

# Consumer Affairs Victoria

## *Using licensing to protect consumers' interests*

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# “ Preface ”

Licensing is one method governments use to regulate traders when there is a high risk of consumer detriment. It is a powerful regulatory approach that can simultaneously track traders entering and leaving the industry, screen new entrants and monitor and enforce ongoing compliance with industry standards. Because it involves extensive regulation, the costs and benefits of licensing should be analysed thoroughly before it is introduced to avoid imposing excessive costs on traders.

Consumer Affairs Victoria’s administration of licensing schemes reflects an awareness of the potential costs and benefits of licensing. None of its schemes put absolute restrictions on the number of industry participants. They, therefore, reduce one of the greatest potential costs of licensing, restricting entry into the industry and reducing consumer choice. Consumer Affairs Victoria continually monitors and improves its licensing schemes to protect consumers more effectively and reduce the cost to traders.

This research paper is one in a series designed to stimulate debate on consumer policy issues. It extends the discussion in the preceding paper *Choosing between general and industry-specific regulation* to analyse in more detail one common form of industry-specific regulation, licensing schemes.

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# *“Using licensing to protect consumers’ interests”*

Protecting the interests of consumers is often a key objective of licensing regulation. This objective recognises that consumers in some industries may not have the knowledge and skills to make informed choices about which products or services they will buy. Government may need to help consumers overcome these problems. The questions facing government in this case include whether the benefits of government intervention would outweigh the costs and, if so, which policies should be adopted.

Licensing schemes are one option available to government. This paper looks at the strengths and weaknesses of using licensing to protect the interests of consumers, the alternatives to regulating through licensing, and the case for greater national consistency in licensing schemes. It also provides a brief background on licensing, its use in Australia, and processes for reviewing licensing schemes.

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# “What is licensing?”

# 1

Licensing schemes differ greatly across industries and across the states and territories, but they have the following broad components:

- *Notification*—the business is required to register with, and supply information to, a specified agency.
- *Prior approval*—the business must obtain the approval of a specified agency before it can commence operating in the area covered by the licence.
- *Standards*—the business is required to comply with licence conditions.
- *Enforcement*—it is unlawful to supply the products or services covered by the licence without holding a valid licence. A business that does not comply with the licence conditions could have additional conditions imposed on its licence, or have its licence revoked and lose its right to carry on that business. (BIE 1996, pp. 5–6)

It is often difficult to distinguish licensing from registration schemes. Some registration schemes involve minimal regulation—for example, Victoria’s system for registering business names. At its least restrictive, registration requires businesses or individuals wishing to provide specified products or services to notify the regulating agency. The regulating agency may require the business or individual to provide certain information, but it would not approve new entrants to the industry. It would be unlawful for an unregistered business to provide the products or services covered by registration.

Many registration schemes, however, are more onerous. They require the businesses or individuals to meet minimum standards and to become accredited before entering the industry. In these industries, registration has the same effects as licensing. This paper covers both licensing schemes and registration schemes that have characteristics similar to licensing.<sup>1</sup>

<sup>1</sup> The paper uses the term ‘licensing’ to cover both schemes.

# “Licensing in Victoria”

## 2

Common in Australia, licensing schemes usually cover industries where businesses supply a product or service that is potentially dangerous, or where suppliers have expertise, skills or knowledge that makes it difficult for most consumers to judge the quality of the product or service they are purchasing. Licensing is thus required in industries such as health care, legal services, finance and superannuation, and the building sector, as well as many smaller industries—for example, security providers (security guards and other patrol services, crowd controllers, employees of security companies, bodyguards and workers in the cash transit industry), driving instructors, motor vehicle dealers, real estate agents, travel agents, taxis, and pawnbrokers and second hand dealers.

Historically, individual state and territory governments developed most licensing schemes, because the Commonwealth could not legislate nationally to cover all businesses in many of the industries subject to licensing. Under Australia’s Constitution, Commonwealth powers do not extend to unincorporated businesses operating within a state. Yet the industries covered by state and territory licensing schemes are typically region based, unincorporated businesses—for example, doctors’ and dentists’ practices are usually small businesses that serve a particular town or area within a city. Industries covered by licensing schemes are unlikely to change sufficiently in the foreseeable future for Commonwealth legislation to be a viable alternative. These schemes will thus continue to be the responsibility of state and territory governments.

Many licensing schemes in Victoria have been recently reviewed as part of the national competition policy reform process. Appendix 1 summarises two case studies of licensing scheme reviews.

Not all of the licensing schemes with consumer protection objectives are managed within Victoria’s Consumer Affairs portfolio. The regulation of health professionals, lawyers and the building sector, for example, is designed to protect consumers, and licensing schemes in these three areas are the responsibility of agencies other than Consumer Affairs Victoria (although it has some role in complaints handling and dispute resolution for building services).

The following sections discuss consumer protection issues that arose in reviews of travel agents licensing, which is managed within the Consumer Affairs portfolio, and cadastral surveyors licensing, which is the responsibility of the Surveyors Board of Victoria (within the Sustainability and Environment portfolio). They also outline licensing schemes that are the responsibility of Consumer Affairs Victoria, under the Business Licensing Authority.

### 2.1 Consumer protection in licensing schemes

The Centre for International Economics’ review of travel agents (CIE 2000) illustrates the use of licensing schemes to achieve consumer protection objectives. Conducted on behalf of the Ministerial Council on Consumer Affairs, the review described the objectives of travel agent regulation as:

- *to protect consumers from financial loss arising from the failure of travel agents to account for monies deposited with them; and*
- *to ensure minimum standards of service by travel agents.* (CIE 2000, p. 112)

It recommended:

*... that the current positive licensing framework remains and that it be administered by the present state licensing authorities. Licensing functions should be limited to a fit and proper person test and a check that any compulsory insurance requirements are satisfied. (CIE 2000, p. 116)*

Along with this recommendation, the ministerial council also endorsed the recommendation to retain entry qualifications and have each jurisdiction review the qualifications to ensure uniformity (NCC 2003a, p. 5.37).

Governments have agreed to retain an amended licensing scheme because travel agents hold substantial amounts of money on behalf of their clients and, as with all businesses (particularly small businesses), there is a risk that some agencies could fail. The provision of compulsory insurance is a condition of the licence, to protect consumers against the considerable financial loss they could suffer if their travel agent failed. Without this insurance, licensing alone would not guarantee consumer protection from such financial losses. The review assessed that the risk to consumers from the failure of their travel agent is substantially higher and more damaging than for other businesses. The higher risk results from the following combination of factors:

- Consumers only occasionally use travel agents, so it is difficult for them to accumulate an up-to-date understanding of the industry or to assess the likelihood that their travel agent will fail.
- Travel agents hold large amounts of money on behalf of consumers, who do not have the information to assess whether this money is secure.
- Consumers are unlikely to be able to recover lost money without regulation.

The Victorian Government also decided to retain amended licensing for cadastral surveyors, following a review by Southbridge (1997). The review concluded that licensing protects the interests of consumers and the general public. Southbridge recommended that an amended licensing scheme continue, with high uniform standards on entry and accredited training, and the ability to deregister cadastral surveyors who do not meet industry standards. The review found, and the government agreed (DNRE 1999), that:

*The main purpose of the Surveyors Act 1978, as stated in the second reading speech, is to regulate cadastral surveying and to protect the public by ensuring confidence in the Torrens title system of land registration. (Southbridge 1997, p. 17)*

Confidence in the land titles system removes the need for consumers to check the validity of land titles information and the accuracy of previous surveys. Incorrect surveys are difficult to identify, because inaccuracies may not be noticed for many years. If a landowner has built on a property based on an inaccurate survey, significant financial costs can arise for both the landholder and the owners of surrounding properties. Confidence in the quality of land surveys avoids the need for surrounding landowners to commission their own survey to validate the results of a neighbour's survey. The review concluded that the benefits to consumers and the community justify continued licensing of cadastral surveyors.

## 2.2 Licensing within Consumer Affairs

Within the Consumer Affairs portfolio, the Business Licensing Authority is responsible for managing licensing arrangements for credit providers, estate agents, introduction agents, motor car traders, prostitution service providers, second hand dealers and pawnbrokers, and travel agents (as illustrated in box 1). Liquor licensing is the responsibility of the Director of Liquor Licensing. Consumer Affairs Victoria provides administration support to both the Business Licensing Authority and the Director of Liquor Licensing. As noted previously, it also has a role in complaints handling and dispute resolution in the building sector, but it is not responsible for the licensing arrangements in that sector.

In 2004–05, Consumer Affairs Victoria considered more than 1800 licence and registration applications. The Business Licensing Authority determined over 2000 applications, 2034 were approved, some with conditions, 25 were refused and 140 withdrawn (CAV 2006, p. 84). Consumer Affairs Victoria also processed 16 782 applications for new, temporary or renewed liquor licences (CAV 2006, p. 90).



