Cost***	Establishment costs: $23.7 million Ongoing costs: $46 - $82 million per annum
	Reduced employment	***Cost***	Two thirds of survey respondents reported that they would reduce employees as a direct result of the DNCR expansion.
	Productivity gains due to reduction in number of unwanted calls	***Benefit***	$34 - $47 million per annum
High	Decline in market efficiency due to reduction in competition, information and innovation	***Cost***	Unable to be quantified.
	Loss of revenues via flow-on effects to end-users of products sold through telemarketing	***Cost***	Unable to be quantified.

Source: ADMA, (sub. 9, Report by Access Economic Pty Ltd for Australian Direct Marketing Association).

6.3 Music related issues

Live music

The Music Council of Australia (MCA) (sub. 13) is concerned about the complexities business faces when confronted with the plethora of state and territory regulations that which cover live music. The MCA highlights that few other industries face the challenges of having their workplace change from day to day, and that this is a particular challenge in an industry characterised by micro, small and small-medium enterprises.

By way of example, the MCA noted that while there is a National Standard for Occupational Noise, New South Wales also has a separate code covering noise

management. The MCA provides a table summarising some of the differing regulatory arrangements in the different jurisdiction (table 6.1).

These issues largely relate to inconsistencies between state and territory regulation, rather the Commonwealth regulation. Where they do relate to some aspects of Commonwealth regulation (ie environmental protection regulation) the regulations in question are economy-wide generic regulation, rather than being specific to the industries covered by this year's review. In light of this the issues raised by the MCA, while significant, appear to lie outside of the scope of the current review. The concerns raised by the MCA might be more appropriately considered through the Cultural Ministers Council and the Commission urges the Australian Government to consider raising these issues in that forum.

Fees for background music

Restaurant and Catering Australia (sub. 8) draws the Commission's attention to the concerns by some businesses about the requirement to pay fees in order to play recorded music in businesses such as restaurants. While the cost of the fees was not considered to be significant, it is felt that paying and additional fee to play a CD the business has already purchased is unjustified.

The fee for playing music is not a government charge. It is a fee for the performance of a recording covered by copyright, which is collected by the Australasian Performing Right Association (APRA) and/or the Phonographic Performance Company of Australia on behalf of the copyright owners.

This issue was examined by the House of Representative Committee on Legal and Constitution Affairs in 1998 (HRCLCA 1998). The Committee recognised the importance of copyright in encouraging Australians to create music. It also acknowledged that many of those creators were themselves operators of small businesses which relied on royalties from the public performance of their works as an important source of income. The Committee further noted that the interpretation of the *Copyright Act 1968* was consistent with the international obligations which arise out of Australia's membership of international fora and agreements on intellectual property rights. Nevertheless, the Committee concluded that 'there is a high level of confusion and misunderstanding about the nature of the public performance right and the collecting societies which administer the right' (HRCLACA 1998, p. 7) and made some recommendations about better informing business of its obligations and improving dispute resolution procedures.

The appropriateness of imposing a fee for playing recorded music is a policy issue for the government to consider in the context of its international agreements.

Table 6.1 **Regulation of live music**

Comparison of state and territory arrangements

	ACT	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Specific reference in the objects of the Act	N	Y	N	N	Y	N	N	Y
Entertainment venue liquor licence	N	Y	N	Y	Y	N	N	Y
Afforded liquor licences	N	Y	Y	N	Y	Y	Y	N
Order of occupancy, noise & amenity complaints process	N	Y	N	Y	Y	N	N	Y
Minors able to perform	N	Y	N	N	Y	N	N	N
Code of conduct for child employment in entertainment industry	N	Y	N	Y	N	N	Y	N
Demarcation between primary purpose and ancillary use	N	N	N	N	N	N	Y	N
Planning approval for large screens	N	N	N	N	Y	N	N	N
Capital city zoned entertainment precincts	N	Y	N	Y	N	N	Y	Y
Workplace health & safety entertainment industry code of practice	N	N	N	Y	N	N	N	Y
Licensing for agents and managers	N	Y	N	N	N	N	N	N
Code of conduct for agents and managers	N	N	N	Y	N	N	N	N
Deeming provisions for entertainers in workers compensation legislation	N	Y	N	N	Y	N	N	N
Arts funding available under gaming legislation	N	N	N	N	Y	N	N	N
Arts funding available under lotteries legislation	N	N	N	N	N	N	N	Y
Information resources for liquor licensing for venues	N	Y	N	Y	Y	Y	Y	Y
Helpline for building and compliance information	N	N	N	N	Y	N	Y	N
Dedicated publications on building compliance	N	N	N	Y	N	Y	N	Y
Dedicated website on building compliance	N	N	N	N	N	N	Y	N
Building compliance information available from relevant Business Licensing Info. Service	Y	N	Y	Y	Y	Y	Y	Y
Entertainment specific environmental protection publication	Y	N	N	Y	N	N	N	N
Entertainment specific environmental protection website	N	N	N	Y	N	N	N	Y
Adequate reference for agents & managers	N	Y	N	N	N	N	N	N

Source: Music Council of Australia (sub. 13).

