

Australian Government  
National Competition Policy  
Report

2005-07

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## Abbreviations

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AAPP	Australian Association of Pathology Practices
ABA	Australian Broadcasting Authority
ACA	Australian Communications Authority
ACC	Approved Collection Centre
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ACT	Australian Competition Tribunal
AGCNCO	Australian Government Competitive Neutrality Complaints Office
AHMAC	Australian Health Ministers' Advisory Council
AHMC	Australian Health Ministers' Conference
AMSA	Australian Maritime Safety Authority
APA	Approved Pathology Authority
APVMA	Australian Pesticides and Veterinary Medicines Authority
AQIS	Australian Quarantine and Inspection Service
ARMCANZ	Agriculture and Resource Management Council of Australia and New Zealand
AWB	Australian Wheat Board
AWBI	AWB (International) Limited
BHP	BHP Billiton Iron Ore
BSB	Broadcasting Services Bands
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CCA	<i>Conduct Code Agreement</i>

## Abbreviations (continued)

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CIRA	Competition and Infrastructure Reform Agreement
CLRS	Commonwealth Legislation Review Schedule
CNPS	Commonwealth Competitive Neutrality Policy Statement (June 1996)
COAG	Council of Australian Governments
CPA	<i>Competition Principles Agreement</i>
CPI	Consumer Price Index
CRIS	Cost Recovery Impact Statement
CSO	Community Service Obligation
DAB	Digital Audio Broadcasting
DAFF	Department of Agriculture, Fisheries and Forestry
DOHA	Department of Health and Ageing
DOFA	Department of Finance and Administration
DOTARS	Department of Transport and Regional Services
EAL	Essendon Airport Limited
FAGs	Financial Assistance Grants
FBT	Fringe Benefits Tax
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMG	Fortescue Metals Group Ltd
GCA	Grains Council of Australia
GBE	Government Business Enterprise
GDP	Gross Domestic Product
Implementation Agreement	<i>Agreement to Implement the National Competition Policy and Related Reforms</i>
ISP	Internet Service Provider



## Abbreviations (continued)

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Medsafe	New Zealand Medicines and Medical Devices Safety Authority
MoU	Memorandum of Understanding
NCC	National Competition Council
NCP	National Competition Policy
NRA	National Reform Agenda
NWC	National Water Commission
NWI	National Water Initiative
OBPR	Office of Best Practice Regulation (formerly the Office of Regulation Review)
ORR	Office of Regulation Review
OECD	Organisation for Economic Co-operation and Development
PCC	Pathology Consultative Committee
PIO	Postal Industry Ombudsman
PISC	Primary Industries Standing Committee
QA	Quality Assurance
RFA	Regional Forest Agreement
RIS	Regulation Impact Statement
SACL	Sydney Airport Corporation Limited
SCARM	Standing Committee on Agriculture and Resource Management
SMA	Spectrum Management Agency
TGA	Therapeutic Goods Administration
TPA	<i>Trade Practices Act 1974</i>
WEA	Wheat Export Authority



# Introduction

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## The success of competition policy for Australia

Australia has experienced 16 years of continuous economic growth. Gross Domestic Product (GDP) growth since the turn of the millennium has averaged above three per cent per annum, among only a handful of Organisation for Economic Co-operation and Development (OECD) countries achieving such rapid growth.

During this period, Australia has experienced a number of external and internal shocks – the Asian financial and economic crises, two major droughts, the global slow-down of 2001, the uncertainty after the 9/11 attacks, SARS, a housing boom, natural disasters, significant increases in oil prices, and the commodities boom. Any of these shocks could have triggered an economic slow-down and/or higher inflation. However, Australia not only continued to experience stable economic growth but thrived, surpassing the per capita income levels of the average of OECD countries. Australia has reached record employment levels and attained the lowest unemployment figures in 30 years, with low inflation.

Australia has maintained a strong economic record in the face of these shocks because the economy is flexible and able to adapt quickly to change. The OECD has recently commented that wide-ranging macroeconomic and microeconomic reforms, particularly to promote competition, were instrumental in engendering greater flexibility in the Australian economy.<sup>1</sup> These reforms are broad and deep, and have been implemented progressively over many years.

Competition reforms have reduced barriers to market entry and exit, improving anti-competitive regulations and exposing government-owned businesses to market forces in a competitively neutral manner. Competition provides incentives that promote productivity growth and address excessive investment in some sectors and under-investment in others, poor service delivery and inefficient pricing.

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1 OECD, *OECD Economic Surveys: Australia*, vol 2006/12, 2006, Paris.

Reforms introduced under the National Competition Policy (NCP) framework continue to benefit the economy, with the Productivity Commission observing that productivity and price changes in key infrastructure sectors in the 1990s – to which NCP and related reforms have directly contributed – have increased GDP by 2.5 per cent or \$20 billion.<sup>2</sup>

While many of the NCP reforms initially agreed to by the Council of Australian Governments (COAG) are now in place, the reform task is far from complete. Substantial issues around national markets, for example, water and greenhouse, remain a high priority to progress on a national scale. There is also a need for renewed focus in policy making, away from promotion of resource utilisation toward promotion of resource allocation and resource creation – that is, supply side improvement.

This has been recognised by COAG, which has agreed to the National Reform Agenda (NRA) to address competition, particularly in the areas of energy, transport, infrastructure and planning and climate change; regulatory reform; and improvements to human capital in the priority areas of health, education and training and work incentives.

## History of the National Competition Policy Framework

In April 1995, the Australian, State and Territory Governments entered into three Inter-Governmental Agreements (NCP Agreements) – the *Conduct Code Agreement* (CCA); the *Competition Principles Agreement* (CPA); and the *Agreement to Implement the National Competition Policy and Related Reforms* (Implementation Agreement). The Agreements aimed to provide a timely, coordinated and comprehensive approach to competition reform across all levels of government.

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<sup>2</sup> Productivity Commission, *Review of National Competition Policy Reforms*, Final Report, 2005, Canberra.

The commitments embodied in the Agreements effectively underpinned the NCP in Australia – seeking to ensure all costs and benefits to the community and the distributional impacts of a particular course of action are identified and made available to decision makers for consideration.<sup>3</sup> The reforms reinforced other competition policy initiatives, such as the limitations on anti-competitive conduct established by the *Trade Practices Act 1974* (TPA).

### The Australian Government's reporting requirement

Under the CPA, the Australian Government is required to publish an annual report outlining its progress toward:

- achieving the review and, where appropriate, reform of all existing legislation that restricts competition (as outlined in the Commonwealth Legislation Review Schedule (CLRS)); and
- implementing competitive neutrality principles, including allegations of non-compliance.

However, to recognise fully the range of Australian Government commitments established by the NCP Agreements, a broader range of Australian Government commitments under NCP have been reported.<sup>4</sup> Covered in this report are updates on:

- the review and, where necessary, reform of priority legislation from the current NCP Legislation Review Program in accordance with the NCP public benefit test (Chapter 1);
- the implementation of competitive neutrality for all government business activity operating in a contestable market (Chapter 2);

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3 The 1995 Inter-Governmental Agreements also resulted in the establishment of the National Competition Council (NCC), an inter-jurisdictional body funded by the Australian Government. The NCC has statutory responsibilities under the Australian Government *Trade Practices Act 1974* as well as specified roles under the Agreements aimed at ensuring the effective implementation of NCP.

4 The commitments contained within the NCP Agreements apply to both Australian Government and State and Territory governments. This report discusses these commitments from the Australian Government perspective.

- the structural reform of public monopolies, where their markets have been opened to competition or they are to be privatised (Chapter 3);
- the provision of access arrangements to services provided by significant infrastructure facilities (such as electricity grids, airports and communications networks) that would be uneconomic to duplicate (Chapter 4);
- the application of competition law across all jurisdictions (including the scope for exceptions in certain circumstances), centrally administered by the Australian Competition and Consumer Commission (ACCC) (Chapter 5); and
- details of the final competition payments made by the Commonwealth to States and Territories following the 2005 National Competition Council (NCC) assessment of government progress in implementing the NCP and related reforms (Chapter 6).

This report formally covers the period from 1 July 2005 to 30 June 2007, except where specified.

#### Further resource material relating to NCP and the NRA

Various Australian Government publications relating to NCP matters are available from the Australian Government Department of the Treasury website ([www.treasury.gov.au](http://www.treasury.gov.au)), including previous annual reports.

Other relevant sites include COAG ([www.coag.gov.au](http://www.coag.gov.au)), the NCC ([www.ncc.gov.au](http://www.ncc.gov.au)); the Productivity Commission and Australian Government Competitive Neutrality Complaints Office (AGCNCO) ([www.pc.gov.au](http://www.pc.gov.au)); the ACCC ([www.accc.gov.au](http://www.accc.gov.au)) and the Department of Finance and Administration (Finance) ([www.finance.gov.au](http://www.finance.gov.au)).

# 1 Legislation review

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## 1.1 Why is legislation review necessary?

Effective and efficient regulations facilitate the achievement of a range of community objectives without creating unnecessary burdens on business or the community. The term 'regulation' includes primary legislation introduced by the Government, subordinate legislation, treaties and quasi-regulation.

Over the last two decades, governments in Australia and other countries have found that many regulations have inhibited healthy competition, increased business costs and prices, and constrained growth in living standards. In some cases, consumers' choice of supplier and products has been unnecessarily constrained.

Restrictions imposed on markets by government regulation, for example, through the creation of legislated monopolies or the imposition of particular pricing practices, can be a major impediment to competitive outcomes. Compliance with these regulations can also impose significant costs on business.

In recognition of this, the CPA states that legislation (including Acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

This is generally referred to as the 'public interest test' (see Box 2).

The CPA further states that all existing anti-competitive legislation (enacted prior to 1996) should be reviewed against these criteria and modified or repealed where there is no net community benefit in its retention.

The requirement to demonstrate net community benefit also applies to the introduction of new or amended legislation that restricts competition. To satisfy this commitment, the Australian Government introduced its regulation impact assessment process (see section 1.5.1).

Importantly, this process provides that legislation that restricts competition may be retained or introduced where it is demonstrably in the public interest.

However, recognising the continually changing economic environment and social objectives, legislation subjected to the public interest test must be reviewed at least every 10 years after its initial review or introduction. This requirement also applies to anti-competitive legislation reliant on a section 51(1) exemption under the TPA (see section 5.2).

#### Box 1: When is legislation anti-competitive?

While almost no regulatory activity is completely neutral in its implications for competition, legislation may be regarded as affecting competition where it directly or indirectly:

- governs the entry and exit of firms or individuals into or out of markets;
- controls price or production levels;
- restricts the quality, level or location of goods and services available;
- restricts advertising and promotional activities;
- restricts price or type of inputs used in the production process;
- confers significant costs on business; or
- provides advantages to some firms over others by, for example, sheltering some activities from the pressures of competition.<sup>5</sup>

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5 Hilmer, F M Rayner, and G Taperell (The Independent Committee of Inquiry into a National Competition Policy), *National Competition Policy*, Australian Government Publishing Services, 1993, Canberra, p 191.



The objective of the CPA legislation reform program is to remove restrictions on competition that are demonstrated not to be in the interest of the community as a whole. However, following the Prime Minister's policy statement *More Time for Business* (1997), the Australian Government's legislation review requirement was expanded to include the assessment of legislation that imposes costs or confers benefits on business. The aim is to reduce compliance costs and the paperwork burden for business.

An essential component of legislation reform is the validity of the review process. To ensure all relevant costs and benefits are recognised, the CPA sets out a range of issues that should be considered in examining any particular piece of legislation. These issues are set out in Box 2, and include social, regional and environmental factors.

In many cases, it may be difficult to quantify all the costs and/or benefits of specific regulation to the community as a whole. The requirement to identify non-quantifiable effects of a particular course of action means that these can be explicitly considered in the decision-making process, rather than excluded due to the lack of an agreed dollar value.

A clear identification of the costs, benefits and distributional impacts resulting from the removal of a regulation on wider public interest grounds will also assist government to introduce targeted adjustment mechanisms. Such assistance may be considered necessary to mitigate the impact of transitional costs of reform on particular sectors of the community.

## Box 2: Assessing the public interest

Without limiting the matters to be taken into account, in assessing the costs and benefits, the following matters should be considered:

- government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including Community Service Obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations, access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or of a class of consumers;
- the competitiveness of Australian businesses; and
- the efficient allocation of resources.<sup>6</sup>

In past years, the Australian Government's compliance with its legislation review requirements was independently assessed by the NCC, and was also reported in the Productivity Commission's *Regulation and its Review* publication series.<sup>7</sup>

The 2005 assessment was the final one prior to the COAG's review of the NCP Agreements and agreement on the new NRA.

The NRA includes a recommitment by all jurisdictions to the principles contained in the CPA and to complete outstanding priority legislation reviews from the current NCP Legislation Review Program.<sup>8</sup> The NRA

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6 COAG, *Competition Principles Agreement*, 1995, sub-clause 1(3).

7 This function was undertaken by the Office of Regulation Review, now the Office of Best Practice Regulation (OBPR), an independent office located within the Productivity Commission.

8 COAG, *National Competition Policy Review — Attachment B*, 10 February 2006, Decisions 1.1 and 1.2.

also includes further measures to reduce the regulatory burden imposed by all three levels of government and a range of measures to ensure best practice regulation making and review.

In accordance with COAG's decision and in order to meet its commitment under the CPA, the Australian Government has conducted a detailed examination of its progress in the review and reform of existing anti-competitive priority legislation from the CLRS. This is reported in section 1.2. A summary of compliance with regulation impact assessment requirements for legislation introduced or amended in the current reporting period is contained in section 1.5.

Where Australian Government legislation is complemented or matched by State or Territory regulation, a coordinated national review may be undertaken. Australian Government participation in national reviews is examined in section 1.4.

## 1.2 Commonwealth Legislation Review Program

The CLRS details the Australian Government's timetable for the review and, where appropriate, reform of all existing legislation that restricts competition or imposes costs or confers benefits on business by the year 2000.<sup>9</sup>

The original Schedule, prepared in June 1996, listed a total of 98 separate legislation reviews. However, changing circumstances have resulted in some reviews being added, rescheduled or deleted.<sup>10</sup>

Legislation may be deleted from the CLRS if it is not considered cost-effective to review — where the competition effects are small relative to the cost of implementing new arrangements — or it is repealed as a consequence of changes to Government policy.

Any changes to the CLRS require the approval of the Prime Minister, the Treasurer and the responsible portfolio minister(s). Within the Treasury

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9 COAG, at its meeting of 3 November 2000, decided that this deadline would be extended to 30 June 2002.

10 This includes the extension of the CLRS to incorporate reviews scheduled on the basis of direct or significant indirect impacts on business.

portfolio, the Treasurer's CLRS role has been performed by the Parliamentary Secretary to the Treasurer since November 2001.

At its February 2006 meeting, COAG agreed that each jurisdiction would complete outstanding priority legislation reviews from the current NCP Legislation Review Program in accordance with the NCP public benefit test.

The CLRS as of 10 February 2006 is included at Appendix A.

### Reporting requirements for legislation reviews

The following sections provide information on the Australian Government's progress, since the last NCC assessment in 2005, in meeting its scheduled legislation review commitments.

This information has been organised in terms of each individual piece of priority legislation.<sup>11</sup>

### Complexity of the review and details of the review panel

The priority and importance of the legislation being reviewed varies. Accordingly, the method of review for the legislation takes into account its significance and the extent of expected benefits from reform. More significant pieces of legislation are reviewed by an independent committee of inquiry or the Productivity Commission. Where such review costs are not considered to be warranted, reviews are generally undertaken by a committee of officials.

The ministerial portfolio with current responsibility for the legislation, and the commencement date of the review, are also identified.<sup>12</sup>

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11 Information on progress has been provided by the responsible portfolio department or agency.