## Box 1: Licensing schemes managed within the Consumer Affairs portfolio

### Estate agents

Anyone who buys, sells, leases or manages real estate or a business on behalf of a vendor, landlord, purchaser or tenant must hold an estate agent's licence or be employed by a licensed estate agent as an agent's representative. There are age, qualification and other restrictions on who can be licensed as an estate agent or employed as an agent's representative. Estate agents must report annually to the Business Licensing Authority and, in operating their business, must:

- *properly supervise any estate agency business for which they're responsible;*
- *take reasonable steps to ensure that any agents' representatives or other employees of the business comply with the provisions of the Estate Agents Act 1980 and any other laws relevant to the conduct of the business;*
- *be regularly and usually in charge at the principal office;*
- *give regular and substantial attendance at the principal office;*
- *control the estate agency business;*
- *establish procedures designed to ensure that the business is conducted in accordance with the law and good estate agency practice; and*
- *monitor the conduct of the business in a manner that will ensure, as far as practicable, that those procedures are complied with. (BLA 2005a)*

### Motor car traders

Any person who buys, sells or exchanges more than four motor cars over 12 months must be licensed as a motor car trader. Licensed traders are required to:

- contribute (through the licence fee) to the Motor Car Traders Guarantee Fund, which compensates customers who have suffered a loss as a result of a licensed motor car trader's failure to comply with certain provisions of the *Motor Car Trader's Act 1986* (Vic.)
- employ only people who meet certain conditions, such as not being disqualified from holding a licence or convicted of an offence involving fraud, dishonesty, drug trafficking or violence that attracts a sentence of at least three months imprisonment
- report annually to the Business Licensing Authority
- keep records on the vehicles they sell
- comply with other conditions, such as providing information to consumers on the previous owner, distance travelled, price, age and model of second hand vehicles. (BLA 2005b)

### Second hand dealers and pawnbrokers

Anyone who trades in second hand goods (a second hand dealer) or advances money on the security of pledged goods (a pawnbroker) must be licensed. While licences are ongoing, the licence holder must report annually to the Business Licensing Authority, and the licence is automatically cancelled if the licensee or an associate:

- has been convicted or found guilty within the previous five years of an offence involving fraud, dishonesty, violence or drug trafficking that attracts a sentence of at least three months imprisonment, or
- has their licence or registration cancelled or suspended, or is disqualified from any occupation or business under Australian law. (BLA 2005c)

Second hand dealers and pawnbrokers must also meet conditions on how they conduct their business, including identifying their customers, recording information on their transactions, informing customers of their rights in pawning goods, and reporting suspected stolen goods to the police.

# “Licensing is under scrutiny”

## 3

All governments in Australia are scrutinising licensing schemes. In recent years, the Commonwealth, state and territory governments have undertaken reforms that affect the policy approach to licensing and the management of agencies responsible for licensing schemes. The main reform processes include:

- the National Competition Policy—the systematic review of all legislation that contains restrictions on competition (NCC 2002)
- regulatory impact assessments—processes established by each government to review the costs and benefits of new and amended legislation (DTF 2005, pp. 4.1–4.27; NCC 2003a, pp. 3.1–13.19; PC 2003a, pp. 87–92)
- a focus on reducing business red tape and improving the efficiency of government agencies.<sup>2</sup>

The Victorian Government has emphasised its commitment to regulatory reform:

*The Victorian Government is committed to regulatory reform, the creation of a competitive business environment and the achievement of better social outcomes in the State.*

*An improved regulatory framework will reduce the time and costs of doing business in Victoria—and the prices faced by Victorian consumers—by ensuring that government regulation does not unduly impact on business productivity and growth. (DTF 2005, p. i)*

This includes a commitment to protecting the interests of consumers, which is reflected in the principles of good regulatory governance (DTF 2005, p. 1.7).

In addition, the calls for greater national consistency are increasing (VCEC 2005, p. 137).

These policy initiatives prompt questions about the use of licensing regulation. Those agencies considering using licensing schemes to protect consumer interests may thus need to change how they analyse, develop and present policy options. They should clearly articulate their policy objectives and take a broad approach to analysing the costs and benefits of the various policies that might achieve those objectives. It is not enough to consider consumer issues in isolation; agencies also need to consider the effects of policy on the way in which the industry operates, the price and service choices available to customers, the competition among service providers, and the costs to business and the government.

A key objective is to choose the policy approach that will best meet the regulatory objectives at the lowest cost. This involves examining a range of policy options in detail, analysing how well these options would achieve the regulatory objectives and choosing the option where the benefits outweigh the costs by the greatest amount. The *Victorian guide to regulation* (DTF 2005) provides guidelines on analysing the best approach to regulation and conducting a cost–benefit analysis of regulatory alternatives. The following sections of this paper discuss the circumstances in which licensing is good policy.

The Government’s new initiatives on reducing the regulatory burden on business, place obligations on all government agencies to reduce regulation’s paper work costs and offsetting the additional costs of new regulation by further reducing cost to business in related areas (Brumby 2006).

<sup>2</sup> Appendix 2 outlines these reform processes.

The institutional structure used to manage the selected regulation approach influences its effectiveness. The later sections of this paper thus discuss institutional issues that are particularly relevant to licensing, the arguments for industry-specific versus general regulators and for separating responsibility for parts of the regulatory processes, and the circumstances in which national consistency is important.

Overall, any policy proposal that advocates licensing to protect the interests of consumers should consider the following consumer issues:

- Would licensing deliver real benefits to consumers?  
If the regulation contains significant restrictions on competition that reduce consumers' choice of suppliers, products or services, or increase the prices they pay, then consumers may face more costs (through higher prices and less choice) than gains from the regulation.
- Can existing legislation such as the *Fair Trading Act 1999* (Vic.) deal with the potential consumer detriment? If not, is the potential detriment sufficiently large and difficult to reverse to justify the costs of a licensing scheme?
- Is the regulatory body sufficiently representative to balance the interests of all stakeholders, including consumers, and not favour any one interest group?

# “Reasons for regulation”

# 4

When markets operate efficiently, competition among sellers generally delivers the best outcomes for consumers. Competitive markets create an environment in which firms strive to provide the products and services that consumers want, at the lowest possible price. Over time, these markets reward those businesses that continue to provide good quality products and services and adapt to the changing needs of their customers.

But markets do not always operate efficiently; sometimes they fail. From an economic perspective, two market failures are often used to justify licensing schemes: externalities (spillovers) and information constraints. Other market failures such as public goods<sup>3</sup> and natural monopolies<sup>4</sup> can also justify government regulation or provision of services. These problems, however, are less likely to be addressed using the type of licensing schemes discussed in this paper.

Further, the *Victorian guide to regulation* (DTF 2005) specifies social objectives that can accommodate consumer protection, such as redistributing income, protecting vulnerable and disadvantaged people, ensuring health and safety, maintaining law and order, achieving cultural objectives and preserving and protecting environmental resources. And government can consider these objectives when assessing whether regulation is appropriate. While there is considerable overlap between consumer protection objectives and the problems that emerge from market failure, it is worthwhile considering both the economic and social policy issues to identify and account for all of the benefits of the regulation.

<sup>3</sup> A public good has two key features. First, one person using a public good will not affect the ability of others to use it. Second, it is not possible to exclude people from using the public good. These characteristics mean the service provider cannot charge users of the public good. Street signs and defence are examples. The government usually provides these services rather than licensing private providers.

<sup>4</sup> A natural monopoly occurs in industries where it is cheaper for one firm to supply the whole market than for two or more firms to compete. Rail networks, for example, are natural monopolies. Regulation of natural monopolies usually involves price oversight and the setting of service standards. Again, government does not usually address these issues by licensing private providers. One exception may be when the government uses a competitive tender to allocate the right to provide the monopoly service.

## 4.1 Externalities

*External costs and benefits, commonly referred to as externalities or spillovers ... occur when an activity imposes costs (which are not compensated) or generates benefits (which are not paid for) on parties not directly involved in the activity. Without regulation, the existence of externalities results in too much (where external costs or negative externalities occur) or too little (where external benefits or positive externalities arise) of an activity taking place from society's point of view. Pollution is the most common example of a negative externality, while immunisation against a contagious disease is an example of an activity that generates a positive externality. (DTF 2005, p.2.1)*

By definition, externalities do not affect the consumer purchasing the product or service; they can, however, affect consumers more broadly or the community. Licensing the use of dangerous chemicals (such as the aerial spraying of agricultural crops) is an example of licensing that can benefit the general community, because it can help reduce the risk of chemical spills and facilitate a quick response to any accidents. The advantages of licensing the control and use of agricultural and veterinary chemicals include:

- *encouraging a more competent agvet [agricultural and veterinary] contracting workforce;*
- *facilitating the policing of contractors; and*
- *facilitating trace back through record keeping.* (PricewaterhouseCoopers 1999, p. 84)

The problems created by externalities often overlap with health and safety objectives. The licensing of liquor and gambling outlets, for example, is often designed to protect the community from the harmful effects of alcohol abuse or problem gambling.

## 4.2 Information constraints

*Consumers may not have adequate access to the information they require to make decisions that are in their best interests. For example, consumers need access to information on the quality or content of products (including associated hazards). Sometimes, sellers may have access to better information than buyers (often referred to as 'information asymmetries'). Under such circumstances, governments may regulate to require information disclosure, to provide the information directly, or place restrictions on the supply of goods or services regarded as dangerous. (DTF 2005, p.2.2)*

Information constraints arise if:

- consumers do not have access to adequate information
- the cost of obtaining that information is prohibitive
- consumers do not have the skills to collect or interpret the information
- consumers do not use the available information when they choose which products or services to buy.

Businesses that try to deceive their customers, and problems such as addictions (tobacco, alcohol and gambling) also inhibit the ability of consumers to judge the quality of products and services, and of the businesses that supply them.

Such information constraints can be a problem for consumers generally or specific consumer groups. People with disabilities, young people or older people, for example, may have particular problems in obtaining and assessing adequate information. Without adequate information, or the skills to assess that information, consumers cannot objectively assess the quality of the products or services they are buying; the integrity of suppliers and their ability to supply the product or services expected by the consumer; and the possible effect of the products or services on the consumer's health or wellbeing.

A well designed licensing scheme may provide some assurance of minimum service quality. In New South Wales, the Department of Health perceived consumer protection as a primary issue in the regulation of dentists. Its review recommended:

*The Dentists Act be amended to include a provision stating that the object of the Act is to 'protect the health and safety of members of the public by providing mechanisms to ensure that dental care providers are fit to practice'. (NSW Health 2001, p. 11)*

As discussed later, problems arising from information constraints can be redressed in other ways too.