6.4 Australian content in broadcasting

The Music Council of Australia (MCA) (sub. 13) discusses the effect of the concessions made in the Australia United States Free Trade Agreement which prevents Australia from increasing Australian content quotas on free-to-air television broadcasts and severely constrains Australia's ability to impose content quotas on digital multi-channels. Although the MCA acknowledges that the existing regulations impose a financial burden on broadcasters it argues that the public good flowing from the Australian content quotas outweighs the impost on business.

The Commission has been asked to identify specific areas of Australian Government regulation that are unnecessarily burdensome, complex or redundant. While the views of the MCA in relation to Australian content on free-to-air television are of interest, they are not directed at identifying unnecessary regulatory burdens which should be addressed by the Government.

The MCA also draws the Commission's attention to the administration of the Commercial Radio Codes of Practice (CRA 2010). These stipulate the quota of music performed by Australians which must be broadcast by a licensee during an Australian Performance Period. The Codes are developed by the Commercial Radio Australia (CRA) and registered by the Australian Communications and Media Authority (ACMA) once it is satisfied that broadcasters have undertaken public consultation and the codes contain appropriate community safeguards. Complaints about breaches of the Codes are normally considered, in the first instance, by the broadcaster whose broadcast is the subject of the complaint.

The MCA considers that the administration of the Codes by CRA is unsatisfactory because, in the MCA's view, CRA has continually shown itself to be hostile to the regulations. The MCA feels that CRA's activities give no confidence that the local content level for music will be sustained in commercial radio in the absence of regulation supporting local content. The MCA also advocates transferring the local content requirements for analogue radio to digital radio.

While the current local content arrangements are largely the responsibility of the radio industry, there are external controls over those arrangements. Although the codes are developed by CRA it must satisfy the regulator, ACMA, about both the level of public consultation on a proposed code, and the content of the code, before ACMA will register the code. ACMA also has the power to promulgate industry standards if it considers that the codes do not adequately address an issue. Similarly, while most complaints about a breach of the code are initially dealt with by the broadcaster, a complainant who is unsatisfied with the outcome of their complaint may escalate the complaint to ACMA. These mechanisms provide assurance that

both the codes, and their administration, will take into account wider community interests.

6.5 Quarantine requirements

The following issues were raised about aspects of the regulation of imports by the Australian Quarantine and Inspection Service (AQIS):

- complexity and inflexibility in the AQIS process for issuing import permits — including excessive authorisation steps and the requirement that permits be renewed every two years — is resulting in unnecessary paperwork, processing delays and excessive costs, particularly for small and medium enterprises (Science Industry Australia (SIA)[1] sub. 6)
- AQIS requirements for transporting and storage of quarantine samples are time consuming and resource intensive (Tasmanian Government sub. 19)
- multiple permit requirements — SIA (sub. 6) highlights the example of an importer that is required to have four different permits, one from AQIS as well as permits from three other agencies (box 6.3)
- inconsistencies between AQIS and the Office of the Gene Technology Regulator (OGTR) in the regulation of research facilities and the requirement to liaise with two regulators (and keep abreast of their changing compliance and reporting requirements), is leading to ambiguity, conflicting advice and excessive costs. (Tasmanian Government sub. 19).

Assessment

Concerns about quarantine and biosecurity requirements and processes have been raised with previous Commission reviews of regulatory burdens (PC 2007 and 2008c). At the time of the Commission's 2008 Review *Regulatory Burdens: Manufacturing and Distributive Trades*, the Beale Review of quarantine and biosecurity arrangements was underway (box 6.4) and as a consequence the Commission did not make recommendations in response to the specific industry concerns.

Appropriate biosecurity and quarantine measures are essential for protecting Australia from pests or diseases that might have potentially devastating consequences. At the same time, excessive restrictions or inefficient delays in

[1] SIA is the peak body representing manufacturers, importers and distributors of scientific equipment, laboratory and technical service companies and the scientific research community.

assessing imports can impose an unnecessary burden on businesses and for consumers it can lead to reduced choice and access to beneficial new products and higher prices.

Box 6.3 **Costs of multiple import permits**

Science Industry Australia (sub. 6) provided the Commission with case study information on the costs for a small firm that is required to have four different permits from four different agencies for the importation of a single diagnostic test kit. The kits are used for the detection of testosterone in blood samples for children suffering from precocious puberty. The following is an extract from the submission.

The permits cover the following:

(a) importation of biological material — issued by AQIS every two years specifically for a product line at a cost of $150 plus assessment fees ranging between $40 and $320

(b) permit to import radioactive isotopes — issued by the Australian Radiation Protection and Nuclear Safety Agency every year at a cost of $1500

(c) Australian Register of Therapeutic Goods Listing of Medical Device — issued by the Therapeutic Goods Administration at a cost of $550 per annum

(d) permit to import anabolic steroids — issued by Department of Health and Ageing — this covers only a period of 2½ months and is for a single importation of a kit containing less than 1 microgram of testosterone — less than 1/5000 of a medically significant amount.

The total sale value of this product is around $50 000 per annum.