12 In some cases, ministerial responsibility for particular legislation may have changed during the reporting period. Similarly, department titles referred to in connection with various reviews may differ over time.

## Terms of reference

The scope and structure of each review are outlined in its terms of reference. Without limiting the terms of reference for each review, the CPA establishes that scheduled reviews should:

- clarify the objectives of the legislation;
- identify the nature of the restriction on competition;
- analyse the likely effects of the restriction on competition and on the economy in general;
- assess and balance the costs and benefits of the restriction; and
- consider alternative means of achieving the same result including non-legislative approaches.

The Office of Regulation Review (ORR) and, more recently, the Office of Best Practice Regulation (OBPR), was required to approve the terms of reference for any scheduled CLRS review. To assist this process, and to ensure a consistent approach and focus for reviews, the ORR developed a template terms of reference to be tailored to suit each piece of legislation to be reviewed.<sup>13</sup>

Where a review has commenced during a reporting period, the terms of reference have been published in the relevant annual report. There were two new terms of reference for priority legislation finalised between 1 July 2005 and 30 June 2007. These were for the review of approved collection centre arrangements and the review of Pathology Enforcement and Offence Provisions of the *Health Insurance Act 1973*. The terms of reference are included in Appendices B and C respectively.

## Extent of public consultation

Public consultation is a required part of all CLRS legislation reviews. This obligation was stipulated by the Australian Government in the release of the CLRS. The NCC recommended that, to meet this obligation, all reviews should be conducted in an independent, open and

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13 Productivity Commission, *Regulation and its Review 1998-99*, AusInfo, Canberra, 1999, p 49.

transparent way, against clear terms of reference, and in a manner that allows interested parties to participate.

The review terms of reference set out the minimum public consultation to be undertaken. In the interests of transparent decision-making and ensuring that the broadest range of views on the matter under consideration are received, this generally involves advertising the review and seeking written submissions on a national basis. There may also be more targeted consultations with specific stakeholders.

#### Review progress or recommendations and Government response

Further information is reported depending on the extent of progress of the review. Where the review has been completed, if possible, a summary of the main review recommendations is provided. The final report of each review is to be made publicly available, although for particularly sensitive reviews this may not occur immediately.

A summary of the Government's response to the review recommendations is included, where applicable.

The following sections report on the Australian Government's review and reform activity in the period of 1 July 2005 to 30 June 2007. Details of reviews completed in previous reporting periods are available in previous annual reports ([www.treasury.gov.au](http://www.treasury.gov.au)).

##### 1.2.1 *Aboriginal Land Rights (Northern Territory) Act 1976*

(Department of Families, Community Services and Indigenous Affairs)

The *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act) provides for the granting of land to traditional Aboriginal owners in the Northern Territory. It further provides traditional Aboriginal owners with certain rights over granted land, including the right to give consent to mineral exploration (contained in Part IV).

The terms of reference for the review were approved on 26 October 1998. The Aboriginal and Torres Strait Islander Commission contracted Dr Ian Manning from the National Institute of Economics and Industries to undertake the review.

### *Review progress*

The review report was publicly released in August 1999. It contains 12 recommendations addressing the processes in Part IV pertaining to mining and exploration permits.

### *Government response*

The Australian Government announced its response to a number of reviews of the Land Rights Act, including the NCP review, on 5 October 2005 and 18 November 2005. The announcements included improvements to the exploration and mining provisions of the Land Rights Act including devolving some powers from the Australian Government to the Northern Territory Government. Legislation giving effect to the Government's announcement was passed by Parliament on 17 August 2006 and received the Royal Assent on 5 September 2006.

Following proclamation, the new regime for exploration and mining commenced operation on 1 July 2007. Complementary changes to Northern Territory legislation were introduced in June 2007 and are expected to pass the Northern Territory Legislative Assembly in August 2007.

## 1.2.2 Agricultural and Veterinary Chemicals Legislation

(Department of Agriculture, Fisheries and Forestry)

The review of this legislation was included in the national review of Agricultural and Veterinary Chemicals Legislation (see section 1.4.1).

## 1.2.3 *Australian Postal Corporation Act 1989*

(Department of Communications, Information Technology and the Arts)

The review of the *Australian Postal Corporation Act 1989* commenced in May 1997 and was conducted by the NCC.

### *Government response*

The *Postal Services Legislation Amendment Act 2004*, which received Royal Assent on 22 June 2004, contained amendments to address regulatory and consumer issues relating to the postal legislation regime. The powers of the ACCC have been extended to allow the ACCC to inquire into any of the terms and conditions of a bulk interconnection service.

The Government introduced the Postal Industry Ombudsman Bill 2004 into Parliament on 17 November 2004. The Bill received Royal Assent on 6 April 2006. The *Postal Industry Ombudsman Act 2006* provides for the establishment of a Postal Industry Ombudsman (PIO) within the office of the Commonwealth Ombudsman. The establishment of the PIO is the result of a 2001 election commitment that recognised the need for a dedicated independent entity to deal with complaints from consumers and small business about the provision of postal services. The PIO will have jurisdiction over Australia Post and any other postal operators who elect to 'opt into' the PIO scheme.

#### *1.2.4 Broadcasting Services Act 1992, Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992, Radio Licence Fees Act 1964, Television Licence Fees Act 1964*

(Department of Communications, Information Technology and the Arts)

The *Broadcasting Services Act 1992* and the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* (the Broadcasting Services Acts) govern a diverse range of radio and television services for entertainment, educational and informational purposes. The Broadcasting Services Acts seek to provide a regulatory environment that varies according to the degree of influence of certain services upon society and which facilitates the development of an efficient and competitive market that is responsive to audience needs and technological developments. The Broadcasting Services Acts also seek to protect certain social and cultural values, including promoting a sense of Australian identity, character and cultural diversity; encouraging plurality of opinion and fair and accurate coverage of



matters of national and local significance; respecting community standards concerning program material; and protecting children from program material that may be harmful to them.

The *Radio Licence Fees Act 1964* and the *Television Licence Fees Act 1964* seek to recover some of the value inherent in commercial broadcasting licences from commercial broadcasters and provide a return to the public for their use of scarce radio frequency spectrum. Fees are based on the advertising revenues of commercial broadcasters.

The review of these four Acts commenced in March 1999.

#### *Review progress*

The Productivity Commission presented its final report to the Treasurer on 6 March 2000. The report was publicly released on 11 April 2000.

#### *Government response*

The Government has continued to introduce reforms in the broadcasting sector that relate to the review recommendations. These include:

##### **Structural diversity in Australian broadcasting**

The *Broadcasting Legislation Amendment Act (No. 2) 2002* (the Broadcasting Legislation Amendment Act) was passed in November 2002. As well as providing a new licensing framework for community television, the Act makes related community broadcasting amendments that will improve the general community broadcasting licensing regime.

##### **Ownership and control**

In 2004, the Government committed to reforming Australia's media ownership laws, while protecting the public interest in a diverse and vibrant media sector. On 18 October 2006, the Australian Parliament passed the media reform legislative package, which removed the current commercial television and subscription television-specific foreign ownership restrictions from, and relaxed the cross media ownership rules in, the *Broadcasting Services Act 1992*, effective from 4 April 2007 following the proclamation of Schedule 2 to the *Broadcasting Services Amendment (Media Ownership) Act 2006*. The newspaper-specific foreign

ownership restrictions in the Foreign Investment Policy will be rescinded concurrent with the proclamation of Schedule 2.

### **Enforcement powers**

The media reform package was passed by Parliament on 18 October 2006. This included the *Communications Legislative Amendment (Enforcement Powers) Act 2006*, which provides the Australian Communications and Media Authority (ACMA) with a more appropriate range of broadcasting related enforcement options in relation to the *Broadcasting Services Act 1992*, involving civil penalties, injunctions, enforceable undertakings and infringement notices; and the *Radiocommunications Act 1992*, involving enforceable undertakings and infringement notices, from 5 February 2007. Given the relationship between broadcasting and radiocommunications regulation, particularly in relation to spectrum planning and apparatus licensing, it was important to extend ACMA's new enforcement undertaking powers to compliance with the *Radiocommunications Act 1992*.

### **Anti-siphoning**

The anti-siphoning scheme was established in 1994 to ensure sporting events of national significance would continue to be available on free-to-air television, given the introduction of pay television. The anti-siphoning list gives free-to-air broadcasters first access to the broadcast rights of listed events, however, it does not force them to buy the rights, or to show the events live. In October 2005 the Minister for Communications, Information Technology and the Arts directed ACMA to begin monitoring free-to-air broadcasters' coverage of events on the anti-siphoning list from 1 January 2006. On 20 December 2006, the Minister announced that 'use it or lose it' guidelines would apply to events on the anti-siphoning list from 1 January 2007. The guidelines represent a practical set of criteria which reflect the day-to-day realities of covering live sport, while establishing some clear requirements to which free-to-air broadcasters should adhere under the revised scheme. It is not intended that failing one of the guidelines will be determinative of a result that an event has not been 'used' and hence, 'lost'. Rather, a broadcaster's treatment of an event will be considered against the guidelines as a whole. Listed events that do not receive adequate coverage, or which are not acquired by free-to-air broadcasters, may be considered for permanent or partial removal from the anti-siphoning list,

which would allow pay TV broadcasters to bid for broadcast rights at the same time as free-to-air.

### **The Online Content Co-Regulatory Scheme**

This was established in July 1999 and commenced operation in January 2000. A statutory review of the Scheme commenced in May 2002 and a report of the review was tabled in Parliament in May 2004. The review found that, while some types of server level filtering are technically possible given the limited benefits of an Internet Service Provider (ISP) level filtering system, the costs of a mandated requirement to filter do not appear justified. It also found that internet safety would be improved by more active promotion of filtering technologies by Australian ISPs.

### **Digital television**

Following a series of reviews and further consultation through the issuing of a discussion paper in early 2006, legislation was introduced into Parliament in September 2006 relating to the digital television regulatory regime. The media reform package passed by the Parliament in October 2006 and related legislation passed in November 2006 contained a number of reforms including:

- provision for the allocation of two digital channels for new digital services such as mobile television or new in-home services;
- permitting commercial free-to-air television stations to broadcast one standard definition multichannel from 2009, and allow full multichannelling no later than the time of digital switchover;
- permitting a high definition multichannel from 2007 by removing the simulcast requirement on high definition television programming; and
- removing the 'genre' restrictions on the types of programming which can be shown on ABC and SBS multichannels.

### **Digital radio broadcasting**

In 2004, the Government committed to undertake a transparent and accountable process to develop a policy framework and implementation

strategy for digital radio. The Government initiated an extensive process of industry consultation, research and policy development in late 2004, culminating with the release, by the Minister for Communications, Information Technology and the Arts, on 14 October 2005 of a policy framework to guide the implementation of digital radio. The framework recognises that digital radio will be a supplement to existing radio services in Australia rather than a replacement technology. The key features of the framework include:

- the staged rollout of existing broadcasting services commencing in the state capital markets using the Digital Audio Broadcasting (DAB) platform, also known as Eureka 147;
- a first right of refusal for commercial and coverage community broadcasters to control the DAB multiplex and hold relevant spectrum, supported by minimum entitlements to broadcast capacity and rules to ensure fair and reasonable access to the multiplex; and
- a six year moratorium on new Broadcasting Services Bands digital commercial radio licences commencing from the first digital broadcasts in the state capital cities.

In May 2007, the Parliament passed the *Broadcasting Legislation Amendment (Digital Radio) Act 2007* and the *Radio Licence Fees Amendment Act 2007* to guide the introduction of digital radio in Australia. This legislation is consistent with, and gives effect to, the Government's agreed policy framework for digital radio implementation, released by the Minister in October 2005. It will enable the commencement of DAB terrestrial digital radio services in the six state capital cities by 1 January 2009.

#### 1.2.5 Anti-dumping legislation, *Customs Act 1901* Part XVB and *Customs Tariff (Anti-dumping) Act 1975*

(Attorney-General's Department)

A review of the *Customs Act 1901* Part XVB and the *Customs Tariff (Anti-dumping) Act 1975* was deferred to allow implementation of Government reforms improving Australia's anti-dumping and countervailing duty mechanisms. To date, the Government has agreed

that the study should proceed, but has not finalised the timing or manner of a review of the legislation.

#### 1.2.6 *Export Control Act 1982* (fish, grains, dairy, processed foods etc)

(Department of Agriculture, Forestry and Fisheries)

The *Export Control Act 1982* (the Export Control Act) provides a comprehensive legislative base for the export inspection and control responsibilities for certain goods. The Export Control Act provides for the application of export controls to goods specified in regulations; details inspection responsibilities and provides the authority for inspection staff to carry out these responsibilities; and sets penalties to apply in the case of fraud or deliberate malpractice.

##### *Review progress*

The review in relation to goods such as fish, grains, dairy, and processed foods commenced in January 1999. The report was finalised on 23 December 1999, and released publicly in February 2000.

The review was undertaken by a review committee, consisting of Mr Peter Frawley, formerly Executive General Manager of CSR and Chairman of Livecorp; Mr Raoul Nieper, previously Head of the Queensland Department of Primary Industries, now an independent consultant; Mr Lyndsay Makin, an independent consultant, previously General Manager, Export for Nestle; and Ms Barbara Wilson, Assistant Director, Technical Services and Operations in the Australian Quarantine and Inspection Service (AQIS).

##### *Government response*

The Government response was approved by the Minister for Agriculture, Forestry and Fisheries on 22 April 2002. AQIS has engaged all relevant export industry consultative groups in the implementation process. Significant progress has been made on the implementation of the Government's response to the recommendations.

The finalisation of the *Export Control (Meat and Meat Products) Orders 2005* and the *Export Control (Dairy, Eggs and Fish) Orders 2005* brings to a conclusion reviews that have been underway for several years. The old orders were criticised by the review committee for creating unnecessary regulatory burden on exporters and processors, and being too prescriptive rather than outcomes focused. The new orders will see Australia's export industries strategically placed in the world trade environment to maximise their competitive edge. The new orders are consistent with the direction of international trade standards and will enable Australian industries to be innovative and flexible and to take up new technologies.

The recommendation that the Export Control Act be amended to include a statement of specific objectives is still to be finalised. The Government supports this recommendation. This legislative change to the Export Control Act has been included on the portfolio's legislative calendar.

All other recommendations are being progressed to a satisfactory standard. Implementation of the recommendations in the Report has been monitored by the Quarantine and Exports Advisory Council.

### 1.2.7 *Health Insurance Act 1973 Part IIA*

(Department of Health and Ageing)

The *Health Insurance Act 1973* (the Health Insurance Act) establishes the Medicare benefits scheme and sets out the arrangements that apply to the provision of pathology services. The main provisions relating to pathology services are contained in Part IIA. However, other parts of the Health Insurance Act, along with a range of regulations and pieces of delegated legislation, also relate to the provision of pathology services.

#### **Review of approved collection centres**

The Health Insurance (Eligible Collection Centres) Approval Principles 2005 (the Principles) underpin a licensing scheme which limits the number of collection centres an Approved Pathology Authority (APA) may own. The current licensing arrangements attempt to achieve a balance between access, cost and affordability by allocating licences

based on the activity and performance of individual APAs, generally on their throughput over the preceding 12 month period.

Outlays for pathology services under the Medicare benefits arrangements are managed under the *Pathology Quality and Outlays Memorandum of Understanding 2004-2009* (MoU) an agreement between the pathology industry and the Australian Government. Management of the MoU is overseen by the Pathology Consultative Committee (PCC) which comprises representatives from the Department of Health and Ageing (DOHA) and the three major industry/professional representative organisations: the Australian Association of Pathology Practices (AAPP), the National Coalition of Public Pathology and the Royal College of Pathologists of Australasia.