## 4.3 Social objectives

*Governments generally achieve redistributive goals through the taxation and social security systems. It is a widely held belief that every individual should have access to at least some minimum level of income... In addition... certain goods and services are fundamental or essential and should be provided free of charge to all (or, at least, at concessional rates to those most in need). This helps to explain why governments typically provide education and health services. Restrictions on the prices charged by firms to certain consumers under Community Service Obligations represent another form of redistribution.*

*Health and safety concerns are another common rationale for government intervention on social policy grounds. Sometimes, the government objective may be the minimisation of harm – for example, through the restriction of alcohol sales to minors, or through stringent controls over the use and sale of dangerous goods (such as handguns and harmful chemicals).*

*Regulations may also be imposed to assist in the policing of crimes or to reduce the risk of criminal activity. Thus, persons in occupations such as second-hand dealers and dealers in firearms may be required to keep detailed records of transactions to assist police in apprehending and prosecuting suspected criminals.*

*Other social policies include human rights, protecting the vulnerable and disadvantaged, and relieving geographic and social isolation (e.g. by ensuring adequate community facilities and the appropriate provision of infrastructure). (DTF 2005, p.2.2)*

Many public health and safety objectives and some law and order objectives overlap with externalities and information constraints. Crime prevention, for example, can be considered with the analysis of externalities. And concerns about the potential impact of products or services on consumers' health often arise because consumers do not have the information or skills to judge health risks for themselves. Other issues, however, are harder to pick up in the economic analysis—for example, one reason for licensing pharmacies is to facilitate the delivery of subsidised drugs through the Pharmaceutical Benefits Scheme, which is primarily an equity objective.

# “ Advantages and disadvantages of licensing ”

# 5

The purpose of regulation is to address risks that potentially cause harm or detriment to consumers, the general public or the environment, such as dangerous products or incompetent suppliers. Licensing is a detailed form of regulation that can simultaneously address several types of risk, such as externalities, information constraints and other risks to consumers. The balance of advantages and disadvantages for any particular licensing scheme will depend on the types of risk that need to be targeted and whether licensing is a cost-effective way of addressing those risks. Each of the following stages of a typical licensing scheme can target different risk types.

## 5.1 Notification

Notification is the first stage of a licensing scheme. It establishes a database of all individuals or businesses involved in the licensed activity, and can be used to accumulate basic information about the licensed operators. On its own, notification does not screen the quality or skills of the participants in the industry. It does, however, reduce consumer risks by:

- making it easier to identify activities that could cause problems—for example, improving the enforcement of regulation by facilitating the targeting of inspection and audit activities
- allowing the regulator to track dangerous substances and increasing the regulator’s ability to identify the source of problems
- reducing the risk that unscrupulous operators re-enter the industry by allowing regulators to trace businesses that enter and exit an industry.

Notification is useful for identifying and/or tracing who is in the industry. But these benefits are achievable only if the notification database is kept up to date. If, for example, the database does not also note or delete firms that have left the industry, it will soon become useless. Further, while notification can help identify firms operating in the industry, it does not guarantee the skills of those managing or working in those firms.

## 5.2 Prior approval

The second stage of a licensing scheme is prior approval, which requires individuals or businesses involved in the licensed activity to meet minimum standards before commencing work in that industry. Prior approval allows the regulator to test or inspect all operators, reducing the risk that poor quality or ill equipped operators will enter the industry. In the case of estate agents and building trades, for example, prior approval involves ensuring operators have met minimum training standards. Those involved in handling dangerous chemicals need to demonstrate that they have the equipment necessary to handle these chemicals safely.

Prior approval can be expensive. In some cases, too, it is difficult to set upfront standards that are relevant over time, do not stifle innovation and can be readily measured and assessed. Further, prior approval does not ensure a business conducts itself in a competent manner after being approved, and it cannot guarantee the circumstances of the business will not change over time. A check on the financial viability of a business, for example, cannot guarantee that the business will continue to be financially strong during the licence period.

## 5.3 Ongoing standards

The third stage of a licensing scheme involves ongoing standards that licensed operators must meet. Ongoing licence standards vary across industries and can be used to address many risks. Credit providers, for example, are required to disclose credit contract information to consumers and are prohibited from charging interest rates above a maximum level and from including some conditions in credit contracts. Motor car traders must contribute to a fund that is used to compensate consumers for losses they suffer if a trader has not complied with legal obligations.

Licensing standards need to be carefully defined to address particular market failures or social policy objectives. Poorly designed standards are often costly and ineffective, stifle innovation and compete. The financial costs of industry standards are discussed later in this section. Minimum standards, however, may reduce the cost of the regulated businesses by reducing the need for advertising, decreasing risk and thus insurance premiums, and/or making it easier to gain international acceptance of the quality of the Australian products.

In addition, licensing standards are only one of several ways of setting industry standards: codes of practice and regulation are possible alternatives. Some industries have a strong incentive to ensure standards are met, so self-regulation is likely to be effective and licensing standards would not be necessary.

## 5.4 Enforcement

The fourth stage of a licensing scheme is enforcement. Enforcement includes the processes and sanctions that ensure licensed operators comply with the requirements for notification and prior approval, and observe ongoing standards. Without effective enforcement, the objectives of the other stages of the licensing scheme would not be achieved. Regulation that is not enforced gives consumers a false sense of safety and can undermine community confidence in the industry and the regulatory system. The licensing

scheme can reduce the cost of enforcement, however, by making it easier to identify and monitor regulated businesses. Similarly, the potential for operators to lose, or have conditions placed on, their licence is a significant deterrent against traders seriously or persistently breaching industry standards.

The paper on *Choosing between general and industry-specific consumer regulation* discusses the enforcement of industry-specific regulation, and its comments generally apply to licensing regimes. Broadly, regulators can more easily detect and prove that a business has breached its obligations if the industry is subject to ongoing monitoring or testing, particularly requirements for traders to report annually to the regulator (as with many of the licensing schemes under the Consumer Affairs portfolio).

Objective rules, which are common in licensing schemes, also make it easier to gauge the extent of the breach and make prosecution less dependent on proving that the intention or the outcome of the breach would damage consumers. In addition, a regulator is more likely to be able to use its own testing to obtain evidence to prosecute an offender; it is less reliant on the participation of consumers.

The requirement for enforcement should feature in the choice of regulation. If enforcement is unnecessary or impractical, then the benefits of licensing are unlikely to outweigh the costs, and industry self-regulation may be more appropriate.

## 5.5 Limitations and costs of licensing

Licensing cannot address some risks. While licence conditions and prior approval processes can set standards for the training and characteristics of licence holders, and test licence holders against their past performance, licensing cannot guarantee against corrupt business practices, for example. Similarly, while licensing provides additional tools to prosecute unlicensed operators, it cannot guarantee that such operators will not enter the industry and exploit customers (box 2).



## Box 2: Rogue traders

Rogue traders are attracted to industries where they can obtain large financial gains quickly, where consumers have difficulty protecting themselves because it is difficult to judge the quality of the product or service, and where it is difficult to catch or prosecute rogues because the industry lends itself to employing strategies to avoid detection. Such industries may include some that are subject to licensing.

Licensing can reduce the impact and risk of rogue traders by limiting who enters the industry and increasing the tools available to prosecute licensed and unlicensed rogues. It establishes a database that records who enters and exits the industry, so it is easier to track unethical operators. Approximately 40 of Victoria's Acts with licensing and registration provisions have a 'fit and proper person' test. About 20 Acts also set conditions on the character of associates of the applicant.<sup>5</sup> Such tests allow the regulator to review an operator's past record when considering whether to grant them a licence. Also, by setting standards, licensing schemes make it more costly to set up business, and, therefore, discourage operators that do not have a long term commitment to the industry.

But licensing cannot stop all rogue operators, particularly unlicensed operators, from attempting to exploit consumers. The Australian Securities and Investments Commission website lists nearly 200 overseas businesses that do not have an Australian Financial Services Licence but have made unsolicited calls offering investment products to Australians. The commission estimated that Australians have lost at least \$400 million in telephone investment fraud (ASIC 2005a). Similarly, rogue traders in Victoria have exploited consumers in industries such as credit provision, building, motor car sales and real estate, which are all subject to licensing.

Finally, many licensing arrangements are state or territory based. Without national cooperation by regulatory and enforcement agencies, it can be difficult to track an unethical operator that moves between jurisdictions. Similarly, licensing arrangements are usually industry based, so it can be difficult to track an unethical operator that moves between industries.

Licensing also has costs. These include direct financial, administration and compliance costs for business, administration costs for government, and costs to consumers due to higher prices or less choice of suppliers or products and services. Industry and government bear the direct costs of managing and complying with licensing requirements. The allocation of these costs depends on the design of the licensing scheme and the government's policy on cost recovery. The Productivity Commission estimated, for example, that the total cost to general practitioners of complying with vocational registration was about \$228 million in 2001–02 (PC 2003b, p. xxi). These higher costs are often passed on to consumers.

Costs for consumers also arise when licensing constrains the number and types of business that produce the products and services covered by the licence. Licensing conditions on who can provide the products or services and how they conduct their business limit competition and the price and cost reductions that competition can stimulate. Similarly, prescriptive licence conditions can stifle innovation by affecting how businesses can conduct their activities. Regulation of the location of pharmacies, for example, can prevent a new pharmacy co-locating with a health clinic and offering a more convenient service to patients. These costs are magnified if the licence conditions are too onerous or if other methods of regulation could better achieve the objectives of the licence conditions.

Some licensing schemes directly restrict the number of businesses that can enter the industry. Under these schemes, new entrants must purchase an existing licence before they can start a business. The scarcity of these licences makes them valuable, and they can cost thousands of dollars. This substantially increases the cost of establishing the business, and this cost is passed on to consumers as higher prices. All state governments restrict the number of taxis, for example, by issuing only a limited number of licences. Victorian Government estimates indicate that Melbourne licences are valued at \$335 695 (DOI 2005). An earlier review in Victoria estimated that the average price of a taxi journey was around \$3 higher than it would be if the market were unrestricted (KPMG Consulting 1999, p. 86). If the objective of these schemes is to improve service quality, then restricting operator numbers in the industry will not necessarily achieve this goal. A better approach might be to impose higher standards on taxi and driver quality, which might indirectly decrease the number of taxis but would also directly achieve better quality services.