Source: SIA (sub. 6, p. 12).

The Commission has therefore previously emphasised the importance of ensuring that measures are supported by scientifically sound quarantine risk analysis and, moreover, that the process in which the analysis is undertaken is as cost-effective as possible, with burdens imposed on those who participate kept to a minimum (see, for example, PC 2008c). This includes ensuring processes and information requirements are commensurate with the objective evidence of risks and that there is appropriate flexibility to impose lesser requirements where risks are demonstrated to be low.

From 1 July 2009, AQIS was integrated into a new divisional structure within the Department of Agriculture, Fisheries and Forestry, called Biosecurity Services Group (BSG). Reflecting the recommendations made by the Beale Review, BSG brings together all sanitary and phytosanitary strategies for animal, plant, food and quarantine operations — integrating the functions and responsibilities of AQIS, Biosecurity Australia (BA), Product Integrity, Animal and Plant Health Division and the Quarantine and Biosecurity Policy Unit. For now, AQIS and BA maintain their separate identities (branding) within BSG.

Box 6.4 The Beale review and the Government's response

A major review of Australia's quarantine and biosecurity arrangements was recently conducted by an independent panel chaired by Roger Beale. The Beale Review examined the appropriateness, effectiveness and efficiency of the existing arrangements, including resourcing levels and systems and considered Australia's arrangements in an international context. The final report — *One biosecurity: A Working Partnership* — and the Australian Government's preliminary response were released in December 2008. The Review Panel identified a number of significant deficiencies and made 84 recommendations for reform — including in relation to governance arrangements, transparency and timeliness — and all were agreed to 'in-principle' by the Government. One of the key recommendations was replacing the *Quarantine Act 1908* with new legislation, with the objectives of: achieving greater national consistency; and facilitating more effective biosecurity management by making the legislation simpler for both industry and the regulator. Implementation of many of the recommendations is dependent on commencement of proposed legislation and whole-of-government budget processes.

Particular reforms (recommended and/or recently implemented/being progressed) with the potential to reduce the regulatory burden on business, include:

- increased resourcing of biosecurity and quarantine functions and a more efficient allocation of resources to high risk areas (through moving to a 'risk-return' approach based on improved collection and usage of data)
- reinforcing independent, science-based decision making and the appropriate use of formal economic analysis in assessing potential biosecurity threats
- aggregation of cost recovery charges for like activities
- scoping work has commenced on an upgrade of ICT systems — the Review Panel recommended that paper work should be eliminated wherever feasible and that there be a focus on connectivity with other agencies
- wider adoption of co-regulatory arrangements; greater consistency in the administration, auditing, and response to non-compliance of co-regulators; reduced regulatory burdens for businesses that maintain an excellent track record of compliance with co regulatory arrangements
- development of education and awareness programs for importers
- amendments to legislation for imported food that came into effect in February 2010 enable AQIS to enter into compliance agreements that formally recognise food safety management systems, thereby minimising unnecessary regulatory burdens on food importers
- (for exporters) improved delivery arrangements for AQIS inspection and certification services via the implementation of the Export Certification Reform Package.

Source: DAFF (2010).

BSG (AQIS) issues import permits based on an assessment of the risk associated with the imported product and imposes conditions that seek to mitigate those risks to a very low level in line with Australia's Acceptable Level of Protection. This process is undertaken every two years (or more frequently in some cases involving high risk products or products with unknown risks).

BSG consider that the two year limit for import permits is appropriate as it ensures a regular assessment and review of the quarantine risks associated with the importation of biological products. For a given product, risks may change, for example, as a result of alterations in manufacturing procedures or the origin of ingredients. An assessment also takes into account changes to quarantine policy applicable to the product. Where there is no change to quarantine policy or the nature of the risks associated with the product, assessments progress relatively quickly. Approximately 70 per cent of permit applications for biological products are finalised in less than 10 business days (BSG pers. comm., 21 April).

There are various mechanisms in place which seek to reduce paperwork burdens for importers and reduce the time involved in making a permit application and the processing time once lodged. BSG has an 'eLodgement' system, which allows importers to submit import permit applications electronically and also has the facility to issue electronic or 'e-permits' for particular commodities that have been assessed as low risk, provided they comply with standard conditions. Import permits issued through the e-permit system have a shorter turn around time than applications lodged manually.

BSG seeks to reduce the cost to business of keeping abreast with changing requirements through a variety of mechanisms, including:

- advising changes to import conditions through its website, by issuing Industry Notices and Quarantine Alerts
- consultation with industry representative bodies through specific committees — the Biological Consultative Group, for example, meets every six months to discuss issues, including proposed amendments to the permit application process and cost recovery fees.

BSG requirements for transporting and storing quarantine samples are determined following an assessment of the quarantine risk posed by the particular product. The conditions associated with the transport, storage or handling are designed to allow the continued importation of specific products, but with the confidence that any potential quarantine risks are addressed appropriately. In principle, it is hard to argue with this basic approach to setting requirements, but the process for determining actual risks and how data are interpreted can lead to dispute. It is

essential that best practice risk-management systems are employed, an issue recognised in the Beale Review.