The MoU contained an agreement by both parties to undertake a review of Approved Collection Centre (ACC) arrangements to ensure that these remain consistent with the objectives of competition policy. An independent external party, KPMG, was appointed to undertake this review, in accordance with the NCC guidelines.

The terms of reference for the review are included in Appendix B.

#### *Review progress*

The review was completed in October 2006 and a copy of the final report placed on the DOHA website on 19 October 2006. The key recommendation of the review was that, based on NCP principles, future regulatory arrangements for ACCs be based on the pathology providers status as an APA, and its capacity to meet appropriate quality standards; and that there should be no restrictions on licence numbers.

### *Government response*

Negotiations with the pathology profession and industry sought to respond to the KPMG review by developing arrangements that would (a) remove the disadvantage for smaller providers inherent in the scheme that operated in 2006-07 (and previously); and (b) contain aggregate growth in the number of ACCs. The industry's strong view is that more collection centres generate more pathology services.

The scheme that was agreed involved smaller providers being entitled to a minimum of four ACCs, growing by one additional ACC each year. To restrain aggregate growth in ACCs, growth for providers with more than four ACCs was restricted to one additional ACC, or an increase equivalent to the rate of population growth, whichever gave the highest result. The new principles support small providers with a 'floor' of four ACCs but otherwise do not discriminate between providers according to their size.

There is scope under the new scheme for the aggregate number of ACCs to increase at the rate of population growth at a minimum. DOHA will monitor the patterns of growth in ACCs to establish whether regions such as urban growth corridors and rural areas are adequately served.

The *Health Insurance (Eligible Collection Centres) Approval Amended Principles 2007* came into effect on 1 July 2007.

### **Review of pathology enforcement and offence provisions**

In 2005, DOHA commissioned a review, undertaken by Phillips Fox Lawyers, to examine the pathology enforcement and offence provisions of the Health Insurance Act. The enforcement and offence provisions are intended to prohibit bribes and other inducements to request pathology tests and to ensure that clinical need is the only motivation for ordering services.

The objectives of the review were to:

- evaluate the effectiveness of the enforcement and offence provisions;



- identify compliance arrangements that also apply to providers of pathology services in state jurisdictions or standards of professional conduct generally accepted by medical practitioners;
- identify different options for compliance regimes to regulating pathology services; and
- evaluate each of the identified options.

The terms of reference of the review are at Appendix C.

#### *Review progress*

The review was completed in August 2005 and was released by the Government in September 2005. The review report is available at: <http://www.health.gov.au/internet/wcms/publishing.nsf/content/health-pathology-leg-index.htm>.

The review included 52 recommendations. Combined, these recommended that the enforcement and offence provisions be redrafted to express more clearly the Government's intent to prevent benefits and bribes between pathology providers and requesters of services, and to extend the application of provisions to create an enforcement framework that can be more effectively applied.

#### *Government response*

The Government response to the review, accepting the majority of recommendations, was released in May 2006. The Government response is available at:

<http://www.health.gov.au/internet/wcms/publishing.nsf/content/health-pathology-leg-index.htm>.

The enforcement and offences provisions are being amended to reflect Government policy. The majority of the amendments are designed to clarify and strengthen existing provisions and are aimed at:

- prohibiting certain practices in relation to the rendering of pathology services, including prohibiting inducements and other relationships between requesters and providers of pathology services;

- preventing payments for pathology services that do not benefit patients; and
- encouraging fair competition between pathology providers on the basis of quality of service provided and cost to patients.

The legislative changes also address a number of the recommendations of the 2002 *Review of Commonwealth legislation for pathology arrangements under Medicare*.

The amendments have passed through Parliament, were given Royal Assent on 21 June 2007 and will take effect on 1 March 2008.

### 1.2.8 *Interactive Gambling Act 2001*

(Department of Communications, Information and the Arts)

A review of the operation of the *Interactive Gambling Act 2001* (the Interactive Gambling Act) was conducted in 2003. The report of the review was published in 2004.

The conduct of the review was a statutory requirement under section 68 of the Interactive Gambling Act. The Act contains no requirement for further review.

### 1.2.9 *Navigation Act 1912*

(Department of Transport and Regional Services)

The *Navigation Act 1912* (the Navigation Act) provides a legislative basis for many of the Australian Government's responsibilities for maritime matters including ship safety, coasting trade, employment of seafarers and ships' structural and equipment aspects of the protection of the maritime environment. It also regulates wreck and salvage operations, passengers, tonnage measurements of ships and a range of administrative measures relating to ships and seafarers.

The coastal trade provisions of Part VI of the Navigation Act were scheduled for review in 1998-99. The Shipping Reform Group undertook a comprehensive review of the shipping industry including those sectors

to which Part VI apply. The group sought submissions from all sectors of the shipping industry and acted as a substitute for the Part VI review.

In December 1997, the Government decided to review the remaining provisions of the Navigation Act in two stages. The first stage considered repeal of employment related matters more appropriately dealt with under the *Workplace Relations Act 1996*. This review stage was completed in 1998 and resulted in the Navigation Amendment (Employment of Seafarers) Bill 1998, which was introduced into Parliament on 25 June 1998 and passed by the House of Representatives on 31 March 1999. During the Senate debate on the Bill, a significant number of items in the Bill were rejected. The Bill lapsed on the calling of the 2001 election.

The second-stage review commenced in August 1999 and was completed in June 2000.

The review was conducted by officials of the Department of Transport and Regional Services (DOTARS) and the Australian Maritime Safety Authority (AMSA). The review team operated under the guidance of an independent steering group, which provided direction to the review team and acted as an external reference for the conduct of the review, ensuring that it was strategic and reflected as broadly as possible the views of stakeholders.

The steering group comprised the independent chairman, Mr Rae Taylor AO; Mr Lachlan Payne, Chief Executive Officer, Australian Shipping Federation; Mr Barry Vellnagel, Deputy Director, Minerals Council of Australia; Mr Clive Davidson, Chief Executive, Australian Maritime Safety Authority; and Ms Joanne Blackburn, Assistant Secretary, DOTARS.

#### *Review progress*

The final report was presented to the Minister for Transport and Regional Services on 15 June 2000. It was released for publication on 20 August 2000 and copies were distributed to those persons and organisations that made submissions. The report is also published on the DOTARS website.

### *Government response*

The Government's consideration of these reviews was presented in a speech to the industry in 2004 which detailed the Government's shipping policy in respect of coastal shipping and included reforms associated with the administration of the coasting trade provisions and the approach to shipping registration reform. The Government is again considering mechanisms to address the outstanding review of Part VI of the Navigation Act.

#### 1.2.10 *Quarantine Act 1908 (plant and animal)*

(Department of Agriculture, Fisheries and Forestry)

The review of the *Quarantine Act 1908* (Nairn Review) was under way prior to its listing on the CLRS. AQIS is proposing to commence a comprehensive re-examination of the *Quarantine Act 1908* (the Quarantine Act) and any amendments arising from this review will be subject to the RIS process. This re-examination of the Quarantine Act will also include a review of those elements that were unchanged following the Nairn Review for compliance with CPA legislation review principles.

The examination has been delayed pending the resolution of the challenges concerning Australia's quarantine regime in the World Trade Organization and assessment of any administrative and legislative actions that might become necessary as a result.

#### 1.2.11 *Radiocommunications Act 1992 and related Acts*

(Department of Communications, Information Technology and the Arts)

The main objective of the *Radiocommunications Act 1992* (the Radiocommunications Act) and related legislation is to maximise the public benefit by the efficient allocation and use of the radiofrequency spectrum. The legislation also provides for allocation of spectrum for public or community services and an equitable charging system, while supporting the Government's communications policy objectives and

Australia's international interests in the consistent and efficient use of the radiofrequency spectrum.

Review of market based reforms and activities were previously undertaken by the Spectrum Management Agency (SMA). In 1997 the SMA merged with Austel to form the Australian Communications Authority (ACA). In 2005 the ACA merged with the Australian Broadcasting Authority to establish the Australian Communications and Media Authority (ACMA). ACMA has assumed responsibility for review of market based reforms and activities.

#### *Review progress*

The Productivity Commissions' final report was released on 5 December 2002.

#### *Government response*

The former Minister for Communications, Information Technology and the Arts issued a joint media release with the Treasurer on 5 December 2002 announcing the tabling in Parliament of the reports of the Radiocommunications Review (June 2001), the Productivity Commission's Radiocommunications Inquiry (July 2002) and the Government's responses to the reports.

The two reviews of the Radiocommunications Act were established to assess the appropriateness, effectiveness and efficiency of the radiocommunications legislation including whether it restricts competition between, or imposing costs or benefits, on business.

The majority of the recommendations of the Radiocommunications Review and the Productivity Commission's Inquiry have been implemented through administrative action by the ACMA.

The Radiocommunications Amendment Bill will implement the recommendations for the Radiocommunications Review and those of the Productivity Commission's Inquiry, accepted by the Government, which require legislative action. It will also contain a number of minor additional amendments being sought by the ACMA.

Introduction of the Bill has been delayed. The Bill may be introduced in the 2007 Spring sittings.

#### 1.2.12 *Export Control Act 1982* — Export Control (unprocessed wood) Regulations

(Department of Agriculture, Fisheries and Forestry)

The objective of the Export Control (Unprocessed Wood) Regulations under the *Export Control Act 1982* is to control the export of unprocessed wood (including woodchips and logs). Amendments to the regulations have lifted export controls on plantation-sourced wood in all States except Queensland, and on wood sourced from native forests in regions covered by Regional Forest Agreements (RFA).

In 2000-01 the Commonwealth undertook a review of the following regulations made under the *Export Control Act 1982*: Export Control (Unprocessed Wood) Regulations, Export Control (Hardwood Wood Chips) Regulations 1996, and Export Control (Regional Forest Agreements) Regulations.

The review panel comprised of: Rob Rawson, General Manager, Forestry Industry, Department of Agriculture, Fisheries and Forestry (DAFF); Chris Sant, Office of Legislative Drafting; and Richard Sisson, Innovation and Operating Environment, DAFF. DAFF provided secretariat support.

##### *Review progress*

The review was completed in 2001. The review recommendations were that:

- the Government remove export controls over sandalwood;
- the Government consider its position on export controls over plantation-sourced wood following the outcome of the review of the plantation codes of practice for Queensland and the Northern Territory. If those reviews result in removing the need for an export licence for wood sourced from within those jurisdictions because National Plantation Principles are observed, then the regulations become redundant and should be removed; and

- the Government should reconsider its position on export controls over hardwood woodchips sourced from native forests and either:
  - remove the requirement for an export licence for any hardwood woodchips or other unprocessed wood produced from wood harvested in a native forest, including those native forests outside RFA regions; or
  - allow the export of hardwood woodchips from regions not covered by an RFA under licence where options for a future comprehensive, adequate and representative forest reserve system would not be compromised by the granting of such a licence.

#### *Government response*

Export controls have been lifted on plantation-sourced wood in all States and Territories except Queensland and on wood sourced from native forests in regions covered by RFAs. Queensland is the only State or Territory not to have an approved Code of Practice for plantations in place and thus the only State where exporters of plantation timber are required to apply for an export licence. It would be inappropriate to remove the relevant regulations before Queensland has a Code of Practice in place.

Aside from Queensland plantation timber, the total of all other exports requiring a licence is extremely small – less than 2,000 tonnes per year. By far the largest volume of unprocessed wood exports (including wood chips) is from RFA regions and from plantations. The RFA regions are exempt from needing export licences under the unprocessed wood regulations.

Discussions with Queensland on a Code of Practice for plantation timber are being progressed.

#### 1.2.13 *Shipping Registration Act 1981*

(Department of Transport and Regional Services)

The objective of the *Shipping Registration Act 1981* (the Shipping Registration Act) is to provide Australia with its own regime for the

registration of ships. The Shipping Registration Act has been reviewed in line with the requirements of the CPA.

### *Review progress*

The terms of reference for the review were approved in 1996-97. The review team comprised officials from the Department of Workplace Relations, the Bureau of Transport Economics and AMSA, with a senior executive level steering committee from the department and AMSA, and an independent reference committee. The report was finalised in December 1997.

While the review found no significant restrictions on competition that are in the interests of the community, some potential improvements to current maritime legislation were identified to streamline the operation of the Shipping Registration Act, remove dated concepts and align the legislation with contemporary shipping industry organisation and modern approaches to regulation and shipping financing.

The main recommendations were:

- to restructure the Australian Register of Ships (the register) into four parts;
- to consider ways that holders of non-mortgage securities might be recognised by the Shipping Registration Act;
- added protection be given to mortgagees of bareboat chartered ships by amending the Shipping Registration Act;
- to provide for registration of ships under construction by amending the Shipping Registration Act and creating in a separate part of the register;
- the concept of home port to be retained but the list of 'approved' home ports be abolished; and
- the register be available online.



### *Government response*

Measures are being implemented as Government legislative priority allows. For example, the *Maritime Legislation Amendment Act 2006* amended the Shipping Registration Act to provide for online access to the Australian Register of ships consistent with one of the recommendations of the review of the Shipping Registration Act.

#### 1.2.14 *Therapeutic Goods Act 1989*

(Department of Health and Ageing)

The review of this legislation was included in the national review of drugs, poisons and controlled substances legislation (see section 1.4.2).

#### 1.2.15 *Wheat Marketing Act 1989*

(Department of Agriculture, Fisheries and Forestry)

The *Wheat Marketing Act 1989* (the Wheat Marketing Act) did not specify its objectives, but in accordance with NCP guidelines, the 2000 NCP review report set out the inferred objectives as being 'for the Australian Government to use its control of wheat exports to ensure (i) direct grower access to marketing services and export markets, and (ii) that growers receive the highest net return from sales in export markets.'

The terms of reference for this review were approved in April 2000. The review, with secretariat support provided by the DAFF, was conducted by the following three person committee:

- Mr Malcolm Irving, Chair: Chairman of Caltex Australia and the Australian Industry Development Corporation. He is also a director of Telstra, a member of the Supermarket to Asia Council and was Chair of the Australian Horticultural Corporation for nine years;
- Professor Bob Lindner: Executive Dean of the University of Western Australia's Faculty of Agriculture. He was also the faculty's inaugural Professor of Agricultural Economics. He is Chair of the Western Australian Herbicide Resistance Initiative Board and a member of the Export Grains Centre Advisory Council; and

- Mr Jeff Arney: South Australian grain grower, Chair of the South Australian Farmers Federation Grains Council and a past president of the Grains Council of Australia.

#### *Review progress*

The committee delivered its final report to the Minister for Agriculture, Fisheries and Forestry on 22 December 2000. It was made public on the same day.

#### *Government response*

The Government response to the review recommendations was announced on 4 April 2001.

The principal outcome was that the wheat single desk held by Australian Wheat Board International (AWBI) was to remain, but with improvements made to the export consent system operated by the Wheat Export Authority (WEA). The Wheat Marketing Act was not to be amended so as to avoid any potential for adverse structural changes to impact on Australian Wheat Board Ltd's (AWB) then proposed listing on the Australian Stock Exchange.

A revised export consent system which allows for longer term consents, particularly to niche markets; incorporates criteria in the WEA's guidelines to assess exporters; provides for market allocation/forward prospects statements; and eases the administrative burden by reducing the frequency of applications, was put in place from 1 October 2001.

The Government did not adopt the report's recommendations for the removal of AWBI's role in the consent process for export of wheat in containers and bags, or for durum wheat in bulk, as it would have meant amending the *Wheat Marketing Act 1989* (the Wheat Marketing Act) and changing significantly the balance between the operations of the WEA and AWBI. Consistent with assurances given by AWB, improved durum marketing arrangements were announced in July 2001.

The review terms of reference required an examination of relevant matters in Clause 4 of the CPA regarding structural reform of public monopolies. The Government's response was that there would be no

legislative or significant structural change to the current arrangements. The recommendation from the report for a joint industry forum was not adopted by the Government as such an initiative was seen to be mainly an issue for industry to bring forward, if it considers there is a need for new consultative arrangements.