<sup>5</sup> Derived from a search of the Victorian legislation database.

Governments also control the number of operators as part of their regulation of the gambling industry. The Productivity Commission review of Australian gambling industries (PC 1999) identified the following aspects of gambling regulation that restrict the number of operators:

- *Lotteries have monopolies in nearly all jurisdictions.*
- *TABs also have monopolies, and they can accept phone bets from interstate, but not 'solicit' them.*
- *Casinos have acquired exclusive licences for lengthy periods within specified market boundaries. The extensiveness of licences in some states has gaming machines and internet provision.*
- *Several jurisdictions have allocated the rights to own, distribute and /or monitor gaming machines to a limited number of operators. (PC 1999, p. 35)*

Regulation of gambling is designed to protect consumers, minimise criminal or unethical activities and reduce problem gambling. The Productivity Commission made the following comments about the success of restricting operator numbers in achieving regulatory objectives:

*Revenue raising? Notwithstanding the states' imperatives, this is not in itself a sound rationale for restricting ownership. Governments have generally rescinded the practice of selling monopoly privileges to consumers through higher prices and restricted choice. Such effects also arise in the gambling industries. The likely overall outcomes are clouded, however, by regulatory controls on prices and availability, and the presence among consumers of problem gamblers.*

*Reduce social costs? In practice, ownership restrictions have not served to reduce the accessibility of gambling, other than for casino table games. And monopoly rights are unlikely to facilitate harm minimisation strategies for problem gamblers.*

*Facilitate probity checks? Economies are likely to be gained with fewer operators to monitor. But the costs of probity regulation should in any case be borne by venues and this would partly determine their appropriate size.*

*Some efficiency benefits? Scale is important to lotteries, but with the ability to pool across lotteries, does not necessitate exclusivity. There is a case for government intervention to address potential market failures for wagering on horse racing, but monopoly TABs do not appear necessary for this. (PC 1999, p. 35)*

The Productivity Commission argued that reducing access to gaming could reduce the social costs of gambling. In most cases, controls on ownership, such as on the ownership of poker machine distributors, do not reduce access and are unlikely to reduce problem gambling. The Productivity Commission noted that more proactive policies targeting problem gambling are likely to be more effective. Restricting the number of casinos may be one exception, where controlling the number of operators would reduce the number of venues.

None of the licensing schemes administered by Consumer Affairs Victoria have direct restrictions on the number of businesses that can enter an industry. Their effects on entry are, therefore, less extreme and the costs of businesses entering the industry are affected more by the licensing process and licence conditions.

# “ Alternatives to licensing ”

# 6

Many alternatives to licensing could help protect the interests of consumers. They include general consumer protection legislation, negative licensing, codes of practice, compulsory provision of information and accreditation. It is useful to outline some alternatives to help analyse whether a comprehensive licensing scheme is appropriate. The *Victorian guide to regulation* (DTF 2005, pp. 2.3–2.7) discusses different forms of regulation, many of which could provide an alternative to licensing schemes.

## 6.1 General consumer protection legislation

Victoria, like all states and territories, has general consumer protection legislation. The purpose of the Fair Trading Act is:

- (a) *to promote and encourage fair trading practices and a competitive and fair market;*
- (aa) *to protect consumers;*
- (b) *to regulate trade practices;*
- (ba) *to provide for statutory conditions and warranties in consumer contracts;*
- (bb) *to provide for unfair terms in consumer contracts to be void;*
- (c) *to provide for the safety of goods or services supplied in trade or commerce and for the information which must be provided with goods or services supplied in trade or commerce;*
- (d) *to regulate off-business-premises sales and lay-by sales;*
- (e) *to provide for codes of practice;*
- (f) *to provide for the powers and functions of the Director of Consumer Affairs Victoria including powers to conciliate disputes under this Act and powers to carry out investigations into alleged breaches of this Act;*
- (g) *to repeal the Consumer Affairs Act 1972, the Ministry of Consumer Affairs Act 1973, the Fair Trading Act 1985 and the Market Court Act 1978.*

## 6.2 Negative licensing

Many of the problems that licensing is designed to address fall under provisions in the Fair Trading Act—for example, the Act's requirements to provide a safe product and accurate information. One alternative to industry-specific licensing is thus to rely on general consumer protection legislation.

The Fair Trading Act specifies the rights of consumers and the appropriate behaviour of businesses and suppliers. It does not provide guidelines on how suppliers are required to meet these standards. Industry-specific regulation, on the other hand, tends to be more prescriptive in how businesses should conduct themselves. This prescriptiveness may be appropriate when the consequences of inappropriate behaviour are large and when placing some requirement on the way in which businesses operate can reduce the risk of such behaviour. As always, policy makers should assess whether the benefits of such restrictions outweigh the costs.

The Consumer Affairs Victoria research paper on *Choosing between general and industry-specific consumer regulation* discusses the strengths and weaknesses of these two approaches. It concludes, given that general regulation is already in place and will continue, that industry-specific regulation is most suited to addressing additional issues that are beyond the scope of general regulation. Proposals to exempt specific industries from the application of general regulation should be treated with caution: by attempting to duplicate existing regulatory requirements, they risk creating inconsistencies and gaps. The paper concludes that for industry-specific regulation to be appropriate, it is necessary to identify situations where:

- general regulation is not working
- general regulation cannot be improved to address the problem
- the problem is big enough to warrant further action
- specific regulation can effectively target the problem and the industry involved
- the problem and the industry are stable enough to make detailed action effective over time.

Under negative licensing, businesses do not need to demonstrate they meet preconditions before entering the industry. If, however, a business breaches industry standards, it can be barred from continuing to operate. Negative licensing is used for Finance Brokers in Victoria (BLA 2005d) and mobile hawkers in the Australian Capital Territory, consistent with the recommendations of a review of the *Hawkers Act 1936* (ACT) (The Allen Consulting Group 2000, pp. 26–27). In the Northern Territory, restrictions on the business structure and ownership of legal practices have been replaced by less restrictive regulation, which includes a negative licensing scheme. Under the Northern Territory scheme, the Supreme Court can:

*... disqualify incorporated legal practices from practising if the corporation has been found guilty of offences or if it has a history of employing persons who, whilst in such employment, are guilty of professional misconduct or unsatisfactory professional conduct or of employing persons who are suspended or disqualified.*

(Toyne 2003, p. 3)

Negative licensing is less costly than a traditional licensing scheme. It is also usually less restrictive because new entrants do not need to meet preconditions before establishing a business. Further, under negative licensing, the regulator may be able to take a more performance based approach to regulation. Because a business is assessed after it has commenced operation, the regulator can look at the results of the business's practices, not just its structure and the qualifications of the people involved.

For negative licensing to work effectively, the government needs to allocate resources to identifying and pursuing businesses that do not meet acceptable standards. Currently, the administration of many licence schemes is funded by cost recovery from the regulated industry. If industry based cost recovery is not practicable under negative licensing, government should find alternative methods of funding enforcement activities—perhaps increasing the budget funding of the enforcement agency, or combining negative licensing with a registration scheme to facilitate cost recovery.

## 6.3 Codes of practice

Codes of practice set out the rules under which businesses in the industry operate. They are often negotiated between the regulator and the industry, and can be voluntary or compulsory. The building industry, for example, has various codes of practice that set out mandatory obligations.

Sanctions can be attached to a code's conditions via reference to the code in Regulations and creating associated offences and penalties for breaching the code. Alternatively, Regulations can specify broad performance standards, and those businesses complying with the code can be deemed as complying with those standards.

A mandatory code of practice can have benefits similar to those of licence standards. It is an alternative to a comprehensive licensing scheme when the primary objective of regulation is to control the standard of products or services. It is less costly and less restrictive than licensing because it does not require all businesses to register or gain prior approval. The money saved by eliminating the prior approval process could be used to increase compliance through education and to investigate those businesses suspected of not complying with the code.

Codes of practice can be an important part of schemes involving co-regulation or self-regulation.

## 6.4 Co-regulation and self-regulation

Under co-regulation, the government regulator and an industry body share responsibility for administering the regulation:

*Co-regulation typically refers to the situation where an industry or professional body develops the regulatory arrangements (e.g. a code of practice, accreditation or rating schemes) in consultation with a government.*

*While the industry administers its own arrangements, the government provides legislative backing to enable the arrangements to be enforced. For example, the Victorian Code of Accepted Farming Practice for the Welfare of Poultry is underpinned by the Prevention of Cruelty to Animals Act 1986. Co-regulation is common in relation to professions such as lawyers and engineers.*

(DTF 2005, p. 2.5)

Co-regulation can encourage the industry and its professional associations to take more responsibility for the behaviour of businesses in the industry, and it can encourage compliance with Regulations. Industry input can make regulation more practical and cost-effective, but co-regulation increases the risk that industry will capture the regulatory process and that industry participants will have undue influence over setting and interpreting the industry standards. The industry body could, for example, use its powers to mould and interpret regulation to benefit existing businesses at the expense of new entrants to the industry.

Under self-regulation, the industry takes a lead role in developing codes of practice that specify the standards expected of those operating in the industry. Government may be involved in these negotiations, but the codes are not legally binding or enforced by a regulatory agency. Self-regulation can be highly flexible and allow businesses to achieve standards in a way that suits their business needs. For effective self-regulation, however, industry understanding and acceptance of the standards must be high, and participants must have a strong desire to uphold their industry's reputation. Without strong industry commitment, self-regulation is ineffectual.