With respect to concerns about overlap in roles and responsibilities between AQIS and other government agencies, it is clear that BSG, OGTR and the other agencies that regulate in relation to the importation of biological materials, do so with a different focus and with different risks to consider. That said, there would appear to be scope for further improving consistency across agencies. BSG should continue to explore ways to improve its interaction with other government agencies and ensure that requirements and processes are as coordinated and consistent as possible. In this regard, the Commission notes:

- AQIS and OGTR have been working together in conjunction with Standards Australia to ensure, where possible, requirements are identical. This process has resulted in common compliance requirements in many cases. For example, if an operator meets the Australian/New Zealand Standards for containment they would in most cases also meet AQIS requirements and OGTR standards.
- the Government has agreed (in-principle), in its preliminary response to the Beale Review Panel report, to move toward a unified coordinated system for the approval of quarantine facilities (for animal and plant research laboratories). This would require agreement between the BSG, the OGTR and the Australian Pesticides and Veterinary Medicines Authority.

In conclusion, these concerns are not new, with similar issues having been raised with previous Commission reviews. Some reforms have been introduced in recent years that have sought to reduce compliance burdens and the progressive implementation of reforms following the Beale Review has the potential to further reduce compliance burdens for business.

The Commission encourages the Department of Agriculture, Fisheries and Forestry to continue to explore options for reducing compliance costs for business, in particular in relation to AQIS processes for issuing import permits. The Department should also work closely with other government agencies that have a role in the regulation of the importation of biological materials to ensure requirements and processes are coordinated and, wherever possible, consistent.

6.6 Chemical regulation

The Regulation Taskforce (2006) identified chemicals and plastics regulation as an area where regulatory burdens were excessive and as a priority area for reform. Specific concerns, included: duplication; inconsistency between state, territory and

Commonwealth regulation; the volume and complexity of regulation; regulatory delays; and high compliance costs. The Taskforce made a number of recommendations, including that an independent public review be undertaken.

In February 2006, COAG nominated chemicals and plastics as a regulatory 'hotspot' and agreed to establish an inter jurisdictional ministerial taskforce to develop measures to streamline and harmonise regulation. To inform the work of the taskforce, the Commission was asked, in July 2007, to conduct a review of chemicals and plastics regulation. The final report (PC 2008d) was released in August 2008.

In July 2008 (with the benefit of the Commission's draft report, but prior to release of the final), COAG agreed to a number of 'early harvest' reforms. Subsequently, COAG also agreed to an interim response to the Commission's Report and a new governance structure for chemicals and plastics reform — to address the need for greater coordination and regulatory oversight, including in relation to risk management decision making and standard setting.

Overall, progress in implementing reforms in this area has been mixed, with delays in achieving agreed outcomes in relation to many of the Commission's recommendations. As a consequence, a number of concerns previously raised about chemicals and plastics regulation have been raised again with this review.

Inconsistencies in regulation of drugs and poisons

Science Industry Australia (SIA sub. 6) raised the issue of inconsistencies across jurisdictions in the regulation of scheduled poisons and listed drug precursors. In relation to the *Code of Practice to protect against the diversion of chemicals into the illicit production of drugs*, SIA are concerned that each jurisdiction has added or subtracted compounds, leading to inconsistencies. SIA provided the following case study information:

> Merck Pty Limited, is an international company with a manufacturing and import business in Victoria. Merck Pty Limited distributes its goods Australia-wide. The compliance cost to Merck Pty Limited is estimated to be $12 500 per annum. This can be extrapolated to the conservative estimate of 100 companies in [the] science industry affected by these different regulations. (sub. 6, p. 9)

SIA recommends that national guidelines be developed — and adopted by individual jurisdictions without alteration — covering:

1. restriction on access to scheduled poisons
2. actions required to be taken prior to the sale of listed drug precursors.

Assessment

The Commission considered these issues in the 2008 review of *Chemicals and Plastics Regulation* (PC 2008d) and recommended reforms to address inconsistencies (see especially recommendation 5.1, 5.2 and 5.6).

COAG agreed to the national harmonisation of poisons scheduling regulation using template or model regulation, and mutual recognition of decisions. Work is progressing on implementing this reform. Other relevant reforms to address inconsistencies in regulation of scheduled poisons that have been made recently or are underway in response to recommendations made by the Commission include:

- state and territory governments are to adopt poisons scheduling decisions, made by the Department of Health and Ageing, directly by reference
- the National Coordinating Committee on Therapeutic Goods is, from July 2010, to report to the Australian Health Ministers' Conference on any state and territory variations to nationally-agreed poisons scheduling and the reasons for the variations
- separation of the scheduling of poisons and medicines — legislation has been passed and the changes are to take effect from 1 July 2010.