The Government decided that the terms of the WEA 2004 review required under the Wheat Marketing Act should not be altered to incorporate NCP principles, to avoid further uncertainty in the industry and for wheat growers. Rigorous performance indicators were announced on 4 September 2001 for ongoing monitoring of AWBI as managers of the single desk, and for the 2004 review, and are available on the WEA website ([www.wea.gov.au](http://www.wea.gov.au)).

Another NCP review of the legislation governing the single desk arrangements is required to be conducted before 2010.

The Government made temporary changes to the wheat export marketing arrangements in December 2006. The *Wheat Marketing Amendment Act 2006* (the Wheat Amendment Act) came into effect on 9 December 2006. The Wheat Amendment Act provided for the temporary transfer of the veto power for bulk wheat exports from AWBI to the Minister for Agriculture, Fisheries and Forestry until 30 June 2007. Under the temporary arrangements, the WEA retained its current functions, but the Minister is able to make a determination on bulk export applications and allow them to occur where he considers it to be in the public interest.

In the Second Reading Speech, the Minister said it was a temporary measure being taken to address current concerns in the industry about the wheat marketing arrangements, particularly in Western Australia where there is not the same range of domestic marketing options as there is in the eastern states. These temporary arrangements were also intended to address the uncertainty caused by the ongoing debate and consideration of the long term wheat marketing arrangements in light of the Cole Inquiry.

On 12 January 2007, the Minister for Transport and Regional Services and the Minister for Agriculture, Fisheries and Forestry jointly announced the appointment of an independent four member Wheat

Export Marketing Consultation Committee to undertake extensive consultation with the Australian wheat industry, particularly growers, about their wheat export marketing needs. The members of the Committee are Mr John Ralph AC, Mr Roger Corbett AM, Mr Peter Corish and Mr Mike Carroll. The Committee delivered its report to the Prime Minister on 29 March 2007.

On 22 May 2007 the Government announced that it would retain the single desk. However, growers will be given until 1 March 2008 to establish their own company, separate from AWB, to manage the single desk. If this deadline is not met the Government has indicated it will consider implementing alternative marketing arrangements.

The Government introduced a range of additional changes to the wheat marketing arrangements in further legislative changes (the Wheat Marketing Amendment Bill 2007) which was passed by Parliament in June and received Royal Assent on 28 June 2007.

The amendments provide the Minister for Agriculture, Fisheries and Forestry with the power to designate and revoke a company as the holder of the single desk between 1 March 2008 and 30 June 2008.

The Minister's temporary veto power to approve or reject export applications has been extended for a further 12 months to 30 June 2008. This power has been primarily extended so that AWBI is unable to hold the power of veto while it is still a part of the AWB group. The export of wheat in bags and containers will be deregulated. However, exporters will still have to comply with the conditions of a Quality Assurance (QA) scheme which will be developed by the WEA to protect the good reputation of Australian wheat from the behaviour of rogue traders. These arrangements will commence from Monday 27 August 2007.

The WEA has been given broader information gathering powers to investigate wheat exporters and their associates. The Minister has been given the power to direct the WEA to undertake investigations and refer any information on to appropriate law enforcement and regulatory agencies.

In addition, the amendments provide for changes to the WEA's governance arrangements. The WEA will become known as the Export Wheat Commission and be run by up to six skills-based commissioners.

### 1.3. Legislation deleted from the CLRS

This section identifies legislation deleted from the CLRS during the reporting period.

At its February 2006 meeting, COAG agreed that only priority legislation reviews from the current NCP Legislation Review Program need be completed. As such, the CLRS has been amended to include only priority legislation that has not previously met CPA criteria.

Information on non-priority legislation reviews from previous reporting periods is available in earlier annual reports ([www.treasury.gov.au](http://www.treasury.gov.au)).

### 1.4 Legislation subject to national review

The CPA provides that where a review raises issues with a national dimension or effect on competition (or both), the party responsible for the review will consider whether the review should be undertaken on a national (inter-jurisdictional) basis. Where this is considered appropriate, other interested parties must be consulted prior to determining the terms of reference and the appropriate body to conduct the review. National reviews do not require the involvement of all jurisdictions.

The scheduled reviews of the following Australian Government legislation have been incorporated into national reviews:

- *Agricultural and Veterinary Chemicals (Administration) Act 1992 and Agricultural and Veterinary Chemicals Code Act 1994; and*
- *Therapeutic Goods Act 1989.*

#### 1.4.1 Agricultural and Veterinary Chemicals Legislation

The NCP review covers legislation that created the National Registration Scheme for Agricultural and Veterinary Chemicals and legislation

controlling the use of agricultural and veterinary chemicals in Victoria, Queensland, Western Australia and Tasmania. Separate to that review, the jurisdictions of New South Wales, South Australia and the Northern Territory conducted reviews of their own 'control of use' legislation to be aggregated with the NCP review.

The review was commissioned by the Victorian Minister for Agriculture and Resources on behalf of Australian Government and state and territory ministers for agriculture/primary industries following a decision by the then Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ).

#### *Review progress*

The consultant's final report was presented on 13 January 1999. The Steering Committee accepted that the report fulfilled the terms of reference.

#### *Government response*

On 3 March 1999 the Standing Committee on Agriculture and Resource Management (SCARM) agreed to publicly release the Report and established a jurisdictional signatories (to the National Registration Scheme for Agricultural and Veterinary Chemicals) working group to prepare an inter-governmental response to the report's recommendations. SCARM and ARMCANZ endorsed the inter-governmental response to the review in January 2000. The COAG Committee on Regulatory Reform cleared the response.

Following on from consideration of the recommendations in the review and preparation of the inter-governmental response, a number of processes commenced to more closely examine issues of concern. An inter-jurisdictional taskforce was established by SCARM to implement the recommendations covering reforms to a number of different aspects of the National Registration Scheme for Agricultural and Veterinary Chemicals. The NCP reforms relating to the regulation of low-risk chemicals were given effect by amendments to Commonwealth agricultural and veterinary chemicals legislation that were enacted in February 2003. The reforms relating to off-label chemical use, veterinary surgeons' exemptions and control of use licensing have been

implemented through relevant State and Territory agricultural and veterinary chemicals legislation.

Working groups were established to further examine and progress the review recommendations relating to Commonwealth agricultural and veterinary chemicals legislation (specifically *Agricultural and Veterinary Chemicals (Administration) Act 1992* and *Agricultural and Veterinary Chemicals Code Act 1994*) which deals with manufacturer licensing, cost recovery and use of alternative assessment providers. Reports of these working groups have been finalised, with the outcomes/recommendations of the investigations into cost recovery and use of alternative assessment providers being endorsed by Primary Industries Standing Committee (PISC), formerly known as SCARM, in late 2002.

### **Manufacturer licensing**

The final report of the Manufacturers Licensing Working Group recommended that the Australian Pesticides Veterinary Medicines Authority (APVMA), previously known as the National Registration Authority for Agricultural and Veterinary Chemicals, develop and adopt other means to ensure the quality of active constituents and agricultural chemical products. On 1 May 2004, the APVMA introduced a new scheme to address the quality of the active constituents of agricultural chemical products through revision of existing data requirements and standards.

### **APVMA Cost Recovery**

The NCP reforms of the cost recovery arrangements for the APVMA have taken some time to finalise due to widely divergent views within the agricultural and veterinary chemicals industry and with user groups on the proposed new cost recovery framework. A draft cost recovery impact statement (CRIS) on the proposed fee structure was released for public comment in December 2003. The proposed changes were subsequently deferred to allow for a comprehensive response to a range of issues raised during the public consultation phase. A revised draft CRIS was released for public comment on 17 November 2004. Following this consultation, a cost recovery model for the APVMA has been finalised, with the release of a final CRIS in March 2005. The *Agriculture and Veterinary Chemicals Legislation Amendment (Levy and Fees) Act 2005*,

which implements new cost recovery arrangements, received royal assent on 1 April 2005. The new fee and levy structure commenced on 1 July 2005.

### **Alternative Assessment Providers**

In September 2002, PISC endorsed the final report of the Assessment Services Working Group. DAFF and DOHA subsequently developed an operating framework for the provision of human health assessments and advice on human health risk management to the APVMA. The framework includes provision for contestability of some work subject to certain conditions. The framework was endorsed by Federal Cabinet in the context of its December 2003 response to the *Review of Administrative Arrangements for Commonwealth Public Health and Safety Regulation*.

### **Other**

The Government considered the report's recommendations in relation to protection of data associated with agricultural and veterinary chemicals and agreed to an enhanced data protection mechanism. The components of the data reform package for approval of active constituents and registration of chemical products have been given effect under legislation to implement Australia's obligations under the Australia US Free Trade Agreement, that is, the *US Free Trade Agreement Implementation Act 2004*, which commenced on 1 January 2005. Legislation to implement the remainder of the data protection package and other ongoing reform matters is expected to be introduced into Parliament through 2007 and beyond.

The inter-governmental response rejected the report's recommendation with respect to efficacy and decided to retain, as part of the registration process, an assessment of whether the efficacy claimed by a supplier is appropriate. In its 2003 assessment report, the NCC concluded that, '... the risks involved in using chemicals with inadequate efficacy may be considerable, and that the requirement for 'appropriateness' assessment does not appear to be a costly restriction, the council considers that there is a net public interest case for retaining 'appropriateness' assessment.'

The report's recommendation relating to the licensing of aerial spraying businesses and operators is being progressed by a PISC working group.



This will likely involve changes to State and Territory agricultural and veterinary chemicals legislation.

#### 1.4.2 Drugs, poisons and controlled substances legislation

The State, Territory and Australian Governments commissioned a review to examine legislation and regulation which imposes controls over access to, and supply of: drugs; poisons; and controlled substances.

An independent Chair, Ms Rhonda Galbally, undertook the review, with advice from a Steering Committee representing all jurisdictions.

The objectives of drugs, poisons, and controlled substances legislation are to protect and promote public health by preventing poisoning, medicinal misadventure and diversion of these substances to the illicit drug market.

Invited submissions against the terms of reference formed the basis for the development of the options paper, released for comment in February 2000. The draft report was released in September 2000, provided a further opportunity for interested parties to comment. The final report was publicly released in January 2001.

##### *Review progress*

Australian Health Ministers Conference (AHMC) forwarded the review report and comments prepared by a working party of the Australian Health Ministers' Advisory Council (AHMAC) to COAG in June 2004. COAG endorsement of the Government response was completed in June 2005.

Most of the recommendations were accepted by the AHMAC working party, however recommendations 12 (e) and (f), that relate to the implementation of a Code of Practice for the Supply of Samples of Poisons, were rejected for reasons of practicality. The diverse nature of the particular poisons addressed by this recommendation (which are included in Schedules 5 and 6 of the *Standard for the Uniform Scheduling of Drugs and Poisons*), the wide variety of retail outlets from which they are supplied, and the lack of industry association membership would make enforcement of a code difficult.

Following the release of the report of the Galbally Review, the Australian and New Zealand Governments agreed to establish a joint agency (the Agency) for the regulation of therapeutic products. Australia's Therapeutic Goods Administration (TGA) and the New Zealand Medicines and Medical Devices Safety Authority (Medsafe) would be replaced by a single agency accountable to both the New Zealand and Australian Governments.

On 16 July 2007 the New Zealand Government announced that it would not be proceeding with the legislation designed to enable the establishment of a joint agency with Australia for the regulation of therapeutic products. This is in recognition that the New Zealand Government does not have sufficient support in the New Zealand Parliament to ensure the passage of its Bill at this time.

Both the Australian and New Zealand Governments remain committed to the vision of a joint trans-Tasman therapeutics authority. However, negotiations between the two countries are postponed for the time being. The Agreement between the Government of Australia and the Government of New Zealand for the Establishment of a Joint Scheme for the Regulation of Therapeutic Products remains in place and is able to be re-visited at some future time.

In November 2006, an out-of-session COAG meeting endorsed 'A Report to the Australian Health Ministers' Conference on Implementation of the Review Recommendations' describing the actions taken to implement the agreed Galbally review recommendations. Many of the agreed Review recommendations have already been implemented by States and Territories and the Australian Government.

## 1.5 New and amended regulation (enacted since 1 July 1995)

The CPA requires all new and amended legislation that restricts competition to be accompanied by analysis illustrating that the benefits of the restriction to the community as a whole outweigh the costs and that the objectives of the legislation can only be achieved by restricting competition.

As previously noted the Prime Minister's 1997 *More Time for Business* policy statement, prepared in response to the recommendations of the Small Business Deregulation Taskforce, expanded this requirement to apply to all Australian Government regulation that imposes costs or confers benefits on business.

During 2005-06, the independent Taskforce on Reducing Regulatory Burdens on Business examined the areas where regulatory reform can provide significant immediate gains to business. Its recommendations were largely accepted by the Australian Government. As a result, a number of reform measures have been set in place, including a significant strengthening of the Regulation Impact Statement (RIS) requirements.

The Australian Government adopted a three-tiered system to assess all new regulatory and quasi-regulatory proposals:

- All proposals are required to undergo a preliminary assessment to establish whether they are likely to involve an impact on business and individuals or the economy, and whether or not they are considered by the Cabinet.
- If the preliminary assessment shows that a proposal potentially involves medium compliance costs, a full assessment of the compliance cost implications should be carried out.
- Proposals that have a significant impact on business and individuals, whether in the form of compliance costs or other impacts, or that restrict competition, require more detailed analysis documented in a RIS.

The requirements apply to all Australian Government Ministers, departments, agencies, statutory authorities and boards, and regulators. The same best practice regulation principles also apply to Ministerial Councils and other national standard setting bodies for consistency.

In 2006, the Government established the OBPR to play a central role assisting departments and agencies to meet the Australian Government's regulatory impact analysis requirements and in monitoring and reporting on their performance.

### 1.5.1 Regulation Impact Statements

In order to meet CPA obligations, promote effective and efficient regulation and make transparent the potential impact of proposed legislation, a RIS must be prepared for all proposed new and amended Australian Government regulation with the potential to restrict competition, or impose costs or confer benefits on business (see Box 3). The RIS must clearly identify a problem and relevant policy objective and assess the costs and benefits of alternative means of fulfilling the objective.

A function of the OBPR is to advise on whether the Government's RIS process requirements have been met. This includes advising the Government on whether the RIS provides an adequate level of analysis. The OBPR is also responsible for providing guidance and training to Australian Government departments and agencies in preparing a RIS. RIS requirements are detailed in the Best Practice Regulation Handbook (November 2006) which is available from the OBPR ([www.pc.gov.au](http://www.pc.gov.au)).

### Box 3: What is the purpose of the RIS process?

The objective of the RIS process is to improve the quality of regulations, so that regulations provide the most efficient and effective means of achieving objectives. The RIS helps achieve this by ensuring that a comprehensive assessment of all policy options, and the associated costs and benefits, is undertaken. The information is then used to inform the decision-making processes. In this regard, it provides a comprehensive checklist that outlines public policy decision-making best practice.

The RIS process is used to develop the appropriate and best policy solution, which does not impose unnecessary costs on business and the community.

Where a regulatory solution is intended, a formal RIS must accompany the proposed legislation on introduction to Parliament. This provides a public statement of the decision-making process.

A RIS is also required for consultation. It is a requirement that the OBPR assess the RIS for consultation before it is made available for public comment. After consultation, the RIS is revised and submitted to the OBPR for assessment, before being presented to the Ministerial Council or national standard-setting body with the OPBR's advice at the decision-making stage.

The Australian Government's overall performance against the RIS requirements, incorporating compliance for new or amended primary legislation, subordinate legislation, quasi-regulation and treaties, is assessed in detail in the Productivity Commission report *Regulation and its Review 2005-06*.