## 6.5 Mandatory information disclosure

Businesses could be required to provide information to their customers or the general public. In the finance and superannuation sectors, for example, superannuation trustees must inform consumers about the Superannuation Complaints Tribunal (PC 2001). Similarly, before entering a credit contract, a credit provider must give the debtor a precontractual statement and an information statement. The first page of the precontractual statement must disclose:

- the amount of credit to be provided or, if the amount is not ascertainable, then the maximum amount of credit to be provided
- the annual percentage interest rate or rates
- details of any interest free period
- the total amount of interest if the contract is to be paid out within seven years
- the number, amount and frequency of repayments
- any credit fees and charges. (Creditcode 2005, pp. 2–3)

The rest of the precontractual statement must state to whom the credit is to be paid, any variations in the contract, the frequency of the account statement and details on default rates and other charges. The information statement must explain the debtor's rights and obligations under the Consumer Credit Code (Creditcode 2005, pp. 2–3).

When regulation's primary objective is to overcome a lack of consumer information on the product or service, or consumer rights and responsibilities, then mandatory information disclosure may be more appropriate than comprehensive licensing. It can encourage businesses to improve their standards, because consumers can more easily compare alternative suppliers. But if the information is too technical or complex, or consumers do not use that information when they make decisions, then information disclosure will be ineffective.

## 6.6 Accreditation schemes

Accreditation is usually managed by an industry body, and businesses can voluntarily seek to meet accreditation standards. Other firms may still operate in the industry, but consumers have clear information about which businesses have met the accreditation standards. Accountants, for example, can become members of the professional association for certified practising accountants if they meet certain standards. This membership entitles them to use the qualification CPA, which indicates to consumers that the accountant has met the industry's standards.

Accreditation provides for free market entry and is less restrictive than licensing. It may also provide more information than licensing would on the standards achieved by the accredited operator, because the training or experience needed to meet accreditation standards can be detailed and specific. Accreditation is particularly useful in industries where the primary purpose of regulation is to inform consumers so they can judge which businesses have the skills to provide a high quality product or service. It does not, however, prevent consumers from choosing a lower priced, non-accredited service provider. In industries that provide a range of services, only some of which require a high level of skills, accreditation can assist consumers to choose highly skilled providers when they need to, but also to opt for a lower price service when those skills are not needed.

Government sponsored certification is an alternative to industry accreditation. Certification can be voluntary, but is often mandatory, and a government body assesses businesses against the certification criteria. For mandatory schemes, government involvement reduces the risk of industry capture and ensures that certification standards are set to protect consumers' interests and not existing business interests. The arguments for government involvement are weaker, however, for voluntary schemes. When accreditation is voluntary the risk from industry capturing the scheme and reducing consumer choice by excluding new businesses is significantly less. Industry schemes have the added benefit of raising businesses' acceptance of and participation in accreditation.

## 6.7 When is licensing the preferred approach?

The case for a comprehensive licensing scheme is strongest when all components of the scheme (notification, prior approval, standards and enforcement) are necessary to achieve the regulatory objectives. The disadvantages of licensing usually outweigh the advantages unless the costs that the industry could inflict on consumers, or the broader community, are large and difficult to reverse. Similarly, it is difficult to justify the costs of the ongoing monitoring, associated with licensing, if most businesses are willing to comply with voluntarily standards.

Other policy options can be used to set industry standards, provide information and guidance to consumers, and ban incompetent or dishonest operators from the industry. Many of these options are less costly than a comprehensive licensing scheme, so should be considered as alternatives to licensing.

# “Licensing institutions”

# 7

The long term effectiveness of regulation will often depend on the institutions charged with managing its implementation. Two key issues relevant to licensing schemes are industry-specific versus general regulators and the separation of regulator functions.

## 7.1 Industry-specific versus general regulators

General regulators are responsible for a range of industries. They may administer regulation under a single Act that covers all their areas of responsibility or under several industry-specific Acts (such as several licensing schemes). Industry-specific regulators administer the regulation covering only one industry. A body charged with industry specific regulation usually has industry representatives.

Those in favour of industry-specific regulators argue that they have a more detailed, practical understanding of the industry and its market, and of the technical standards needed to protect consumers. They consider that this knowledge makes the regulation and its enforcement more effective and generates greater industry ownership and commitment to the regulatory process. But while industry involvement is critical to ensuring accountability, transparency, practical licence conditions and low compliance costs, the regulatory body's independence and ability to balance consumer and industry interests could be compromised if it is dominated by industry interests.

This problem is often referred to as regulatory capture—a risk that is well recognised. The Organisation for Economic Cooperation and Development noted that ‘regulators specialised in one single sector may develop a more narrow perspective and are more prone to regulatory capture than regulators overseeing multiple sectors, which are necessarily farther away’ (OECD 2003, p. 16).

There is less risk of regulatory capture with general regulators. Such bodies are the best way to develop expertise in regulatory principles, apply that expertise consistently across industries, and ensure a strong focus on the consumer objectives of regulation. Industry can still be involved, however, in the development and administration of licensing schemes. Consultations groups and reference groups, for example, are often used to gain industry feedback and input. Unless regulation requires extensive technical knowledge that is held only by those in the industry and cannot be obtained using expert advisors, benefits are likely from moving towards a general regulator.

## 7.2 Separation of regulatory functions

The regulatory process has several steps: approving and issuing licences; addressing appeals against licensing decisions; investigating compliance and complaints; and enforcing licence conditions. There is debate about the extent to which these regulatory steps should be separated into different organisations.

The chairperson of Victoria's Business Licensing Authority recognised this issue in a paper presented to the National Consumer Congress in March 2004:

*The Gunning Committee heard evidence of the weaknesses of a regulatory framework within which one body exercised a combination of licensing, supervisory/investigative and disciplinary functions. The evidence was that there were perceived conflicts of interest and possibly breaches of natural justice where decision makers effectively act as both ‘prosecutor and judge’.* (Smith & Ward 2004, p. 8)

In Victoria, the steps in the regulatory process are separated for those occupational groups regulated under Consumer Affairs Victoria:

- The Business Licensing Authority, an independent statutory authority, is responsible for licensing and registration.
- Consumer Affairs Victoria monitors and enforces the regulation.
- The Victorian Civil and Administrative Tribunal hears appeals against licensing decisions and disciplinary proceedings against licence holders.

This model could be seen to promote natural justice and avoid bias. It reduces conflicts of interest and the need to establish 'Chinese walls' between functions within an agency. It may be inappropriate, for example, for those involved in monitoring or enforcement action against a licence holder to later assess that same party's application for licence renewal: the subsequent renewal decision may be influenced by the position that the regulator took in the previous investigation. Separation should be managed carefully, however, to avoid duplication and complexity, so consumers and industry can easily identify the agency responsible for various steps of the process. Roles and responsibilities should be clearly defined and good communication and cooperation among agencies is essential if confusion, duplication and gaps are to be avoided.



There are obvious differences in the licensing arrangements operating in each state and territory. Many differences arose following genuine attempts by state and territory governments to meet the needs of consumers and the industry in their jurisdiction. Western Australia and South Australia, for example, require hairdressers to be registered or licensed. Tasmania and Queensland have repealed their licensing legislation for hairdressers, and New South Wales has repealed licensing but requires hairdressers to hold minimum qualifications (NCC 2004, p. 11.18). The states that still regulate hairdressing are separately reviewing their legislation. Western Australia intends to retain licensing and extend it to cover the whole of the state, and South Australia reduced the scope of work reserved to hairdressers, has minimum entry requirements and regulates through negative licensing (NCC 2005, pp. 14.28–14.29, 15.15). Several governments thus have different policies on, and approaches to, licensing hairdressers.

State and territory governments also conducted separate reviews of licensing for child care facilities, liquor sales outlets, electricians, driving instructors and conveyancers. Again, the outcomes of these reviews have been different in different jurisdictions (NCC 2003a). Despite this disjointed approach to reviews in some industries, governments have attempted a more coordinated approach in many other industries. Victoria recognises processes for national uniformity by exempting from its regulatory impact statement process any rules required under national uniform legislation schemes (if a national assessment of the legislation’s costs and benefits has been undertaken). Box 3 contains a few examples of national reviews.

### **Box 3: Examples of coordinated approaches to industry licensing**

#### **Legal profession**

In March 2002, the Standing Committee of Attorneys-General (SCAG) agreed on the need for uniform rules to govern the legal profession. It asked a working group to develop policy options for aspects of legal profession regulation, including practice reservation, professional indemnity insurance requirements and business structures. Ministers subsequently instructed the Parliamentary Counsel’s committee to draft model provisions for admission and legal practices, the reservation of legal work, costs and costs disclosure, and complaints and discipline.

Commonwealth, state and territory Attorneys-General agreed to endorse comprehensive model provisions as a basis for consistent laws to facilitate a national profession in August 2003. Further work is underway to refine the model provisions. A model Bill for national regulation was released in 2004. (NCC 2003a, pp. 4.4–4.5 and NCC 2005, p. 19.17)

### Box 3: Examples of coordinated approaches to industry licensing (cont.)

#### Travel agents

The Ministerial Council on Consumer Affairs commissioned the Centre for International Economics, overseen by a council working party, to review legislation regulating travel agents. It released the review report for public comment in August 2000.

The Western Australian Department of Consumer and Employment Protection, in liaison with the Council of Australian Governments (COAG) Committee on Regulatory Reform, coordinated the preparation of the review response to the working party. The working party, which reported to ministers in August 2003, supported all of the review's recommendations except the two key recommendations:

- The working party did not accept the recommendation that the competitive insurance model be introduced, because it had concerns about continuity of private supply, premium levels, price volatility and the risk minimisation strategies of private insurers. It preferred the review's option of retaining the Travel Compensation Fund but reviewing contribution arrangements to establish a risk based premium structure and make prudential and reporting arrangements more equitable.
- The working party did not support the recommended removal of entry qualifications. Instead, it recommended that qualification requirements in each participating jurisdiction be reviewed and amended to ensure uniformity. It argued that this uniformity would overcome the problems identified by the review report.