In relation to inconsistencies in the regulation of illicit drug precursors, the Commission's *Chemicals and Plastics Regulation* Report recommended (recommendation 5.6) that the Ministerial Council on Drug Strategy should develop regulations for adoption by reference by all jurisdictions. The development and implementation of a National precursor Control Framework is being led by the Commonwealth Attorney-General's Department as part of the *National Strategy to Prevent the Diversion of Precursor Chemicals into Illicit Drug Manufacture*. This work is supported by the National Working Group on the Prevention of the Diversion of Precursor Chemicals — a committee of experts from government and industry. The Commission notes that SIA is pursuing model regulation via the National Working Group.

The Commission recognises that some reforms have been implemented and other work is underway to address the concerns raised by SIA. Governments are urged to work cooperatively to achieve full implementation of national harmonisation of poisons scheduling regulation and consistent national regulation of illicit drug precursors as quickly as possible.

Importation of ozone depleting gases

Science Industry Australia (SIA sub. 6) consider that the requirement to report and pay very small amounts (as little as $0.01) quarterly for the importation of pre charged equipment containing small amounts of environmentally unfriendly gases is unreasonable. SIA argue that importers with a history of importing small amounts of ozone depleting gases should be allowed to report and pay on an annual basis.

Assessment

The same issue was raised by SIA in submissions to the Commission's 2008 reviews of *Chemicals and Plastics Regulation* (PC 2008d) and *Regulatory Burdens on Business: Manufacturing and Distributive Trades* (PC 2008c). In the second of these reviews, the Commission recommended that the Department of the Environment, Water, Heritage and the Arts conduct an assessment of the benefits and costs of allowing low volume importers to report annually rather than quarterly. This was accepted (Australian Government 2009e) in principle and some changes to payment methods were introduced to reduce the burden on low volume importers. These included:

- a partial fee waiver and upfront fee payment method, for low volume importers
- a pre-payment method for quarterly levies
- electronic system reporting
- electronic reminders (email notification) of upcoming reporting deadlines.

Further changes were deferred pending the introduction of a Carbon Pollution Reduction Scheme. With the uncertainty that now exists around the form and timing of the Government response to climate change issues, there would be merit in the Department examining the scope to implement further changes to address the compliance burden for low volume importers of ozone depleting gases.

Other regulation of chemicals

Concerns were also raised by SIA about excessive registration charges and reporting and assessment requirements applying to the importation and supply of small quantities of relatively low risk chemicals used for scientific research purposes.

The key concerns are:

- the National Industrial Chemicals Notification and Assessment Scheme (NICNAS), within the Department of Health and Ageing, requires companies to pay a relatively large annual fee for very small quantities of Tier 1 chemicals — these quantities are regulated in the same or similar ways as bulk chemicals are regulated because the threshold boundaries (in terms of monetary values of the chemicals) that determine the applicable fee are very broad
- SIA consider that the requirement that importers and users of chemicals submit Material Safety Data Sheets (MSDS) to NICNAS is an inappropriate method for managing any risk associated with the chemicals in question and the laboratory quantities involved
- there is unnecessary duplication of effort with many companies having to supply NICNAS with MSDSs for the same chemical entitities and those companies each incurring the costs associated with the requirement to issue MSDSs and updated MSDSs to customers (SIA sub. 6).

Further information in relation to these concerns is provided in box 6.5.

Assessment

Under current regulatory arrangements, new industrial chemicals have to be assessed by NICNAS for their public health, environmental and occupational health and safety risks. The entity introducing the chemical into Australia is required to report to NICNAS. An entity does not need to report on chemicals sourced from an Australian supplier.

In relation to concerns about the applicable annual NICNAS registration fee, the Commission notes that, reflecting current Australian Government policy, the cost of all NICNAS regulatory activities are recovered from industry. The assessment of new chemicals for introduction into Australia is funded under a fee for service arrangement and the remainder of NICNAS's activities under its legislation are funded via a levy across the broader industry group.

SIA claim (box 6.5) that the annual registration fee is $711 for each incidence of chemicals valued at between $1 and $499,000. The actual fee is $381 for 2009-10 and the payment of this single registration fee per year enables introduction of any number of different chemicals up to the total threshold value. As the SIA submission points out companies typically do not introduce only one chemical — indeed even smaller suppliers market around 1000 chemicals.

NICNAS is currently conducting a review of its cost recovery arrangements. This includes examining the current tier structure for registration fees to ensure that it is

fair and equitable. A draft Cost Recovery Impact Statement/discussion paper is expected to be released shortly for consultation with industry and other stakeholders. Concerns about the level of current annual fees are best assessed in the context of this separate review process.

Box 6.5 Concerns about the regulation of chemicals

The following are relevant extracts from SIA's submission.

NICNAS registration system

"Science industry importers and distributors supply small to medium amounts of high purity chemicals. The chemical transactions often involve less than 1 gram of material. However, these quantities are regulated in the same or similar ways as bulk chemicals are regulated elsewhere in the chemicals and plastics industry.

NICNAS requires companies to pay a relatively large annual fee … for very small quantities of Tier 1 chemicals. DHA [Department of Health and Ageing] sets the … fee according to the monetary value of the chemical in question. In this instance, the annual fee is $711 for each incidence of chemicals valued at between $1 and $499,000 . The NICNAS fee is aimed at recovering costs associated with the implementation of the *Industrial Chemicals Act 1989*.