Under the RIS requirements that applied in 2005-06, over 2,600 regulations were made by the Australian Government of which about 3 per cent required preparation of a RIS. Of the 96 RISes required at the decision-making stage, 79 were prepared and 68 were assessed as adequate by the OBPR – a compliance rate of 71 per cent. This compares

with an average compliance rate of 85 per cent over the previous three years.<sup>14</sup>

Of the RISs prepared at the decision-making stage for regulatory proposals introduced via Bills, 59 per cent were adequate (compared with 76 per cent in 2004-05). At the tabling stage, 79 per cent were adequate (compared with 100 per cent in 2004-05).

In the case of disallowable instruments (subordinate legislation and regulation), 86 per cent of the RISs prepared at the decision-making stage were adequate (compared with 83 per cent in 2003-04) and 90 per cent were adequate at the tabling stage (compared to 84 per cent in 2003-04).

### 1.5.2 Legislation enacted that may restrict competition

There were three significant proposals introduced via Australian Government legislation in the period 1 July 2005 to 30 June 2006 that were considered by the OBPR as having the potential to restrict competition<sup>15</sup>. Among proposals of less significance, eight were judged to have the potential to restrict competition (see Table 1.1).

A RIS was prepared for each of the more significant proposals and for four of the less significant ones. Each of the RISs prepared for the less significant proposals was assessed as adequate. However, the OBPR assessed the RISs for the three significant proposals as being inadequate.

The impact of these proposals is discussed in published RISs and depends in part on how the various legislative provisions are implemented and administered by regulators.

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14 Productivity Commission 2006, *Regulation and its Review 2005-06*, Annual Report Series, Productivity Commission, Canberra, pp 14-16.

15 The Productivity Commissions' *Regulation and its Review 2006-07* had not been produced at the time of publication of this report.

**Table 1.1: Selected Australian Government legislation introduced into Parliament between 1 July 2005 and 30 June 2006 having the potential to restrict competition**

<b>Name of Legislation/Regulation</b>
Australian Securities & Investments Commission Policy Statement 186 External Administration: Liquidator Registration
Carrier Licence Conditions (Telstra Corporation Limited) Declaration 1997 (Amendment No. 2 of 2005)
Eastern Tuna and Billfish Fishery Management Plan 2005
Western Tuna and Billfish Fishery Management Plan 2005
Applied Laws (Implementation) Ordinance 2005 (No. 1) (CKI)
Australian Meat and Live-stock Industry (Beef Export to the USA — Quota for 2006) Order 2005
Casino Legislation Ordinance 2005 (No. 1) (CI)
Great Barrier Reef Marine Park Amendment Regulations 2005 (No. 3)
Health Location Amendment (Pharmacy Location Arrangements) Bill 2006
Petroleum Retail Legislation Repeal Bill 2006
Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005

## 2 Competitive neutrality

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### 2.1 Why implement competitive neutrality?

The CPA establishes a policy of competitive neutrality. This requires that government businesses operating in a market where there are actual or potential competitors should not enjoy any net competitive advantages simply as a consequence of their public ownership.

The objective of this policy is to eliminate potential resource allocation distortions arising from the public ownership of significant business activities operating in a contestable environment, and to encourage fair and effective competition in the supply of goods and services.

The ability of government-owned business activities to compete 'unfairly' can have significant economic efficiency and equity implications. This is because pricing decisions taken by government businesses may not fully reflect actual production costs or other business costs borne by their private sector competitors. This may result from a lack of market pressure and discipline, such as that applied through the requirement for private sector firms to earn a commercial rate of return and make dividend payments to shareholders, or special planning regulations. Such advantages may enable a government business to undercut private sector competitors, and provide an effective barrier to entry for potential competitors.

If consumers choose to purchase from the lower priced government provider, the production and investment decisions of that business and actual and potential competitors will be influenced. If the government-owned business is not the least-cost producer when costs are measured on an equivalent basis, the allocation of resources towards production by this business would be inefficient.

As a result, removing those advantages enabling under-pricing should encourage more economically efficient outcomes, and ensure resources are allocated to their best uses.

It also means that where public funds continue to be used to provide significant business activities, increased competitive pressures and



performance monitoring should result in more efficient operations. Consumers will benefit from more competitive pricing practices and improved quality of government services.

Further, where public funds are removed from the provision of goods and services considered best left to the private sector, and those remaining activities are provided more efficiently, a greater proportion of total public funds can be directed towards the provision of social policy priorities such as health, education and welfare.

This improved government business competitiveness does not come at the expense of satisfying legitimate Community Service Obligations (CSOs). However, as discussed in section 2.2, competitive neutrality does encourage greater transparency and efficiency in their provision.

#### 2.1.1 Which Government activities are subject to competitive neutrality?

The Commonwealth Competitive Neutrality Policy Statement (CNPS) deems all Government Business Enterprises (GBEs) and their subsidiaries, and Commonwealth Companies and business units to be significant business activities. Consequently, they are required to apply competitive neutrality principles.

The following activities are also considered significant for the purposes of competitive neutrality:

- other commercial activities undertaken by non-GBE agencies prescribed by regulation under the *Financial Management and Accountability Act 1997* (FMA Act), Commonwealth authorities or departments, with a commercial turnover of a least \$10 million per annum;
- baseline costing for activities undertaken for market-testing purposes; and
- public sector bids.

To be considered a business, the following criteria must be met:

- there must be charging for goods and services;
- there must be an actual or potential competitor either in the private or public sector, that is, users are not restricted by law or policy from choosing alternative sources of supply; and
- managers of the activity must have a degree of independence in relation to the production or supply of the good or service and the price at which it is provided.

Other business activities not listed above are subject to the complaints mechanism and may be required to apply competitive neutrality if a complaint against them is upheld. These business activities may choose to apply competitive neutrality on a notional basis, to preclude complaints.

Competitive neutrality is required to be implemented only where the costs of this course of action do not exceed the benefits.

### 2.1.2 What does the application of competitive neutrality require?

Portfolio ministers are responsible for ensuring that all significant business activities within their portfolio comply with established competitive neutrality requirements. GBEs and Commonwealth Companies are required to have their competitive neutrality arrangements approved by the Minister for Finance and Administration and the responsible portfolio Minister. Competitive neutrality arrangements applied to business units, significant commercial business activities provided by non-GBE agencies prescribed by regulation under the FMA Act, Commonwealth authorities, or departments with a commercial turnover of at least \$10 million per annum are to be approved by the responsible portfolio minister.

The *Australian Government Competitive Neutrality Guidelines for Managers* (December 2006) provides assistance with the practical application of the competitive neutrality principles, as identified in the CNPS, to a wide range of Australian Government business activities.

In general terms, competitive neutrality implementation involves:

- adoption of a corporatisation model for significant GBEs;
- payment of all relevant Commonwealth and State and Territories direct and indirect taxes or tax equivalents;
- payment of debt neutrality charges or commercial interest rates, directed towards offsetting competitive advantages provided by explicit or implicit government guarantees on commercial or public loans;
- attainment of a pre-tax commercial rate of return on assets to ensure, among other things, payment of competitive neutrality components is not simply accommodated through a reduction in profit margin;
- compliance with those regulations to which private sector competitors are normally subject, for example, planning and approvals processes; and
- pricing of goods and services provided in contestable markets to take account of all direct costs attributable to the activity and the applicable competitive neutrality components.

Competitive neutrality is neutral with respect to the nature and form of ownership of business enterprises. It does not require privatisation of Australian Government business activities, only corporatisation. Where the Government decides to privatise a former public monopoly, the requirements of Clause 4 of the CPA must be met.

Competitive neutrality does not require outsourcing of Australian Government activities – but when public bids are made under market testing arrangements they must comply with competitive neutrality. As a result, in-house units should not have an unfair advantage over other bidders.

Regulatory neutrality does not require the removal of legislation that applies only to the GBE or agency and not to its private sector competitors, where the regulation is considered to be appropriate. However, legislation that restricts competition may be reviewed under the Commonwealth Legislation Review Program (see Chapter 1).

The actual application of competitive neutrality varies significantly, depending on the nature of the business activity to which it is being applied and the specific operating conditions being assessed.

## 2.2 Community Service Obligations

A CSO arises when the Government specifically requires a business to carry out an activity or process that:

- the organisation would not elect to do on a commercial basis, or that it would only do commercially at higher prices; and
- the Government does not, or would not, require other organisations in the public or private sectors to fund.

CSOs are often established to meet government social policy objectives. A well known example is the requirement that Australia Post provide a standard letter delivery service throughout Australia for a uniform postage rate.

Competitive neutrality does not prevent the provision of CSOs, but it does establish certain requirements in terms of their costing, funding and interaction with other competitive neutrality obligations. The intention is to encourage more effective and transparent provision of such services, with minimal impact on the efficient provision of other commercial services.

In November 2000, COAG decided that parties should be free to determine who should receive a CSO payment or subsidy when implementing competitive neutrality requirements under the CPA, and that such payments should be transparent, appropriately costed and funded directly by governments. It was also decided that there was no requirement for a competitive process in delivering CSOs. Where an organisation wishes to have an activity recognised as a CSO, it must be directed explicitly to carry out that activity on a non-commercial basis in legislation, government decision or publicly available directions from shareholder ministers, for example, identified in the annual report of the relevant Australian Government department or authority annual report.

CSOs should be funded from the purchasing portfolio's budget, with costs determined as part of a commercially negotiated agreement. CSO agreements should include similar requirements as applied to other activities, that is, these activities should be able to pay taxes and earn a commercial rate of return (as if contracted out).

Under competitive neutrality arrangements, no adjustment should be made to the commercial rate of return target applied to the service provider to accommodate CSOs.

## 2.3 Market testing

Market testing involves inviting tenders for the provision of services and evaluating those tenders against predetermined selection criteria. For activities subject to market testing arrangements, competitive neutrality arrangements should be applied to all public sector bids and baseline costing exercises. In practice, this means that competitively tendering for the supply of a good or service is to be regarded as a commercial activity. Any baseline costing exercise needs to reflect the full cost of providing the good or service, including:

- attribution for: any appropriate costs; payment of Fringe Benefits Tax and goods and services tax (on direct purchases); remaining Commonwealth and State taxes; debt neutrality charges; regulatory neutrality charges; and a notional amount equivalent to any public liability insurance premiums a private sector contractor may be required to pay; and
- incorporation of a commercial pre-tax rate of return on assets. Where plant and facilities are to be made available to all bidders as government-furnished, baseline costing exercises do not need to include a rate of return on such capital.

Should a public sector bid be successful, the business activity would need to assess the application of competitive neutrality in accordance with the Australian Government Competitive Neutrality Guidelines for Managers. Non-compliance could result in a complaint being made to the AGCNCO (see section 2.4).

## 2.4 Complaints alleging non-compliance with competitive neutrality principles

The AGCNCO is an autonomous unit within the Productivity Commission. It was established under the *Productivity Commission Act 1998* to receive complaints, undertake complaint investigations and advise the Treasurer on the application of competitive neutrality to Government business activities.

The AGCNCO can be contacted by:

Post: Australian Government Competitive Neutrality Complaints  
Office  
PO Box 80  
Belconnen ACT 2616

Telephone: 02 6240 3327

Facsimile: 02 6253 0049

Website: [www.pc.gov.au/agcnco/](http://www.pc.gov.au/agcnco/)

Any individual, organisation or government body may lodge a formal written complaint with the AGCNCO on the grounds that:

- an Australian Government business activity has not been exposed to competitive neutrality arrangements, including a commercial activity below the \$10 million per annum turnover threshold;
- an Australian Government business activity is not complying with competitive neutrality arrangements that apply to it; or
- current competitive neutrality arrangements are not effective in removing an Australian Government business activity's net competitive advantage, which arises due to government ownership.

Where the AGCNCO considers that competitive neutrality arrangements are not being followed, it may directly advise government business entities as to the identified inadequacies and actions to improve compliance. If a suitable resolution to a complaint cannot be achieved in this manner, the AGCNCO may recommend appropriate remedial action or that the Treasurer undertake a formal public inquiry into the matter.

Any person contemplating a complaint should discuss their concerns with the government business involved and/or the AGCNCO prior to initiating a formal complaint investigation process.

#### 2.4.1 Complaints received during the reporting period

In the period 1 July 2005 to 30 June 2007, the AGCNCO carried out no new investigations.

There was a report released by AGCNCO on 7 June 2005 on EDI Post – AGCNCO Investigation No. 12. The report recommended no further action in relation to the complaint. Consequently, there was no Government response to the report.

### 2.5 Australian Government actions to assist competitive neutrality implementation

#### 2.5.1 Policy measures

It is general Government policy not to issue an Australian Government Guarantee on new borrowings. Where these are to be provided, there is a statutory requirement that loan guarantees are not be issued without the authorisation of the Minister for Finance and Administration.

#### 2.5.2 Publications

The *Australian Government Competitive Neutrality Guidelines for Managers* was released in December 2006, to assist in the application of competitive neutrality principles to the wide range of Australian Government significant business activities. Copies of the guidelines (which contain competitive neutrality information and advice) are available from the Department of Finance and Administration website ([www.finance.gov.au](http://www.finance.gov.au)).

Prior to this, the AGCNCO released a research paper *Cost Allocation and Pricing* in October 1998. The paper examines these issues in the context of significant business activities which operate within non-GBE Commonwealth authorities or departments, meeting their competitive neutrality obligations. A second paper, *Rate of Return Issues*, was released in February 1999. This paper provides general advice on establishing a commercial rate of return on assets targets, particularly for small government business activities, and those factors the AGCNCO will take into account when rate of return issues arise in a complaint. A third paper, *Competitive Neutrality in Forestry* was released on 22 May 2001. The research paper investigates the application of competitive neutrality principles to state and territory forestry operations and associated log-pricing issues. These publications are available from the AGCNCO or its website ([www.pc.gov.au/agcnco/](http://www.pc.gov.au/agcnco/)).