The Ministerial Council on Consumer Affairs endorsed the working party's recommendations in November 2002, and the Standing Committee of Officials of Consumer Affairs will oversee implementation of the reforms (NCC 2003a, p. 5.37).

#### Agricultural and veterinary chemicals

In 1999, on behalf of all governments, Victoria coordinated a review of the national registration scheme for agvet [agricultural and veterinary] chemicals. In January 2000, agriculture and resource management ministers agreed to an intergovernmental response to the review. The response accepted all recommendations except:

- removing the provision to license agricultural chemical manufacturers. This provision was retained and manufacturers were exempted, pending further review by the Commonwealth Government.
- removing the 'appropriate' criterion from the efficacy review. This recommendation is considered to be inconsistent with minimising chemical use and the associated risks.

A taskforce examined review recommendations on the regulation of low risk chemicals, and the Commonwealth Government subsequently introduced the Agricultural and Veterinary Chemicals

Legislation Amendment Bill 2002, which Parliament passed in March 2003.

Working groups were established to progress the following issues:

- how to set fees and levies to ensure the Australian Pesticides and Veterinary Medicines Authority continues to operate on a cost-recovery basis. The Primary Industries Standing Committee endorsed the outcome of this investigation in late 2002. New application fees were implemented in 2005.
- how to monitor the quality of assessment services that the Australian Pesticides and Veterinary Medicines Authority purchases from alternative providers. The Primary Industries Standing Committee also endorsed the outcome of this investigation in late 2002 and the Australian Government endorsed a revised framework for the use of alternative suppliers of assessment services in 2003.
- whether licensing of agricultural chemical manufacturers is in the public interest. The final report of this working group was sent to the Primary Industries Standing Committee in June 2003. Governments have agreed to modify the scope of the licensing scheme and remove a gap in the legislation on the regulation of the quality on the active constituents of agvet chemical products. (NCC 2003a, pp. 1.110–1.112 and NCC 2005, pp. 19.3–19.4)

#### Architects

In November 1999, the Productivity Commission commenced a nine month review of the legislation regulating the architectural profession. This inquiry served as a national review of participating states and territories' (all states and territories except Victoria) legislation.

The Productivity Commission completed the review on 4 August 2000 and the Commonwealth Government released the final report on 16 November 2000. The recommended approach was to repeal state and territory architects Acts after an appropriate (two year) notification period, to allow the profession to develop a national, nonstatutory certification and course accreditation system that meets requirements of Australian and overseas clients.

A national working group comprising representatives of all states and territories was convened to recommend a consolidated response to the Productivity Commission's findings. The working group supported the commission's broad objectives, but rejected the review's recommended approach as not being in the public interest. It recommended, instead, adopting the alternative approach—namely, adjusting existing legislation to remove elements deemed to be anticompetitive and not in the public interest. Each government has committed to the reform agenda developed by the working group and all but South Australia have implemented the reforms (NCC 2003a, p. 14.6 and NCC 2005, p. 19.11).

## 8.1 The advantages and disadvantages of national consistency

There is some debate about what constitutes a national approach. The two main approaches to national consistency are national uniformity, which involves identical rules in each jurisdiction, and national compatibility, which involves similar schemes where any differences do not have a significant impact on businesses, consumers or the operation of the market.

All methods of achieving national uniformity involve state Parliaments giving up some of their autonomy to set and amend licensing legislation:

- The Commonwealth Government could pass national legislation, although this approach is not possible for many licensing schemes because the Commonwealth does not have constitutional power to regulate.
- The states could refer matters to the Commonwealth Government under s51(37) of the Constitution. This has occurred, for example, in state corporations law matters.
- The states could enact mirror legislation so each state Act is the same. Governments agreed in 1995, for example, to adopt mirror legislation to extend the coverage of part IV of the *Trade Practices Act 1974* (Cwlth).
- States could use a lead legislator approach, whereby one jurisdiction passes a comprehensive Act and then legislation in the other states refers to that Act. South Australia was the lead legislator for the national electricity market, and Queensland is the lead legislator in consumer credit.

Given the complexity of negotiating a nationally uniform approach to licensing schemes, and concerns about the effect on state sovereignty, national uniformity has been pursued only where the costs of a differentiated approach are large. More often, states and territories have strived to make their legislation compatible so any remaining differences are small and do not have a significant impact on the industry. This approach involves processes such as:

- negotiating a consistent approach through ministerial councils or intergovernmental committees
- each state and territory considering the types of licensing scheme already operating in other jurisdictions when developing its own arrangements.

Mutual recognition (explained in section 8.2) is another process designed to reduce the costs of different regulatory approaches and to encourage national consistency.

There are many advantages in consistent regulation:

- Consumer protection is easier because national consistency eliminates confusion among businesses and customers about the standard required in each jurisdiction.
- Minimising duplication reduces the costs of administering licensing schemes and conducting education programs.
- National consistency increases the potential for competition among operators in different states and territories, thus increasing the benefits that competition can bring to consumers through lower prices and more innovative services.
- Business costs are reduced when businesses that wish to move between jurisdictions, or operate in more than one jurisdiction, do not need to learn and comply with different standards.

National industry associations argue that national reviews have cost savings, because the review process is not duplicated in each jurisdiction, and industry bodies can focus on a single review rather than having to respond to multiple reviews. But the process of negotiating a national set of standards can still be costly and time consuming, and may delay reform. National uniformity constrains states and territories from designing schemes specific to their industry and drawing on a range of Australian approaches when refining their licensing schemes. It also limits governments' ability to compare regulatory performance across jurisdictions and reduces the pressure on governments to improve their regulatory arrangements to gain an advantage over other states.

Changing licensing schemes to achieve national consistency imposes adjustment costs on the licensing authorities and the regulated industry. The adjustment process can affect small businesses more heavily than large businesses. The latter may receive the greatest benefit from the opportunities to expand and to reduce the costs of operating across state borders. Small businesses may be less well equipped to manage change and may face high costs in adjusting to the new licensing scheme. Governments thus need to consider how to manage reform implementation, while recognising the benefits to consumers and the economy of developing more efficient national markets.

## 8.2 Mutual recognition

Mutual recognition is a major national initiative. Under mutual recognition:

*If goods meet the regulatory requirement of their home jurisdiction, they can be lawfully sold in all other participating jurisdictions. Similarly, if people meet the registration requirements for their home jurisdiction, they can be registered for the equivalent occupation in other participating jurisdictions. (PC 2003c, p. xv)*

Mutual recognition covers goods and over 200 registered occupations. An occupation is registered for the purposes of mutual recognition if it 'includes any form of approval by or under legislation for carrying on an occupation' (PC 2003c, p. 13). A person holding a licence to practise an occupation in one state or territory can thus have that licence recognised in another jurisdiction without being retested or having to demonstrate that they comply with the licensing standards in the new jurisdiction. This arrangement increases the mobility of skilled workers. In October 2003, the Productivity Commission released a report on mutual recognition (box 4), concluding that it works well. The month allowed for registration boards to check applications covered by mutual recognition and the criteria for postponement appear to be appropriate, and the scheme has had some success in achieving greater consistency in regulatory regimes. The scheme could be improved, however, by raising the awareness of mutual recognition and increasing the focus consistent in standards (PC 2003c, pp. 55, 83).

### Box 4: Productivity Commission's evaluation of mutual recognition

In 2003, the Australian, state and territory governments and the New Zealand Government requested that the Productivity Commission evaluate Australia's Mutual Recognition Agreement and the Trans-Tasman Mutual Recognition Agreement. The commission concluded that the Mutual Recognition Agreement has increased the integration of the Australian economy and promoted competitiveness. It also concluded that many of the permanent exemptions and exclusions should remain, because mutual recognition would otherwise erode justified regulatory differences. Some modifications to coverage, scope, administrative practices and review mechanisms, however, are warranted.

The Productivity Commission argued that there are benefits in:

- clarifying or correcting some permanent exemptions to increase policy consistency and effectiveness
- limiting the exception for the registration of sellers to apply only to regulatory differences based on health, safety and environmental grounds
- removing occupational qualification requirements from business licences that are inconsistent with mutual recognition objectives
- facilitating the use of the exempting and referral processes available under the mutual recognition agreements to introduce or change standards
- making it easier to appeal decisions and review provisions of the agreements
- integrating product safety bans with temporary exemption mechanisms
- increasing the attention given to mutual recognition obligations by policy makers developing new or revised regulation.

The commission suggested governments consider establishing a review group of officials to assess the options for expanding mutual recognition to cover regulation of the use of goods. It also concluded that the scheme's effectiveness could be increased through an awareness program for regulators, policy advisers and relevant industries and professions (PC 2003c, p. xiv).

Mutual recognition does not cover:

- the manner of sale of goods
- the transport, storage and handling, and inspection of goods
- the manner of carrying on an occupation
- regulation of the use of goods
- business licensing
- non-traditional forms of occupational regulation, such as negative licensing. (PC 2003c, p. 227)

For some licensing schemes, therefore, mutual recognition cannot provide for national consistency, and governments should consider greater harmonisation. The Productivity Commission report provided some insights into priorities for achieving a national approach in licensing. First, ensuring mutual recognition is working effectively would help to reduce the impact of any inconsistencies in those areas covered by mutual recognition. Second, mutual recognition does not mean that the scope for greater harmonisation should be ignored. The commission identified benefits from reform even in areas covered by mutual recognition. It also identified that the implementation of agreed national standards needs following up. Finally, many licensing arrangements are outside the scope of mutual recognition—for example, business licensing or licensing that controls the use of goods. There is also legal ambiguity about the extent to which mutual recognition covers co-regulation schemes. Processes other than mutual recognition are needed to achieve national consistency in these areas.