It is obvious from the tier structure used by NICNAS to register introducers of industrial chemicals that the intent of the NICNAS Act is to control, in the broadest sense, high volume chemicals. The lowest tier available in the three tier NICNAS registration system is for chemicals which have a value below $500,000.

The implications of this high threshold can be seen in the following non-hypothetical situation. A supplier introduces 100 kilograms of a laboratory-only chemical valued at $100 per kilogram, total value $10,000. The annual registration fee is $7111 which is about 7% of the value of the introduced chemical."

Material Safety Data Sheets

"It is likely that 80% of shipment value is attributed to around 20% of chemical compounds, i.e. about 600 to 1,000 compounds. Some hundreds of suppliers exist who regularly are required to issue and/or update MSDS for these compounds to tens of thousands of users of these products. Whilst these compounds have perhaps the easiest MSDS to produce, it still is a massive time and dollar cost to the economy.

[It is estimated that] … industry incurs a regulatory compliance cost of $1.6 million per annum. This estimate is based on 100 typical science industry companies each importing an average of 600 chemical entities in laboratory quantities. … the same 100 companies incur a regulatory compliance cost of $71.2 million per annum due to the duplicated effort arising from them issuing and updating MSDS for an average of 600 chemical entities in laboratory quantities that they sell."

Source: SIA (sub. 6, pp. 7, 8, 15 and 18).

In 2004, legislative amendments introduced new assessment categories for low regulatory concern chemicals (LRCC). The LRCC reforms introduced flexibility into the assessment process to enable the fast tracking of low regulatory concern chemicals, while maintaining existing levels of worker safety, public health and

environmental standards. The reforms included increasing the volume thresholds for exempting chemicals from notification requirements (in combination with new reporting requirements).

The Commission's *Chemicals and Plastics Regulation* Study found that, while there was general industry support for the increased flexibility, concerns were raised that individual reforms were not delivering on their cost-reduction objectives and that in some cases costs had increased (PC 2008d, pp. 77-78). The Commission also suggested that 'NICNAS should investigate whether the current reporting requirements for chemicals used in research and development are warranted, given the circumstances of the use of those chemicals and the existence of other risk management measures' (PC 2008d, p. 78).

NICNAS is conducting an evaluation of the LRCC reforms to ascertain their effectiveness. The first phase of the LRCC evaluation project, an assessment of the impacts on industry, was completed by an independent consultant in June 2009. The Consultants final report (Campbell Research & Consulting 2009) presented a number of options for further consideration by NICNAS and feedback from stakeholders, including:

- reviewing the feasibility of increasing the volume limit for low volume exemptions — currently for chemicals introduced at a total quantity of 100 grams to 100 kilograms, suppliers can opt to provide only the total number of chemicals introduced at this level (i.e. no chemical details) and provide more information to NICNAS via an auditing process. Chemicals introduced at a total quantity of less than 100 grams do not need to be reported
- reviewing the feasibility of increasing the volume limit (currently 100 kilograms in a 12 month period) for research and development exemptions — under the R&D exemptions, reporting obligations are reduced, but introducers still have to report annually details such as the chemical name, CAS number and quantity.[2] There is no requirement for companies using the R&D exemption to provide NICNAS with a MSDS
- review the efficiency of current annual reporting requirements — assess the effectiveness of annual reports for LRCC in light of the time burden for industry in producing them and for NICNAS in processing them and the value of the reports for the purpose of achieving NICNAS objectives.

Given the recent evaluation of the LRCC reforms and pending further responses from stakeholders and NICNAS (which may lead to further reductions in regulatory

2 The CAS Number is a unique number assigned to a substance when it is entered into the Chemical Abstracts Service (CAS) Registry database.

compliance burdens), it is not appropriate for the Commission to make suggestions for further changes at this stage.

The Commission notes that NICNAS has had a web-based reporting system in operation for several years and this has reduced the regulatory burden associated with the use of more labour-intensive hardcopy 'intent to report' statements.[3]

Material Safety Data Sheets

Concerns were also raised in relation to MSDSs. An MSDS, also referred to as a Safety Data Sheet (SDS), is a document that describes the chemical and physical properties of a material and provides advice on safe handling and use of the material. Duties and obligations for the production, review, revision and supply of MSDS are prescribed in the Commonwealth, state and territory regulations that give effect to the National Model Regulations for the Control of Workplace Substances. The requirements for MSDSs are regulated by Safe Work Australia.

The supplier (manufacturer or importer) is responsible for preparing an MSDS for a hazardous substance and/or dangerous goods and is obliged to make it freely available to employees and customers handling the substance, at first supply of the material or on request. An MSDS must be reviewed periodically and kept up to date. It must be reissued at least every five years or when any new or significant information becomes available on the hazards of the material. Potential duplication of costs arises where multiple suppliers of the same chemical each need to develop and provide an MSDS to those purchasing the chemical from them.