**Table 2.1: Agencies that applied competitive neutrality during 2005-06<sup>1</sup>**

Name	Activity	Entity	Assessed subject to CN?	Full cost recovery?	Commercial rate of return?	Tax or tax equivalent payments?	Debt neutrality charge?	Regulatory neutrality allowance?	Delivers community service obligation?
Airservices Australia	Other Commercial Revenue Activity-domestic/over seas	Commonwealth Authority	Yes	Yes	Yes	Yes	No	N/A	No
ASC Pty Ltd	Support of Collins Class Submarines	Government Business Enterprise	Yes	Yes	Yes	Yes	No	Yes	No
Australian Broadcasting Corporation	ABC Enterprises	Business Unit	Yes	Yes	Yes	Yes	No	Yes	No
Australian Bureau of Statistics	International Trade and Consultancy Service	Other	Yes	Yes	Yes	Yes	Yes	N/A	No
Australia Post		Government Business Enterprise	Yes	Yes	Yes	Yes	No	No	Yes
Australian Electoral Commission	Commercial Elections	Prescribed Agency	No	Yes	Yes	Yes	Yes	N/A	No

1 Latest data was not available for the period 1 July 2006 to 30 June 2007 at the time of publication of this report.

**Table 2.1: Agencies that applied competitive neutrality during 2005-06 (continued)**

Name	Activity	Entity	Assessed subject to CN?	Full cost recovery?	Commercial rate of return?	Tax or tax equivalent payments?	Debt neutrality charge?	Regulatory neutrality allowance?	Delivers community service obligation?
Australian Electoral Commission	Protected Action Ballots Scheme	Prescribed Agency	No	Yes	Yes	Yes	Yes	N/A	No
Australian Government Solicitor	Legal Services	Government Business Enterprise	Yes	Yes	Yes	Yes	Yes	Yes	No
Australian Hearing	Provision of Hearing Services	Commonwealth Authority	Yes	Yes	Yes	Yes	No	No	Yes
Australian Rail Track Corporation Ltd	Rail Access	Government Business Enterprise	Yes	Yes	Yes	Yes	No	N/A	No
Australian Securities and Investment Commission	Imaging/ Printing	Commonwealth Authority	Yes	Yes	Yes	Yes	Yes	No	No
Australian Taxation Office	Valuation Services	Business Unit	Yes	Yes	Yes	Yes	No	Yes	Yes
Bureau of Meteorology	Special Services Unit	Business Unit	No	Yes	Yes	No	No	No	No
Centrelink	Centrepay	Commonwealth Authority	Yes	Yes	Yes	Yes	No	N/A	No
Centrelink	Rent Deduction Scheme	Commonwealth Authority	Yes	Yes	Yes	Yes	No	N/A	No

**Table 2.1: Agencies that applied competitive neutrality during 2005-06 (continued)**

Name	Activity	Entity	Assessed subject to CN?	Full cost recovery?	Commercial rate of return?	Tax or tax equivalent payments?	Debt neutrality charge?	Regulatory neutrality allowance?	Delivers community service obligation?
Centrelink	Family Law Assistance Gateway	Commonwealth Authority	Yes	Yes	Yes	Yes	No	N/A	No
Centrelink	Family Relationship Advice Line	Commonwealth Authority	Yes	Yes	Yes	Yes	No	N/A	No
Centrelink	Passport Call Centre	Commonwealth Authority	Yes	Yes	Yes	Yes	No	N/A	No
Centrelink	Passport Online	Commonwealth Authority	Yes	Yes	Yes	Yes	No	N/A	No
Centrelink	DIMA Social Worker Assessments	Commonwealth Authority	Yes	Yes	Yes	Yes	Yes	N/A	No
Centrelink	Victory in the Park	Commonwealth Authority	Yes	Yes	Yes	Yes	No	N/A	No
Centrelink		Commonwealth Authority	Yes	Yes	Yes	Yes	No	N/A	No
CSIRO	Research, Technical and Consulting Services	Other	Yes	Yes	Yes	Yes	No	N/A	No
Department of Human Services	Vocational rehabilitation services	Business Unit	Yes	Yes	Yes	Yes	Yes	No	No

**Table 2.1: Agencies that applied competitive neutrality during 2005-06 (continued)**

Name	Activity	Entity	Assessed subject to CN?	Full cost recovery?	Commercial rate of return?	Tax or tax equivalent payments?	Debt neutrality charge?	Regulatory neutrality allowance?	Delivers community service obligation?
Department of Immigration and Multicultural Affairs	Translating & Interpreting Services	Department of State	Yes	Yes	Yes	Yes	Yes	N/A	Yes
Department of Transport and Regional Services	Airport Building Control Officers	Department of State	Yes	No	No	Yes	No	Yes	Yes
Department of Transport and Regional Services	Airport environment Officers	Department of State	Yes	Yes	No	Yes	No	Yes	Yes
Department of Transport and Regional Services	Sydney West Airport Rental Properties	Department of State	Yes	Yes	Yes	Yes	No	Yes	No
Health Services Australia	Occupational Health	Government Business Enterprise	Yes	Yes	Yes	Yes	No	N/A	No
Health Services Australia	Occupational Rehabilitation	Government Business Enterprise	Yes	Yes	Yes	Yes	No	N/A	No
Health Services Australia	Travel Health	Government Business Enterprise	Yes	Yes	Yes	Yes	No	N/A	No

**Table 2.1: Agencies that applied competitive neutrality during 2005-06 (continued)**

Name	Activity	Entity	Assessed subject to CN?	Full cost recovery?	Commercial rate of return?	Tax or tax equivalent payments?	Debt neutrality charge?	Regulatory neutrality allowance?	Delivers community service obligation?
National Capital Authority	National Capital Exhibition Shop (Regatta Point ACT)	Business Unit	Yes	Yes	Yes	Yes	N/A	Yes	No
National Museum of Australia	Museum Shop	Commonwealth Authority	Yes	Yes	Yes	No	No	No	No
Reserve Bank of Australia	Transactional Banking	Business Unit	Yes	Yes	Yes	Yes	Yes	Yes	No
Reserve Bank of Australia	Registry Services	Business Unit	Yes	Yes	Yes	Yes	No	N/A	No
Royal Australian Mint	Sale of collector coin and other minted products	Prescribed Agency	Yes	Yes	Yes	Yes	No	No	Yes
Special Broadcasting Service	On air advertising and sponsorship	Other	Yes	Yes	No	No	No	No	No

## 3 Structural reform

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### 3.1 Structural reform under NCP and the NRA

The CPA does not prescribe an agenda for the reform of public monopolies, nor does it require privatisation.

Clause 4 of the CPA does, however, require that before the Australian Government introduces competition into a sector traditionally supplied by a public monopoly, it must remove from the public monopoly any responsibilities for industry regulation. The relocation of these functions is intended to prevent the former monopolist from establishing a regulatory advantage over its existing and potential competitors.

Further, prior to introducing competition into a market traditionally supplied by and/or privatising a public monopoly, the Australian Government must undertake a review into:

- the appropriate commercial objectives for the public monopoly;
- the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly;
- the merits of separating potentially competitive elements of the public monopoly;
- the most effective means of separating regulatory functions from commercial functions of the public monopoly;
- the most effective means of implementing the competitive neutrality principles set out in the CPA;
- the merits of any CSOs undertaken by the public monopoly and the best means of funding and delivering any mandated CSOs;
- the price and service regulations to be applied to the industry; and
- the appropriate financial relationships between the owner of the public monopoly and the public monopoly, including 'rate of return' targets, dividends and capital structure.

The review requirement acknowledges that the removal of regulatory restrictions on entry to a marketplace may not be sufficient to foster effective competition in sectors currently dominated by public monopolies. Effective competition requires competitive market structures.

The public monopoly must be restructured on a competitively neutral basis to remove any unfair competitive advantages resulting from government ownership. However, the new organisation must also be sufficiently flexible to be able to respond efficiently in a changing environment. This may require that the organisation be restructured.

Structural reform of public monopolies is often linked with the provision of access rights to essential infrastructure services previously under their sole control (see Chapter 4).

During the reporting period, the Australian Government considered Clause 4 matters in relation to telecommunications, aviation services and wheat marketing arrangements.

### 3.1.1 Telecommunications industry sector

The telecommunications sector has been open to full competition since 1 July 1997. It is regulated by legislation, predominantly the *Telecommunications Act 1997* and Parts XIB and XIC of the TPA.

Review of market based reforms and activities were previously undertaken by the Spectrum Management Agency (SMA). In 1997 the SMA merged with Austel to form the ACA. In 2005 the ACA merged with the Australian Broadcasting Authority to establish the Australian Communications and Media Authority (ACMA). ACMA is now the body responsible for ensuring industry compliance with industry codes and standards. The ACCC is responsible for administering the telecommunications competition regime in Parts XIB and XIC of the TPA.

Telstra Corporation Limited (Telstra), the previous monopoly supplier of telecommunications services, has no commercial regulatory functions.

The Australian Government's review obligations under Clause 4 were broadly satisfied through a series of related reviews prior to the partial

privatisation of Telstra in 1997. The pre-1997 review of telecommunications regulatory arrangements involved extensive public consultation and taking of submissions. The review's issues paper canvassed regulatory arrangements relating to industry structure. In light of the review, the Government adopted the current approach to competition regulation.

In 1997, the ACCC established a telecommunications working group to review Telstra's accounting and cost-allocation arrangements and to assist the development of an enhanced accounting separation model for Telstra businesses. In May 2001 the ACCC released the Telecommunications Industry Regulatory Accounting Framework.

This framework has been enhanced further through the Government's direction to the ACCC to require Telstra to prepare and lodge with the ACCC regulatory accounts and reports, based on historical and current costs. This measure is intended to provide transparency between Telstra's wholesale and retail operations, particularly in relation to the core interconnection services provided over Telstra's network.

The accounting separation regime provides a framework for testing over time whether Telstra is systematically favouring its own retail operations in relation to its competitors. The ACCC has now published a detailed series of accounting separation reports, commencing in December 2003.

The Productivity Commission considered structural reform in the telecommunications sector as part of its review of NCP reforms released on 14 April 2005. The Productivity Commission expressed the view that the potential benefits of full vertical separation of Telstra's wholesale and retail arms are not sufficiently large to justify the efficiency and transaction costs that this would entail and that it is unclear that requiring Telstra to divest its interests in Foxtel and/or its HFC cable network would deliver a net benefit in an Australian context.

The Commission recommended that the Government bring forward its scheduled review of telecommunications regulation prior to the sale of Telstra, and that the review's terms of reference should provide for an assessment of whether further operational separation of Telstra's wholesale and retail arms would yield net benefits.



On 11 April 2005, the Minister for Communications, Information Technology and the Arts released a telecommunications competition regulatory reform issues paper which, among other things, sought stakeholders' views on operational separation.

A series of reforms to telecommunications competition regulation were announced by the Government on 17 August 2005, following an extensive review of the regulatory arrangements. These reforms aimed to strike a balance between the need for regulation which promotes competitive services to consumers and investment in new infrastructure, as well as allowing Telstra the scope to meet changing market conditions and demand for services. The centrepiece of the competition reforms was the requirement on Telstra to introduce operational separation.

The final elements of the operational separation framework came into effect on 30 November 2006. Operational separation is designed to increase the transparency of Telstra's internal operations and requires Telstra to demonstrate that it provides its wholesale customers equivalent treatment to its own retail businesses. The model for operational separation was developed in consultation with Telstra and the ACCC, with compliance to be overseen by the ACCC and the Minister for Communications, Information Technology and the Arts.

On 9 October 2006, the Government launched the third and final public offering of Telstra shares known as 'T3'. Following strong demand from both retail and institutional investors, T3 raised \$15.5 billion, with the Government selling around 35 per cent of the company. The remaining Government holding of 17 per cent of Telstra has been transferred to the Future Fund. The T3 sale process has now removed the inherent conflict of interest in the Government being both the telecommunications industry regulator and the majority shareholder in the largest telecommunications company in Australia.

### 3.1.2 Federal airports

In 1997-98 the Government granted long-term leases for all of the Federal airports previously operated by the Federal Airports Corporation to private sector companies, with the exception of the Sydney Basin airports and Essendon Airport in Melbourne. Sydney Airport Corporation

Limited (SACL) and Essendon Airport Limited (EAL), both wholly Australian Government-owned public monopolies, leased the Sydney Basin and Essendon airports sites from the Australian Government.

As part of the Federal airports privatisation process, regulatory functions were separated from commercial functions. The airport lessee companies and businesses on the airport sites are subject to all of the applicable state laws, taxes and charges, except in some specific areas. The areas in which Australian Government laws and regulations apply to the airports are:

- environmental management;
- land use planning and development controls;
- building and construction approvals; and
- price and quality of service monitoring.

On 13 December 2000, the Government announced that Sydney Airport would, among other things, be able to handle air passenger demand over the next ten years and that it would, therefore, be premature to build a second airport in the city. The Government announced that SACL would continue to operate Kingsford Smith Airport only and that the airport would be sold in 2001. Bankstown Airport Limited, Camden Airport Limited and Hoxton Airport Limited were intended to be privatised in late 2002 and their management would be by a separate company competing with Sydney Airport.

The Slot Management Scheme at Sydney Airport, which guarantees access for regional airlines for services that begin and end in New South Wales through the ring fence arrangements, was amended in 2001 to provide further guarantees for regional access by expanding the number of regional slots that were permanent. That is, slots that can only be allocated to regional airlines until they are not used by a regional airline for two years. Given the importance of access to Sydney Airport, the Government also amended the Scheme so that regional slots would not be moved out of the peak periods and, hence, regional travellers made to fly at less convenient times of the day. In addition, the Government directed the ACCC to monitor landing charges so that the airport could not increase charges on regional airlines by more than the inflation rate as a way of forcing the regional airlines out of Sydney Airport.

Bankstown, Camden and Hoxton Airports, previously subsidiaries of SACL, were separated from SACL on 29 June 2001 in readiness to be privatised. All of the shares in EAL were sold to a private sector company in September 2001.

The airport sale process for Sydney Airport began in early 2001 and binding bids were originally due by 17 September 2001. Following the terrorist attacks on the United States of America on 11 September 2001 and the subsequent level of disruption in the global financial markets and aviation sectors, the Government deferred the sale until 2002. The Minister for Finance and Administration and the Minister for Transport and Regional Services announced the sale of Sydney Airport on 25 June 2002, and the sale of Bankstown, Camden and Hoxton Park Airports on 15 December 2003. In accordance with the privatisation timetable, the Department of Finance and Administration undertook a Clause 4 review of SACL. The review was completed in June 2002.

At the time the Government began privatising Federal airports, it established a comprehensive economic regulatory framework to apply to airport lessees. The arrangements were intended to promote operation of the airports in an efficient and commercial manner, while at the same time protecting airport users from any potential abuse of market power by airport operators. These arrangements included price monitoring and a Consumer Price Index (CPI) cap on aeronautical charges at Adelaide, Brisbane, Canberra, Coolangatta, Darwin, Hobart, Launceston, Melbourne, Perth and Townsville airports. Price monitoring of aeronautical-related charges, transparency measures covering airport-specific financial reporting, quality of service reporting and airport-specific access arrangements were also part of the arrangements.

When Sydney Airport was leased to the Government-owned SACL, it was also subjected to prices notification and monitoring of aeronautical and aeronautical-related charges, respectively. Before privatisation, SACL was a company subject to the Australian GBE accountability guidelines and was required to earn a fair and reasonable return on investment for its owners, the Australian Government. Unlike the privatised airports, the Government did not place a price cap on SACL's aeronautical charges due to significant recent redevelopment and continued government ownership. In setting out its sale objectives for Sydney Airport, the Government announced that the ACCC would give

effect to Government's policy to ensure that price increases in any year for regional carriers' access to Sydney Airport would not exceed the inflation rate, even for peak periods.

In early October 2001, the then Minister for Financial Services and Regulation signed new instruments in relation to the existing regime for price oversight at Federal airports. The revised regime retained price caps in Brisbane, Melbourne and Perth airports but allowed for an once-only price increase up to specified amounts. This was to allow the airport lessees to better manage the major structural adjustments taking place in the domestic aviation market. Formal monitoring of the prices, costs and profits related to the supply of aeronautical-related services was retained for Adelaide, Brisbane, Canberra, Darwin, Melbourne, Perth and Sydney airports.

The Productivity Commission began a review of price regulation of airport services in December 2000 and presented its final report to Government on 25 January 2002. The purpose of this inquiry was to examine whether new regulatory arrangements were needed to ensure that the exercise of market power may be appropriately counteracted in relation to those airport services or products where airport operators are identified as having most potential to abuse market power. The Commission's recommendations included five years of price monitoring (but no price caps) at Sydney, Melbourne, Brisbane, Perth, Adelaide, Canberra, and Darwin airports. The Commission recommended that alterations to such a regime only be considered after five years (at which time the regime would be independently reviewed). A second option of retaining a CPI price cap on a limited number of airports was also considered during the review. The Government released the report, and its response, on 13 May 2002.

The Government accepted the recommendation that Sydney, Melbourne, Brisbane, Perth, Adelaide, Canberra and Darwin airports be subject to price monitoring for five years, which is due to expire on 30 June 2007. With this decision, the privatised Federal airports still remain subject to the general operation of the TPA, as well as the *Airports Act 1996* (the Airports Act). The economic regulatory aspects of the Airports Act are addressed under Part 7, which requires financial accounts and reports to be prepared by the privatised Federal airports; and Part 8, regarding Quality of Service (QoS) monitoring.

The Productivity Commission's report recommended that the QoS monitoring should continue at all Federal airports subject to price monitoring. The Australian Government's response to the report agreed that QoS monitoring is a useful adjunct to price-monitoring, but advised that the continued relevance of Parts 7 and 8 would be considered as part of a broader review of the Airports Act.