## 8.3 When is national uniformity important?

In many industries, the costs of achieving national consistency would be low compared with the benefits. National reviews avoid the costs of conducting similar reviews in several jurisdictions, and the time taken to develop a national approach is likely to be offset by the benefits to businesses and consumers who no longer need to deal with multiple licensing schemes. The adjustment costs for business, particularly small business would need to be managed, but these costs are temporary whereas the benefits of national consistency are ongoing. In industries where businesses operate in more than one state or territory, or where businesses or their customers move between jurisdictions, a more national approach to licensing is likely to have substantial benefits.

In prioritising licensing, governments should look for industries where service providers or their customers move between states and territories or operate in more than one state or territory. Prioritising licensing schemes that are not covered by mutual recognition might have added benefits. Still, governments should not ignore areas covered by mutual recognition, because greater national consistency would simplify the mutual recognition processes.

Finally, for some schemes, advantages might be found in identifying those aspects of licensing that are most costly for interstate business activities. The national processes could focus on the parts of regulation where the gains from national consistency are greatest, and allow more flexibility in other parts of the scheme—for example, the greatest benefits in some industries might be in achieving nationally consistent licensing standards while allowing greater flexibility in, say, the enforcement arrangements.

# “Appendix 1: Case studies of licensing reviews”

## A1.1 Licensing of pesticide users and registration of pest control operators

The Victorian Government reviewed the *Health Act 1958* (Vic.) and accompanying Regulations in 2000. This regulation covers activities that affect community health, including the registration of pest control operators and licensing of pesticide users. Licensing and registration apply to only businesses whose primary purpose is pest control and the people working in those businesses. Farmers, local councils, plant nurseries, golf courses and schools, for example, are not covered.

A register is kept of all pest control businesses. The business technical manager must be a licensed pest management technician, whose licence is endorsed to undertake the type of pest control activity in which the business is involved. That person must demonstrate adequate knowledge and skills to operate the business's equipment. Compliance is checked before registration and following any subsequent complaints. Operators not complying with the Act can be deregistered.

Individual pest management technicians employed by a pest control business must be licensed. (Unlicensed employees cannot use pesticides.) There are three licence levels: technical manager, technician and trainee. The licence criteria include:

- completing a recognised pest control course
- passing an examination conducted by the Department of Human Services
- being at least 18 years old
- demonstrating the necessary practical skills.

Licence holders apply to have their licence endorsed for specific types of pest control.

### Reasons for regulation

The industry is regulated to ensure people applying pesticides in pest management businesses have the skills and experience to use these chemicals safely. It protects pest management technicians, consumers, members of the public and the environment. Market failures in this industry include information failure, whereby consumers do not know all of the risks associated with the use of pesticides. The effects of these chemicals on workers, the environment and the community can take months and sometimes years, to become evident. There are also externality problems. The effects of an inappropriate use of pesticides can affect others, not just the business applying the chemicals and the customer that engaged it.

The business registration scheme seeks to ensure businesses:

- employ people with the necessary ability, experience and qualifications
- have an appropriate ratio of trainees to qualified staff
- have adequate equipment and storage facilities.

The database on pest control businesses assists the regulator to conduct information campaigns and safety inspections.

All jurisdictions recognise the national standard for licensing pest control technicians and the national competency standards.

## Cost–benefit analysis

The review recognised that licensing restricts the entry of technicians and businesses into the pest control industry, which can reduce competition and increase the price that consumers pay for pest control services. Prices are also likely to be higher because the regulation’s compliance costs increase business costs. Compliance costs—including licence and registration fees, which cover the costs of enforcement by the Department of Human Services—were estimated to be 1.1 per cent of industry turnover.

The review concluded that there are no benefits from the business registration scheme because there was no evidence to link business registration to improvements in employee and public health. Occupational licensing, on the other hand, establishes:

- minimum standards for people who work in pest management businesses
- a database of people working in the industry, the types of pest they deal with and the pesticides being applied. This information can be used for audits and information campaigns.

The review noted that chemicals are dangerous and that the licensing of technicians:

- improves the industry’s public perception and increases the demand for pest control services
- creates a level playing field for those operators willing to incur the costs to operate safely
- improves the workforce’s skills and increases productivity and customer satisfaction
- reduces accident rates and associated costs, including the government’s investigation costs
- informs consumers and reduces the risk that they engage an unsuitable operator.

## Conclusion

The review concluded that removing restrictions on occupational licensing would remove some costs and potentially decrease prices but would also significantly increase health risks to employees and the general public. There may be some initial advantages for manufacturers if removing licensing reduced the price of pest control services and increased demand. Over time, however, this benefit would be eroded as consumer confidence in the industry declined. Further, while removing the restrictions would reduce the costs of regulation, it would increase the costs of investigating accidents and consumer complaints.

In contrast, removing business registration would reduce business costs and would not affect safety in the workplace or the community. There would be some downward pressure on price, an increase in the number of businesses and no reduction in quality. The review argued that existing regulation (such as that for occupational health and safety) could deal with all other regulatory standards.

## Recommendation

The review investigated alternative approaches to regulation and concluded that none would adequately protect the safety of technicians, consumers, the general public and the environment. It recommended more streamlined arrangements, removing business registration and retaining occupational licensing, along with other amendments to streamline the relationship between the Health Act and the *Agricultural and Veterinary Chemicals (Control of use) Act 1992* (Vic.).

## A1.2 Licensing of cadastral surveyors

In 1997, the Victorian Department of Natural Resources and Environment commissioned Southbridge to review the *Surveyors Act 1978* (Vic.), which regulates cadastral surveyors.<sup>6</sup> The review identified, and made recommendations on, 10 restrictions on competition.

The purpose of the Surveyors Act is to ensure confidence in the Torrens system of land registration. The review noted that:

*When assessing the scope for deregulation of surveying, the surveying market has three important characteristics which must be taken into account:*

- *asymmetric information (buyers have no way of assessing the quality of the work performed by surveyors);*
- *imperfect information flow (clients do not know the reputation of individual surveyors and cannot readily assess the quality of work done); and*
- *a high degree of externalities (third parties can be affected by a market transaction that is beyond their control).* (Southbridge 1997)

<sup>6</sup> Cadastral surveying is concerned with laws on the ownership of land, the definition on the ground of title boundaries and the recording of such information on titles and maps.

### **Restriction 1: There are legislative entry barriers to the surveying market**

The legislation restricts who can be licensed as a cadastral surveyor and the conditions under which a licence can be revoked. Licensees are required to have specific qualifications and training, sit exams and be a 'fit and proper' person. The review assessed the costs and benefits of these restrictions and concluded that market failures mean the benefits outweigh the costs.

The review concluded that setting licensing standards for surveyors avoids boundary disputes and ownership uncertainty, and substantially reduces property disputes and legal costs. The Victorian Government agreed that standards protect the credibility of the Torrens title system, but decided to replace licensing with more relaxed regulation:

*Under the proposed new arrangements, persons wishing to lodge survey plans with the Land Registry will no longer be required to be licensed, but will be required to satisfy minimum (qualification/training) standards and probity criteria to practice. These standards will be determined by government and set in subordinate legislation, and will distinguish through certification between requirements for performing more specialised areas of the profession such as cadastral surveying and requirements for undertaking less sophisticated tasks. To guarantee the accuracy of competency of plans lodged, Land Registry's quality assurance function will include random audits of plans, along with 'user pays' audits upon detection of incorrect plans. This significant easing of restriction on entry to the industry will foster the development of a more diversified market for surveying services. (DNRE 1999, pp. 11–12)*

The government decided to replace the Surveyors Board with a non-statutory Land Surveying Ministerial Advisory Council, to which the minister would appoint members from industry, the community and government. Professional associations would be encouraged to establish one or more accreditation schemes, a code of ethics, a code of practice and a consumer complaints mechanism. Accreditation or membership of an association would not be a prerequisite for admission to cadastral practice.

### **Restriction 2: Entry to the surveying market is controlled by a single body, the Surveyors Board**

The Surveyors Board sets technical standards and can remove from practice surveyors who lodge inaccurate plans. The review concluded that the board should be retained and continue to set technical standards and remove from practice those surveyors who do not meet the standards. It argued that the cost of auditing or policing an alternative system would be prohibitive.

The government agreed in principle with the recommendation, but with significant changes to the composition and role of the regulatory body. It concluded that effective professional indemnity, an industry based code of conduct and effective consumer redress mechanisms would allow the integrity of the land titles system to be maintained in a freer market, without excessive cost. The government would set the entry requirements for surveying, and a new body would be responsible for industry development, continuous improvement and consumer protection.

### **Restriction 3: Potential surveyors need to undertake a training agreement with a supervising surveyor**

This restriction allows trainee surveyors to gain experience under the supervision of a registered surveyor. The review identified that insufficient trainees were being trained and a future surveyor shortage was likely. Further, trainees tied to one supervising surveyor may obtain a narrow range of experience and may not be exposed to the most up to date techniques.

The review considered that postgraduate practical training courses should be an alternative for trainees, and that the regulatory body should have the power to accredit such courses. The government agreed in principle with this recommendation and proposed that the new surveyors' advisory body examine alternatives. The *Surveying Act 2004* (Vic.) provides for annual registration subject to continued professional development (Delahunty 2004, p. 1044).

### **Restriction 4: Applicants face unclear character requirements**

The Act requires applicants to be of good character and a 'fit and proper' person. The review argued that this restriction is vague and should be replaced with more specific criteria. The government noted that it would be reviewing probity criteria in other professions and, if appropriate, would specify criteria based on current best practice.

### **Restriction 5: Surveyors may be removed from practice if they commit an indictable offence**

The review noted benefits in removing from the profession those individuals who might threaten the quality of services or endanger clients or third parties. It recommended that integrity criteria for removal be the same as criteria barring entry to the profession. The government decided that criteria for removal should be considered in conjunction with probity criteria for entry into the industry.