The Commission intends to seek further clarification of the costs associated with the preparation and distribution of MSDSs for the final report, but notes that several factors tend to lessen the regulatory burden:

- there is no requirement for businesses using the exemptions (see above) to provide NICNAS with an MSDS
- NICNAS does not require that updated MSDSs be routinely provided to it
- MSDSs are simple to produce for many of the chemicals concerned
- for any of the more complex MSDSs, compliance costs associated with their preparation can be reduced by reference to the Hazardous Substances Information System (HSIS) — this is an open access consolidated database with

[3] The electronic annual reporting system has been available since the 2005-06 registration year, but was temporarily unavailable in the 2009-10 reporting cycle.

recommendations on labelling and exposure limits and is maintained by Safe Work Australia

- MSDS content, use and regulation is moving to greater global harmonisation and this is leading to greater acceptance of MSDSs produced overseas.

As part of proposed revisions to the workplace chemicals regulatory framework, Safe Work Australia has been consulting stakeholders on a new *National Code of Practice for the Preparation of Safety Data Sheets*. Safe Work Australia should examine options for reducing the regulatory burden associated with MSDS, and in particular duplication of effort, in the context of reviewing the regulatory framework and the Code of Practice.

Conclusion

The review of cost recovery arrangements and the development of a response to the recent evaluation of the LRCC reforms, provide NICNAS with a timely opportunity to consider options for further reducing the regulatory burden of fees and reporting and assessment requirements for business and in particular for introducers of small quantities of low-risk chemicals used for scientific research purposes. When considering future changes, NICNAS must satisfy efficient cost recovery principles and the overriding principle that regulatory requirements — and the associated compliance costs — should as far as possible be commensurate with the risks posed by the chemicals concerned.

More generally, as noted above, reduction in the compliance burden in the regulation of chemicals and plastics is a COAG Reform priority. Reforms in response to the Commission's *Chemicals and Plastics Regulation* Report are still being implemented. One important aspect of the proposed reforms involves the development of better systems for risk-management decision making and standard setting and, in the longer-term, this has the potential to address the sort of burdens raised with this study.

6.7 Environmental related issues

National Strategy on Energy Efficiency — Residential Buildings

The Real Estate Institute of Australia (REIA) (sub. 12) commented that real estate agents would have a considerable role to play, and incur costs, in educating vendors and landlords to ensure their compliance with the requirements of the proposed

National Strategy on Energy Efficiency. These arrangements will require mandatory disclosure of residential building energy, greenhouse and water performance at the time of sale or leasing and are to take effect in May 2011.

The REIA (sub. 12) also noted that a RIS expected in January 2010 would not be available until May which would truncate the time to undertake necessary training and education, further adding to the burden.

Given that these arrangements are not yet in place, the Commission is not in a position to assess their impact on the real estate sector. The Commission understands that a RIS is being developed and will be released in the second half of 2010. The RIS is being developed in consultation with the states and territories as they will have carriage of the mandatory disclosure requirements when implemented.

Energy and carbon reporting

The Property Council of Australia (sub. 21) raised concerns in regard to the number of Australian and state and territory government energy and carbon reporting regimes in place. It noted that each reporting regime required companies to commit significant resources to measuring and collecting data in different ways. It commented that the Australian Government reporting requirements included:

- the National Greenhouse and Energy Reporting System (NGERS)
- the Energy Efficiency Opportunities program
- the proposed scheme for mandatory disclosure of commercial energy efficiency, which will commence in 2010 (sub. 21)

These issues were discussed in detail in the Commission's previous reviews of regulatory burdens on business (PC 2008c, PC 2009a). The 2008 Review (PC 2008c) noted that the core objective of the *National Greenhouse and Energy Reporting Act 2007* was to harmonise the multiplicity of reporting arrangements that exist in all jurisdictions and concluded that all other existing reporting arrangements should be phased out as quickly as circumstances permitted. The 2009 Review (PC 2009a) while recognising the work undertaken through COAG to streamline environmental reporting through NGERS, concluded that all levels of government needed to continue to work cooperatively to reduce the burden associated with environmental reporting obligations. In regard to the Energy Efficiency Opportunities program, the (PC 2008c) noted that the Australian Government had enabled businesses covered by the program to streamline reporting arrangements with the NGERS.

6.8 Regulation impact analysis

The Property Council of Australia (sub. 21) considers that the ever-increasing regulatory burden faced by the property industry is the result of inadequate policy development and a poor regulatory review processes. It feels that the high-level commitment by the Council of Australian Governments (COAG) to regulatory reform and removing administrative burdens on business has failed to filter down to regulators. It believes that the system needs to be overhauled because:

- most officials aren't committed to reform
- regulation is generally the first option – alternatives are rarely seriously considered
- 'evidence-based' policy is the exception rather than the rule
- market failure is often claimed as the basis for new regulation although those claims are rarely supported by evidence
- regulation is often applied too broadly or stringently
- compliance costs which are considered to be acceptable by regulators are too great
- there are no stringent accountability and transparency standards for regulators
- there is a lack of regulatory uniformity within and across jurisdictions
- regulatory impact assessment is often poorly done

In its submission the Property Council of Australia made a number of recommendations to improve the regulatory system.