On 30 April 2007, following a Productivity Commission's *Review of Price Regulation of Airport Services*, the Government announced it would accept the Productivity Commission's recommendation to continue price monitoring for a further six years from 1 July 2007. Several amendments will be made to improve the new regime's effectiveness, including:

- establishing a starting aeronautical asset base for monitoring airport pricing behaviour;
- adopting an expanded set of aeronautical pricing principles to set clear expectations for effective commercial negotiations;
- slightly expanding the scope of the definition of aeronautical services to cover all aeronautical services for which airports are likely to have significant market power; and
- introducing a 'show cause' process whereby price monitored airports may be required to demonstrate why their conduct should not be subject to more detailed scrutiny.

The new regime will apply to Adelaide, Brisbane, Melbourne, Perth and Sydney airports (Canberra and Darwin airports will be removed from the scope of the regime). Further information on the Government response can be found on the Treasurer's website ([www.treasurer.gov.au](http://www.treasurer.gov.au)).

On 14 November 2005, the Government announced the completion of a review of the Airports Act, which recommended several minor amendments to the regulatory regime for privatised airports, including developing a set of guidelines that outline requirements for community consultation for airport master plans and major development plans.

In agreeing to the recommendations, the Government indicated it would continue to retain responsibility for regulation and planning at the

22 federal-leased airports to ensure consistency of treatment for Commonwealth assets.

Legislation giving effect to the Government's response came into effect on 13 May 2007.

### 3.1.3 Former Australian Wheat Board

On 1 July 1999, the former statutory AWB was privatised as a grower-owned and controlled company AWB under corporations law.

The former AWB's export control powers were transferred to an independent statutory WEA in order to separate the commercial wheat marketing operations (AWBI, a subsidiary of AWB), from the regulatory aspects associated with the export wheat single desk arrangements. AWBI has been given an automatic right to export wheat through the legislation. The WEA's functions include issuing export consents to persons other than AWBI and monitoring and reporting on AWBI's performance in relation to the export of wheat and the resultant benefits to growers.

The Wheat Marketing Act, the legislation governing these arrangements, was reviewed in 2000 under NCP. The terms of reference for the review required an examination of relevant matters in Clause 4 of the CPA regarding structural reform of public monopolies. The Government's response to the review was that there would be no legislative or significant structural change to the then wheat single desk arrangements.

Following an inquiry and report by the Senate Rural and Regional Affairs and Transport Legislation Committee on the Wheat Marketing Amendment Bill 2002, the Wheat Marketing Act was amended in July 2003. Amongst other matters, changes were made to the scheduled 2004 review process so that the review would be conducted by an independent panel appointed by the Minister for Agriculture, Fisheries and Forestry and that the WEA would itself be reviewed.

The 2004 review was conducted by an independent panel. The review assessed AWBI's performance as the commercial manager of the single desk and the effectiveness of the WEA as its regulator, as well as the operation of the export consent arrangements. The review assessed

whether benefits to growers resulted from the performance of AWBI in relation to the export of wheat. The terms of reference for the 2004 review did not address whether or not the single desk should continue and the review was not intended to fulfil NCP requirements.

The review provided a report to the Minister in September 2004 and a report for growers in October 2004, the latter of which was tabled in Parliament. The panel found that both AWBI and the WEA had performed well. The panel supported the current framework that establishes the wheat export arrangements but recommended a number of improvements to the governance and management of the single desk by AWBI, the operation of the WEA, and the export consent system, which it considered would benefit growers and the wider community.

The Government responded to the review on 5 April 2005. It has given in-principle support to all of the review recommendations, recognising that responsibility for the implementation rests largely with AWBI, the WEA and in some cases AWB shareholders. AWBI and the WEA provided reports on their progress with implementing the recommendations to the Minister for Agriculture, Fisheries and Forestry and to the Grains Council of Australia (GCA). These progress reports have been made public.

## 3.2 Other structural reforms under the NRA

During the reporting period, the NCP reform program drew to a close and, in 2006, COAG agreed to the new NRA. The NRA's goals include broadening the structural reform process, promoting further competitive and efficient outcomes in the energy and transport sectors and implementing a simpler and more consistent national approach to the economic regulation of significant infrastructure.

In this regard, COAG has made significant progress in the development of substantive reform proposals under the NRA to improve infrastructure markets.

### 3.2.1 Energy and transport

On 13 April 2007, COAG announced reforms including:

- establishment of a National Energy Market Operator for both electricity and gas, encompassing a new national transmission planning function – a key step towards a fully national electricity transmission grid;
- an implementation strategy for a national mandated roll-out of smart electricity meters to areas where benefits outweigh costs; and
- a phased approach to the long-term reform of road and rail freight infrastructure pricing.

### 3.2.2 Competition and Infrastructure Reform Agreement (CIRA)

COAG agreed on an implementation plan for its *Competition and Infrastructure Reform Agreement* (CIRA), signed in February 2006 as part of the NRA. The CIRA provides for a simpler and consistent national approach to the economic regulation of nationally-significant infrastructure, including major ports and rail networks. Under the CIRA, jurisdictions are to undertake a review of the regulation and effectiveness of competition in significant ports by the end of 2007.





## 4 Access to essential infrastructure

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### 4.1 Why is access to essential infrastructure important?

Fair and reasonable access for third parties to essential infrastructure facilities such as electricity grids, gas pipelines, rail tracks, airports and communications networks is important for effective competition.

Many infrastructure facilities exhibit natural monopoly characteristics that inhibit competition in related industries. For example, restrictions on access to rail track infrastructure may prevent competition between different companies seeking to provide rail freight services. Similarly, where a gas producer cannot make use of an existing gas distribution network to reach potential clients, it may be difficult to compete in or even enter the wholesale and retail gas supply markets.

It is generally not economically feasible to duplicate such infrastructure, and given the historic likelihood of vertically integrated owners, it can be difficult for actual and potential competitors in downstream and upstream industries to gain access to these often vital infrastructure services. Even if access is technically available, there may be an imbalance in bargaining power between the infrastructure owner and potential third party users, influencing the terms and cost of access and making entry potentially prohibitive for competitors.

The outputs of these industries are significant inputs to a wide range of economic activities. Where restricted, access arrangements result in higher prices or lower service quality, and whether through reduced competition and/or limited supply, the impact is felt by businesses and consumers alike.

As a result, governments have given increasing attention to establishing a right of access to these facilities, under established terms and conditions, where privately negotiated access is not expected to be a viable option.

## 4.2 Amendments to Part IIIA of the *Trade Practices Act 1974*

Clause 6 of the CPA requires the Australian Government to establish a legislative regime for third party access to services provided by means of significant infrastructure facilities where:

- the facility is of national significance having regard to the size of the facility, its importance to constitutional trade or commerce or its importance to the national economy;
- it would not be economically feasible to duplicate the facility; and
- access to the service is necessary in order to permit effective competition in a downstream or upstream market.

Further, this regime is not intended to cover a service provided by means of a facility located in a state or territory that has established an access regime that both covers the facility and conforms with the principles set out in Clause 6, unless the NCC determines that regime to be ineffective in relation to the inter-jurisdictional impact or nature of the facility.

To give effect to this commitment, Part IIIA was inserted into the TPA. This part is referred to as the national access regime, and is intended to provide for minimum intervention by the Australian Government in determining actual terms and conditions of access.

The national access regime establishes three means by which parties may seek access to nationally significant infrastructure services. These are:

- declaration of a service provided by an infrastructure facility;
  - a person can apply through the NCC to have a service provided by a significant infrastructure facility ‘declared’ by decision of the relevant Minister. Where a service is declared, access to the service may be negotiated on a commercial basis between the service provider and an access seeker;
  - if agreement cannot be reached, the terms and conditions of access can be determined by the ACCC through a legally binding arbitration process. In making an access determination, the ACCC

must take into account a range of factors, including the legitimate business interests of the service provider, the provider's investment in the facility and the public interest;

- a Minister's decision on an application for declaration and an ACCC determination on a post-declaration arbitration can be reviewed by the Australian Competition Tribunal (ACT) upon application within 21 days;
- through an undertaking to the ACCC;
  - the operator of an infrastructure service can give a voluntary undertaking to the ACCC, setting out the terms and conditions on which access to that service will be provided. If an undertaking is accepted, this provides a legally binding means by which third parties can obtain access to the infrastructure service. A service that is subject to an undertaking cannot be declared as described above; and
- certification of a state or territory access regime as an 'effective regime';
  - State or Territory governments may apply through the NCC to have an access regime certified as effective in relation to a particular service. The NCC then makes a recommendation to the relevant Australian Government Minister on whether or not to certify the regime as effective. On receiving a recommendation from the NCC, the Minister must decide whether the access regime is an effective regime by applying relevant principles under the CPA;
  - where an effective state or territory access regime is in place the relevant infrastructure service cannot be declared under Part IIIA; and
  - a decision on an application for certification can be reviewed by the Australian Competition Tribunal upon application within 21 days of publication of the Minister's decision.

Specific access regimes have also been established for particular infrastructure facilities. Apart from the sector-specific

telecommunications access regime, the access regimes for airport services provided at core regulated Australian Government airports and for natural gas transmission and distribution pipelines, interact with the national access regime.

The Productivity Commission conducted a legislation review of Part IIIA of the TPA (Part IIIA). The Government tabled the report on 17 September 2002 and released its response to the report on 20 February 2004.

In response to the recommendations of the review, the Government put in place on 1 October 2006 some legislative enhancements to the national access regime. Among other things, the legislation enhances the regime by:

- clarifying its objectives and promoting more efficient investment in and operation of essential infrastructure, including by establishing pricing principles for access terms and conditions;
- establishing more timely and, in turn, less costly regulatory procedures, including the introduction of target time limits for regulatory decisions; and
- improving the transparency and accountability of decision making processes.

The CIRA contains a commitment for additional reform of Part IIIA to further enhance the timeliness of its regulatory processes.

The Australian Government has also recently announced its intention to amend subsection 44H(4)(a) of Part IIIA which provides one of several criterion that must be satisfied for an infrastructure service to be declared under Part IIIA. The prevailing interpretation of subsection 44H(4)(a) was recently transformed by the Federal Court – in *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146 – creating uncertainty about the future application of Part IIIA and whether it would continue to meet its objectives of promoting efficient investment in, and use of, major infrastructure. Accordingly, the Government has decided to restore the interpretation of subsection 44H(4)(a) to that which prevailed prior to the Federal Court decision. Details of this amendment have yet to be finalised.

## 4.3 Australian Government activity under Part IIIA

This section identifies those actions under Part IIIA involving infrastructure facilities under Australian Government jurisdiction or requiring a decision by an Australian Government minister during the reporting period.

### 4.3.1 Application for declaration of rail track services in the Pilbara region of Western Australia

On 15 June 2004, the NCC received an application from Fortescue Metals Group Ltd (FMG) under Part IIIA for declaration of rail track services provided by the Mt Newman and Goldsworthy railway lines in the Pilbara region of Western Australia. BHP Billiton Iron Ore (BHP) owns both railway lines.

The NCC made two preliminary decisions on 15 December 2004 prior to considering the FMG application. Firstly, the NCC concluded that the Mt Newman line is not part of a production process and is, therefore, potentially subject to declaration. Secondly, it concluded that the Goldsworthy line is part of a production process and is, therefore, exempt from declaration.

On 24 March 2006, the NCC submitted its final recommendation to the designated Minister, recommending that the Mt Newman Service be declared for a period of 20 years.

The NCC concluded that all of the statutory criteria under Part IIIA had been satisfied, including that: declaration would promote competition in at least one other market, specifically the markets for iron ore, rail haulage and iron ore tenements; that it would be uneconomical for anyone to develop another facility to provide the service; and that access to the service would not be contrary to the public interest.

The Treasurer did not publish a decision within the statutory 60 day time period and, on 22 May 2006, he was deemed to have taken a decision not to declare the service.

However, there are currently two separate legal processes underway concerning the FMG declaration application.

### **FMG appeal of decision not to declare the Mr Newman rail service**

On 13 June 2006, FMG lodged an appeal with the ACT against the Australian Treasurer's deemed decision not to declare the Mt Newman rail service. The ACT will reconsider the matter and may either affirm or set aside the decision. The ACT's hearing is still in its preliminary phase.

### **Federal Court decision regarding 'use of a production process'**

On 18 December 2006, the Federal Court declared that BHP's Mt Newman and Goldsworthy rail lines may be subject to declaration applications under Part IIIA, finding that they do not represent 'use of a production process'.

On 12 January 2007, BHP lodged an appeal against the Federal Court decision to the Full Court of the Federal Court. The appeal was heard in late April 2007 and the bench of the Federal Court has yet to announce its decision.

#### **4.3.2 Application for declaration of airside services at Sydney Airport**

In October 2001, the NCC received an application from Virgin Blue Airlines for declaration of airside services at Sydney Airport. On 29 January 2004, the Parliamentary Secretary to the Treasurer accepted a recommendation from the NCC and decided not to declare the services.

Virgin Blue applied to the ACT for a review of the decision. The ACT reconsidered the matter and, on 9 December 2005, decided to declare airside services at Sydney Airport, setting aside the decision of the Parliamentary Secretary to the Treasurer.

On 6 January 2006, SACL applied to the Federal Court seeking judicial review of the ACT's decision. On 18 October 2006, the Federal Court announced its decision to dismiss the appeal.

On 10 November 2006, SACL applied to the High Court of Australia (the High Court) for special leave to appeal the Federal Court decision. On 2 March 2007, the High Court dismissed SACL's application.

Domestic airside services at Sydney Airport are, therefore, declared under Part IIIA. Under these arrangements, the ACCC is currently arbitrating an access dispute between Virgin Blue and SACL.

#### 4.3.3 Application for declaration of services provided by the Tasmanian rail network

On 2 May 2007, the NCC received an application from the Tasmanian Government for the declaration of services provided by Tasmania's entire rail network. The rail network is owned by the Tasmanian Government while Pacific National is the private network operator, as well as the provider of a range of rail freight services.

At the time of writing, the NCC has called for public submissions on the matter and has yet to make its recommendation to the Tasmanian Premier (who is the designated Minister for the purposes of this application).

#### 4.3.4 Certification of Western Australia access regime for electricity network services

On 11 July 2005, the Western Australian Government applied to the NCC seeking a recommendation that its Electricity Networks Access Code 2004 be certified as an effective access regime.

The NCC released a draft recommendation on 3 August 2005 that the access regime be certified for 15 years. The NCC provided its recommendation to the Parliamentary Secretary to the Treasurer on 12 October 2005.

On 17 July 2006, the Parliamentary Secretary to the Treasurer announced his decision to certify the Western Australian Electricity Networks Access Code as an effective access regime for 15 years. This decision accorded with the NCC's recommendation.



#### 4.3.5 Certification of Queensland access regime for gas pipeline services

The Queensland Government made an application to the NCC on 25 September 1998 seeking a recommendation for the certification of the Queensland Gas Access Regime covering gas pipeline services. The regime contains derogations affecting four major transmission pipelines that quarantine those pipelines from having to comply with the principles underpinning the National Gas Code for varying periods.

In February 2001, the NCC forwarded its recommendation on the effectiveness of the Queensland regime to the then Australian Government Minister for Financial Services and Regulation that the regime not be certified. Subsequently, the Minister advised the NCC that he had received a substantial amount of new material from the Queensland Government and the owners of the four derogated gas pipelines. The Minister sought the NCC's advice as to whether this material raised new issues of relevance to his consideration of the regime's effectiveness.

The NCC withdrew its February 2001 recommendation so as to provide a new recommendation after it had given full consideration to the new material. Because considerable time had elapsed since interested parties had an opportunity to provide views on the effectiveness of the regime, the NCC released a further draft recommendation for public consultation. After considering public submissions on the new draft recommendation, the NCC forwarded its recommendation to the Minister on 21 November 2002.