The Association of Superannuation Funds of Australia also raised concerns with regulatory processes observing that 'there is a perception that law makers too often concern themselves with effectiveness, ignoring efficiency issues' (ASFA sub.20 , pp 1-2). Some of the specific issues raised by ASFA are dealt with in chapter 2.

Assessment

The processes through which proposed regulations are developed, their possible impact assessed, and existing regulations are reviewed are important to achieving good regulatory outcomes. During last year's review the Commission found that some regulations had been implemented with minimal analysis of their potential impacts on business. It concluded that best practice regulation requirements should be strengthened by increasing transparency and providing greater scope for consultation with business. It recommended that:

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

In February the OECD (2010c) released a report reviewing regulatory reform in Australia. The OECD found that successful regulatory reforms have helped Australia weather the global financial crisis. It said that this is reflected in the high profile regulatory reform has in the Australian Government and the partnerships that have been made with the states to further reform. The OECD saw Australia as a "role model" for other countries with its proactive approach towards regulatory reform. Nevertheless, the OECD made 27 recommendations covering a range of issues relating to regulatory governance, competition and market openness.

In its response to the OECD review the Government (Australian Government 2010b) announced a number of measures and modifications to existing procedures, including:

- establishing a formal consultation forum with business
- requiring that a RIS be prepared for all regulatory proposals except where the impact of a proposal is minor or machinery
- requiring departmental secretaries or agency heads or their deputies to agree to the content of a RIS, prior to assessment by the OBPR
- strengthening the requirement for agencies to demonstrate that effective consultation has been undertaken in order for a RIS to be assessed as compliant — agencies will be required to develop their own consultation practices and publish details of them.
- creating a central online register ('one-stop shop') for the publication of RISs.

The Office of Best Practice Regulation (OBPR 2010) subsequently released a draft for a revised Best Practice Regulation Handbook to implement some changes to regulation impact assessment processes. The Government's ongoing commitment to reviewing regulation processes is welcomed and some of the proposed changes —

such as the development of a central online register of RISs and post-implementation reviews, and the earlier signalling of non-compliance with the process — will improve transparency and accountability.

However, other proposed changes — such as potentially narrowing the range of options analysed in a RIS, and changes to some adequacy criteria such as the RIS no longer being required to demonstrate that the preferred option has the greatest net benefit — may serve to constrain the operations of the RIS process and seem unlikely to address the concerns of industry.

APPENDICES

A Consultation

An initial circular for the 2010 study was distributed in November 2009. In December, the Commission released an issues paper and placed advertisements in national newspapers seeking public submissions by 26 February 2010.

The Commission has held informal consultations with governments, peak industry groups in the business and consumer services sectors, as well as with a number of companies and individuals. A list of the meetings and informal discussions undertaken is provided below.

The Commission received 27 submissions. A list of these submissions is provided below and all public submissions are available on the Commission's website.

The Commission would like to thank all those who have so far contributed to the study.

A.1 Submissions

Table A.1 **Submissions received**

Participant	*Submission no.*
Abacus – Australian Mutuals	22
Association of Superannuation Funds of Australia	20
Australian Bankers' Association	17
Australian Direct Marketing Association	9
Australian Federation of Travel Agents	4
Australian Hotels Association	10
Australian Institute of Architects	11
Australian Transaction Reports & Analysis Centre	26
CPA Australia and The Institute of Chartered Accountants in Australia (Joint submission)	16

(Continued next page)

Table A.1 (continued)

Participant	*Submission no.*
Department of Immigration and Citizenship	25
Department of Resources Energy and Tourism	15
Gulf Savannah Development Inc	1
Insolvency Practitioners Association	7
Investment and Financial Services Association Ltd	18
Law Council of Australia	23, 27
Mortgage and Finance Association of Australia	2
Music Council of Australia	13
National Insurance Brokers Assoc of Australia	3
NSW Bookmakers Cooperative Ltd	14, 24
Property Council of Australia	21
Real Estate Institute of Australia	12
Restaurant and Catering Australia	8
Science Industry Australia	6
Tasmanian Government	19
Tourism & Transport Forum	5

A.2 Meetings

Abacus — Australian Mutuals

Association of Superannuation Funds of Australia

Australian Bankers' Association

Australian Equipment Lessors Association

Australian Financial Markets Association

Australian Government

- Department of Finance and Deregulation
- Department of Immigration and Citizenship
- Review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System (Cooper Review Secretariat)
- The Treasury

Australian Health Insurance Association

Australian Services Roundtable

Australasian Solarium Association
Ms Alice Bailey
CPA Australia
Financial Planning Association
Franchising Council of Australia
Guardian Financial Planning
Professor Ian Harper
HSBC Bank Australia Ltd
Insolvency Practitioners Association of Australia
Institute of Chartered Accountants in Australia
Insurance Council of Australia
Investment and Financial Services Association
Law Council of Australia
Melbourne Centre for Financial Studies
Mortgage and Finance Association of Australia
National Employment Services Association
National Tourism Alliance
Professions Australia
Recruitment and Consulting Services Association Ltd
Tourism & Transport Forum
Victorian Competition and Efficiency Commission
Westpac

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