On 17 July 2006 the Parliamentary Secretary to the Treasurer determined that the Queensland Gas Access Regime was not an effective access regime. This decision accorded with the NCC's recommendation. The Queensland regime is in place and the provisions of the regime apply, although the services provided by pipeline assets remain open to declaration under Part IIIA in the absence of a certified effective state access regime.

#### 4.3.6 Certification of Tasmanian access regime for gas pipeline services

On 13 October 2004 the Tasmanian Government applied to the NCC for a recommendation that its access regime for gas pipeline services is an effective access regime.

The NCC forwarded its recommendation to the Parliamentary Secretary to the Treasurer on 14 April 2005.

On 17 July 2006, the Parliamentary Secretary to the Treasurer announced his decision to certify the Tasmanian Gas Access Regime as an effective regime for 15 years. This decision accorded with the NCC's recommendation.

#### 4.4 Amendments to the Competition Infrastructure Reform Agreement (CIRA) regarding access to essential infrastructure

The CIRA provides for a simpler and consistent national approach to the economic regulation of significant infrastructure.

Under the CIRA, jurisdictions have agreed to reforms that support efficient use of and investment in significant national infrastructure, by promoting commercial negotiations between service providers and access seekers, increasing regulatory certainty and consistency and reducing compliance costs for infrastructure operators and users.

On 13 April 2007, COAG endorsed an implementation plan for the CIRA. In terms of infrastructure access regulation, the plan contains:

- commitments to streamline regulatory processes in access regimes – including the national access regime (Part IIIA) – by incorporating six month binding time limits and a limited form of merits review for regulatory decisions where merits review is already provided for;
- sets out common objectives clauses and pricing principles, and contains specific measures to enhance regulatory outcomes for nationally significant ports and rail networks; and

- a commitment that States and Territories submit their access regimes for certification under Part IIIA by 2010. This excludes access regimes for electricity and gas which are to be developed and certified in accordance with the Australian Energy Market Agreement and the access regime for the Darwin to Tarcoola railway.

## 5 Conduct Code Agreement

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### 5.1 Competitive conduct rules

The CCA commits the States and Territories to passing application legislation extending the competitive conduct rules of Part IV of the TPA to bodies within their Constitutional competence, and provides for its administration by the ACCC.

It also defines a process for accepting, by legislation, conduct from Part IV of the TPA, modifying the competitive conduct rules and making appointments to the ACCC.

Part IV of the TPA prohibits a range of anti-competitive conduct, as well as providing for exceptions from the requirement to comply with all or part of the restrictive trade practices provisions. In particular, it prohibits:

- anti-competitive arrangements, primary boycotts and price agreements;
- secondary boycotts;
- misuse of market power by a business where the purpose is to damage or prevent a competitor from competing;
- third line forcing as well as exclusive dealing conduct that is anti-competitive;
- resale price maintenance; and
- anti-competitive acquisitions and mergers.

The ACCC has the power to authorise arrangements that technically breach these provisions, provided these arrangements satisfy the public benefit test under Part VII of the TPA. Authorisation, which must be sought in advance by a party, operates to immunise arrangements from court action. This is with the exception of section 46 conduct relating to misuse of market power. ACCC decisions in relation to authorisations are subject to review by the ACT.

Section 51(1) provides general exceptions from Part IV of the TPA for:

- things done, authorised or approved by Federal or Territorial legislation other than legislation relating to patents, trademarks, designs or copyrights; and
- things done in any State or Territory specified in and specifically authorised by state or territory legislation, so long as the State or Territory is a party to the CCA and the CPA.

The exemption provisions in sections 51(2) and 51(3) were subject to a legislation review under the CPA (see previous reports [www.treasury.gov.au](http://www.treasury.gov.au)).

## 5.2 Australian Government exceptions under section 51(1) of the TPA

Any Australian Government legislation reliant on a section 51(1) exception needs to be approved by the Treasurer.

The CCA requires that written notification be provided to the ACCC of all legislation enacted in reliance on section 51(1). This must occur within 30 days of the legislation being enacted.

Proposed legislation that embodies restrictions on competition must also satisfy the requirements of the CPA in relation to net community benefit and include a RIS.

### 5.2.1 Existing legislation reliant on section 51(1)

The following legislation containing exception provisions has been previously identified:

- *Australian Postal Corporation Act 1989* (subsection 33A(6A));
- *Trade Practices Act 1974* (Part X, Division 5 and section 173);
- *Wheat Marketing Act 1989* (section 57(6)); and
- *Year 2000 Information Disclosure Act 1999* (section 17).

### 5.2.2 New legislation — exceptions

There were no notifications of Commonwealth legislation made in reliance on section 51(1) during the reporting period.



## 6 National Competition Policy Payments

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Under the Implementation Agreement, the Australian Government agreed to make competition payments to those States and Territories assessed as making satisfactory progress towards the implementation of specified competition and related reforms.

These payments represent the share of the States and Territories of the additional revenue raised by the Australian Government as a result of effective competition reform, and are worth approximately \$5 billion (between 1997-98 and 2005-06).

These payments originally comprised three tranches of competition payments and the real per capita component of the annual Financial Assistance Grants. However, the FAGs component ceased on 1 July 2000, as agreed to by all States and Territories, with the signing of the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*.

The first tranche of competition payments commenced in 1997-98, and involved a maximum annual payment of \$200 million (in 1994-95 prices).

The second tranche of competition payments commenced in 1999-2000, and involved a maximum annual payment of \$400 million (in 1994-95 prices).

The third tranche of competition payments commenced in 2001-02, and involved a maximum annual payment of \$600 million (in 1994-95 prices).

The Implementation Agreement specified the commitments States and Territories must meet in order to receive the maximum competition payment. The NCC assessed jurisdictions' performance in implementing the required reforms.<sup>16</sup> This assessment formed the basis for determining State and Territory eligibility for payment.

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16 In November 2000, COAG agreed that following the 1 July 2001 assessment, the NCC would undertake an annual assessment of each jurisdiction's performance in meeting its reform obligations as specified by the Implementation Agreement or as subsequently advised by COAG, and provide a recommendation on the level of competition payments to be received by each State and Territory.



For the period 2001-02 all States and Territories received their full allocation of payments, with the exception of Queensland. Queensland incurred a permanent deduction of \$270,000. The total amount of competition payments was \$733.3 million.

For the period 2002-03, all States and Territories received their full allocation of payments, apart from Queensland. Queensland incurred a suspension of \$270,000 and, as a result, NCP payments in 2002-03 totalled \$739.6 million.

For the period 2003-04 the estimated maximum level of competition payments was \$759 million. The Australian Government determined the level of payments after taking into account the NCC's penalty recommendations and comments from the States and Territories on the penalty recommendations. The Australian Government accepted the NCC's recommended penalties, consisting of \$53.9 million in the form of permanent deductions and \$126.9 million in payment suspensions, for jurisdictions' lack of progress in meeting their NCP obligations. The Government also agreed to release Queensland's 2002-03 suspended funds. As a result, \$578.5 million in competition payments was paid to the States and Territories in 2003-04.

The NCC deferred its assessments of New South Wales and Victoria's progress with implementing water reform until 2004 and these assessments were released in mid-2004. The NCC did not recommend any payment penalties for the two states in relation to their 2003-04 competition payments.

For the period 2004-05, the Australian Government accepted the NCC's penalty recommendations unchanged, so imposing penalties totalling \$140.3 million, of which \$26.3 million would be a permanent deduction, for jurisdictions' lack of progress in meeting their NCP obligations. However, the States and Territories did receive reimbursements of 2003-04 suspended amounts totalling \$85.1 million of a possible \$126.9 million, with opportunities for reimbursement of 2004-05 suspended amounts of \$114.1 million subject to further assessment by the NCC. In total, \$724.4 million in competition payments was paid to the States and Territories in 2004-05.

For the period 2005-06, the Australian Government accepted the majority of the NCC's recommendations. However, the Government did not apply any deduction to the Northern Territory in relation to liquor licensing in view of the fact that the Northern Territory was working to address the significant social and health issues associated with excessive alcohol consumption. Penalties totalling \$40.7 million were imposed, all of which were permanent deductions, for jurisdictions lack of progress in meeting their NCP obligations. Reimbursements of 2004-05 suspensions, totalling \$74.5 million, were also agreed.

The outcomes of the National Water Commission's (NWC) assessment of the progress of jurisdictions other than Western Australia in implementing NCP-related water reforms, and the Government's decisions in relation to payment penalties, was announced on 20 April 2006. There were delays in the assessment of Western Australia's progress in implementing water reforms as, at the time of the assessment, Western Australia had not signed on to the National Water Initiative (NWI). Therefore, Western Australia's 2005-06 competition payments remain subject to a final decision in relation to the NWC's assessment.

Overall, the NWC found that States and Territories have made considerable efforts to implement water reforms. The Government accepted all of the NWC's recommendations of a total of \$26.2 million in suspensions for 2005-06, as well as the retention of half (\$13 million) of the total amount suspended from New South Wales' 2004-05 competition payments). However, the NWC found that some key water reform commitments were not met by some states and recommended that the Australian Government impose a suspension of five per cent of 2005-06 competition payments on New South Wales, Victoria and South Australia which totalled \$26.2 million.

Following this assessment, final competition payments to States and Territories for 2005-06 total approximately \$820.4 million.

Since NCP payments were first made in 1997-98, the States and Territories have received approximately \$4.9 billion in competition payments.

Further information relating to payments, including announcements of the Australian Government's decisions on NCC assessments, is available on the Treasurer's website ([www.treasurer.gov.au](http://www.treasurer.gov.au)).

**Table 6.1: Payments and penalties for 2005-06 (subject to adjustment for changes in CPI and population estimates) and reimbursements for 2004-05**

	NSW	VIC	QLD	WA	SA	TAS	ACT	NT
2004-05								
Reimbursements	\$52.0m	-	\$30.1m	\$15.4m	\$3.0m	-	-	-
<b>2005-06</b>								
Maximum Available Payments	\$266.2m	\$197.6m	\$156.5m	\$79.3m	\$60.5m	\$19.0m	\$12.8m	\$8.0m
Permanent Deductions	-	-	(\$7.8m)	(\$23.8m)	(\$9.1m)	-	-	-
Specific Suspensions	(\$26.3m)	(\$9.9m)	-	-	(\$3.0m)	-	-	-
Actual Payments	<b>\$291.9m</b>	<b>\$187.7m</b>	<b>\$178.8m</b>	<b>\$70.9m</b>	<b>\$51.3m</b>	<b>\$19.0m</b>	<b>\$12.8m</b>	<b>\$8.0m</b>

## Appendix A

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### Commonwealth Legislation Review Schedule (as at 10 February 2006)

**Table A1: Commonwealth Legislation Review Schedule (Priority)**

<b>Name of legislation</b>	<b>Responsible department</b>
<i>Aboriginal Land Rights (Northern Territory) Act 1976</i>	Immigration and Citizenship
<i>Agricultural and Veterinary Chemicals Code Act 1994; Agricultural and Veterinary Chemicals (Administration) Act 1992</i>	Agriculture, Fisheries and Forestry
<i>Australian Postal Corporation Act 1989</i>	Communications, Information Technology and the Arts
<i>Broadcasting Services Act 1992; Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992; Radio Licence Fees Act 1964; Television Licence Fee Act 1964</i>	Communications, Information Technology and the Arts
<i>Customs Act 1901 (part XVB); Customs Tariff (Anti-dumping) Act 1975</i>	Attorney-General's
<i>Export Control Act 1982 (food)</i>	Attorney-General's
<i>Health Insurance Act 1973 (part IIA)(pathology collection centre licensing)</i>	Health and Ageing
<i>Interactive Gambling Act 2001</i>	Communications, Information Technology and the Arts
<i>Navigation Act 1912</i>	Transport and Regional Services
<i>Quarantine Act 1908 (plant and animal)</i>	Attorney-General's
<i>Radiocommunications Act 1992 and related legislation</i>	Communications, Information Technology and the Arts
Regulations under the Export Control Act relating to wood	Agriculture, Fisheries and Forestry
<i>Shipping Registration Act 1981</i>	Transport and Regional Services
<i>Therapeutic Goods Act 1989 (drugs and poisons)</i>	Health and Ageing
<i>Wheat Marketing Act 1989</i>	Agriculture, Fisheries and Forestry



## Appendix B

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### Terms of Reference for review of approved collection centre arrangements

1. Examine the regulatory framework of the ACC arrangements to determine whether it is consistent with the objectives of the NCP, with particular attention to:
  - The objectives expressed at the time of introduction of revised arrangements in 2001;
  - Stakeholder views on the current relevance of those objectives;
  - The success or otherwise of the current arrangements in achieving the stated objectives;
  - Any unintended consequences of the current arrangements; and
  - Any differential effects of the current arrangements on particular classes of providers of pathology services (for example, private sector, public sector, corporate providers, not-for-profit providers, 'niche' providers).
2. Assess the costs and the benefits of the current arrangements and, in particular, provide an assessment of whether restrictions on competition are warranted in terms of any public benefits that they might produce.
3. To the extent that there are continuing public benefits from restrictions on competition, consider the case for achieving these benefits through alternative means including:
  - non-legislative approaches;
  - more pro-competitive approaches; and
  - approaches involving a lesser degree of regulation.

4. If it is determined that a regulatory framework is required for the ACC arrangements, identify the objectives of an optimal regulatory framework.
5. A range of options that address any competition issues and problems raised by stakeholders during the review are to be developed for consideration by the Government.
  - The costs and benefits of each of the options including the maintenance of the current arrangements are to be analysed.
  - The effect on stakeholders of any proposed changes in the regulatory framework is to be identified.
  - A detailed conclusion of the review including a recommended option is to be provided in the final report.
  - A process for implementing any changes to the regulatory framework and an outline of mechanisms or measures for assessing the ACC arrangements in the future is to be developed.

## Appendix C

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### Terms of Reference for Review of Pathology Enforcement and Offence Provisions of the *Health Insurance Act 1973*

1. Identify all enforcement and offence provisions in the Health Insurance Act relating to the initiating, performing and claiming pathology services.
2. Identify all extrinsic material and case law that relates to these enforcement and offence provisions in the Health Insurance Act.
3. Where relevant as defence against prosecution of an offence provision of the Health Insurance Act, in liaison with state medical boards and due consideration of relevant state legislation, identify standards of professional conduct generally accepted by medical practitioners.
4. Within the context of the current operating environment and, assuming ongoing continuity of a Pathology Quality Outlays Agreement, advise on functionality, suitability, benefits and, deficiencies or problems with each offence provision. In particular, address such matters as the enforcement of the pathology provisions of the Health Insurance Act including:
  - the practical limitations in identifying each offence;
  - the necessary elements of investigation—including, in the case of criminal offence briefing requirements of the Director Public Prosecutions (DPP), the number of referrals to the DPP, the Medicare Participation Review Committee or other body responsible for determining either criminal or civil sanction on finding an offence committed; and
  - the suitability of the available sanctions and appeals processes.
5. Identify the different options for compliance regimes for the Commonwealth to regulate the provision of pathology services. In particular, address:
  - the relative value of criminal sanctions and extent to which civil law penalties or administrative sanctions may be preferable or suffice;



- where criminal offences are the preferred deterrent, recommend whether such offences ought be established as 'strict liability' offence provisions; and
  - the implications of reversing the onus of proof.
6. In providing comment, give due consideration to impact of electronic connectivity and difficulties presented in an electronic environment in the absence of paper documents signed by hand, make recommendation on integrating evidentiary requirements within fully electronic registration and claim process.
  7. Evaluate each of the identified options by addressing such matters as:
    - the likely administrative obligations of each option; and
    - the impact that each option would have on the pathology industry.
  8. Recommend a preferred regulatory approach.