**Restriction 6: A firm or corporation must be controlled by surveyors to carry out cadastral surveying work**

The reason for this restriction was to ensure high quality advice to consumers. It also restricted the number of firms that could enter the industry and, in particular, restricted the development of full service firms that offer a range of services.

The review argued that the restriction did not increase the quality of survey work, reduce the risk of surveyors being pressured to conduct inaccurate surveys, or reduce audit costs. It concluded that there were no identifiable benefits from the restriction, or any identifiable costs from removing it. The review recommended removing the requirement for surveyors and related professions to form a majority of members/directors of a firm/corporation engaging in cadastral survey work. The government agreed with this recommendation.

**Recommendation 7: The Surveyors Act does not allow for automatic recognition across jurisdictions**

To practise in Victoria, interstate surveyors must apply to the Victorian Surveyors Board and pay a registration fee. The review noted significant differences in cadastral law across jurisdictions and that incorrect advice can cause considerable damage to clients.

A national market, however, would have significant benefits. If Victoria unilaterally deregulated, this would benefit Victorian consumers. But problems could arise if the regulatory authorities in other jurisdictions were slow to act on errors committed by their surveyors operating in Victoria, or if Victoria did not have access to an up-to-date database of surveyors allowed to practise in other jurisdictions. The review recommended, as a long term goal, removing all barriers to interstate surveying businesses and having the Surveyors Board continue to audit the first survey of an interstate surveyor to ensure the quality of the work. Given that removing all barriers to interstate surveyors would involve lengthy negotiations with other jurisdictions, the review recommended removing the registration fees for interstate surveyors, as a first step.

The government supported the recommendation in principle but noted that implementing costless registration across jurisdictions must await the adoption of nationally agreed arrangements to coordinate the licensing of land surveyors and cadastral law.

**Restriction 8: Reciprocal registration applies to only surveyors in Australia and New Zealand**

The legislation recognises only New Zealand as a reciprocating country and applies mutual recognition to surveyors who are New Zealand trained. In practice, the Surveyors Board has recognised many qualifications from Malaysia, Singapore and North America (where the use of the Torrens title system is similar), but it requires applicants to undertake some study in local cadastral law. The review recommended a thorough examination of all options for extending mutual recognition beyond current boundaries. The government accepted this recommendation and intended to pass responsibility for the review to the new advisory body.

**Restriction 9: The surveying industry is regulated by a board dominated by surveyors**

The Surveyors Board has six members, of whom all but one are required to be licensed surveyors. This composition is intended to ensure sufficient expertise to assess technical compliance and legislative issues. The review argued that the board was not representative of the industry's clients or other groups with an interest in the quality of cadastral surveying. It recommended that a greater proportion of members of the regulatory body should be non-surveyors. The government accepted this recommendation in principle and proposed that the new advisory body have broad composition and reflect a balance of interests. The *Surveying Act 2004* (Vic.) replaced the Surveyors Board of Victoria with a Surveyors Registration Board, which has expanded membership to incorporate more non-surveyor interests. (Delahunty 2004, p. 1045)

**Restriction 10: The Surveyors Board has the power to set fees charged by surveyors**

The Surveyors Board has never used the power to set fees for surveying services. The review argued that the diversity of surveys would make it difficult to set enforceable prices. It recommended removing the power to set fees, because removing this restriction would involve no cost and would eliminate a potentially anticompetitive power. The government agreed with the recommendation.

# Appendix 2: Government review and reform processes

All governments are scrutinising licensing schemes. In recent years, the Australian, state and territory governments have undertaken reforms that affect the policy approach to licensing and the management of agencies responsible for licensing schemes. This appendix outlines the main reform frameworks.

## A2.1 National Competition Policy

In 1995, the Australian, state and territory governments signed agreements that established the National Competition Policy reform agenda. The National Competition Policy is a comprehensive reform package that focuses on improving the quality of regulation and the performance of government businesses at all levels of government, including local government. It includes specific reforms in the water, electricity, gas and road transport industries.

A key element of the National Competition Policy reforms is the review and, where appropriate, reform of legislation that restricts competition. Governments prepared timetables that identified around 1800 pieces of legislation Australia-wide for review. Included was legislation that establishes licensing schemes, because licensing restricts competition by controlling who can enter an industry.

Given the number of industries covered by licensing schemes, hundreds of licensing Acts have been reviewed. Clause 5 of the Competition Principles Agreement sets out the guiding principle for such reviews:

*The guiding principle is that legislation (including Acts, enactments, Ordinances or Regulations) should not restrict competition unless it can be demonstrated that:*

- (a) the benefits of the restriction to the community as a whole outweigh the costs; and*
- (b) the objective of the legislation can only be achieved by restricting competition. (clause 5(1) cited in NCC 1998, clause 5(1), p. 19)*

The agreement includes an ongoing obligation that any retained restrictions on competition are again reviewed against the guiding principle at least every 10 years:

*The aim is to ensure that regulation remains relevant in the face of changes in circumstances and/or in government and community priorities. (clause 5(6) cited in NCC 2003b, p. 4.2)*

In assessing whether the benefits to the community outweigh the costs of legislation that restricts competition, governments account for the public interest. The Competition Principles Agreement sets out examples of factors that government can consider in assessing the public interest:

*... the following matters shall, where relevant, be taken into account:*

- (d) government legislation and policies relating to ecologically sustainable development;*
- (e) social welfare and equity considerations, including community service obligations;*
- (f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;*
- (g) economic and regional development, including employment and investment growth;*
- (h) the interests of consumers generally or of a class of consumers;*
- (i) the competitiveness of Australian businesses; and*
- (j) the efficient allocation of resources. (clause 1(3) cited in NCC 1998, pp. 14–15)*

This list indicates that consumer objectives—such as the protection of consumers generally or any class of consumers, access and equity policies, and social welfare and equity considerations—can warrant restrictions on competition. Any review of a licensing scheme should thus consider these consumer objectives when assessing whether the benefits of licensing exceed the costs, and whether there are less restrictive alternatives to licensing that would protect the interests of consumers.

Governments have already reviewed much of the legislation listed on their timetables. In October 20 85 per cent of the review and reform program had been completed, consistent with the obligations under the National Competition Policy (NCC 2005, p.xi).

Currently, the Council of Australian Governments is considering a new reform program. As part of that program, governments have recommitted to the national competition policy principles and agreed to complete any outstanding priority legislation reviews.

## A2.2 Regulatory impact statements

All governments have established arrangements to scrutinise the impact of new and amended legislation. The processes in each state and territory are different, but with similar objectives. Victoria recognises that:

*Given that legislation and regulation can potentially have significant impacts on the parties that it affects, as well as on society, the environment, and the economy as a whole, it is vital that legislative proposals are closely examined to ensure that they represent the best alternative available to government to meet the relevant policy objective. In Victoria, this is achieved through the adoption of stringent and formalised evaluation processes, which are based on an analytical cost-benefit framework that examines the economic, social and environmental impacts of the legislative proposals.*  
(DTF 2005, p. 1.4)

Victoria recently enhanced its process for analysing the costs and benefits of regulation. In 2004, in *Victoria: leading the way* (Government of Victoria 2004), the government announced an expanded process for assessing the impact of government intervention, by requiring the preparation of business impact assessments for proposals to introduce new or amended legislation. It also established the Victorian Competition and Efficiency Commission, which is responsible for assessing the adequacy of regulatory impact statements and business impact assessments.

The new Victorian process for assessing the costs and benefits of new and amended regulation covers:

- primary legislation (Acts), with a requirement to prepare business impact assessments
- subordinate legislation (Regulations), with a requirement to prepare a regulatory impact statement (box A2.1).

### Box A2.1: Victorian regulatory impact assessments

#### Regulatory impact statements

Regulatory impact statements must be prepared for any new or amended Regulation that imposes ‘an appreciable economic or social burden on a sector of the public’. The *Subordinate Legislation Act 1994* (Vic.) sets out the requirement to prepare a regulatory impact statement, and its contents and process.

The regulatory impact statement must be released for consultation, and the Victorian Competition and Efficiency Commission reviews a draft of the statement to assess ‘the analysis of the costs and benefits presented in the RIS [regulatory impact statement] as being adequate for consultation (i.e. the data appear appropriate and the assumptions explicit and reasonable), thereby representing the government’s best estimate at that time’ (DTF 2005, p. 4.24).

These statements must include:

- *a statement of the objectives of the proposed statutory rule;*
- *a statement explaining the effects of the proposed statutory rule;*
- *a statement of other practicable means of achieving these objectives;*
- *assessment of the costs and benefits of the proposed statutory rule, and of any other practicable means of achieving the same objectives;*
- *the reasons why the other means are not appropriate; and*
- *a draft copy of the proposed statutory rule.*  
(DTF 2005, p. 5.1)

### Box A2.1: Victorian regulatory impact assessments (cont.)

#### Business impact assessments

To maintain 'consistency between the scrutiny of primary and subordinate legislation, the same method used to prepare an RIS [regulatory impact statement] is also applicable to the writing of BIAs [business impact assessments]'. There are, however, few key differences. Business impact assessments are an administrative requirement, so the process is not established through legislation, but rather set out in the *Victorian guide to regulation* (DTF 2005):

- Business impact assessments must be prepared for legislation with the potential to have significant effects on business and competition.
- Their analysis must include the same elements as a regulatory impact assessment (listed above), but also an explicit assessment of the impact on small business.
- There is no formal requirement to subject business impact assessments to public consultation. But an assessment can be released only with the agreement of the Premier, the Treasurer and the responsible minister:

*Because primary legislation is fully debated in Parliament, the role of BIAs [business impact assessments] is targeted more towards informing the government in making policy decisions.*  
(DTF 2005, p. 4.2)

The business impact assessments and regulatory impact statements in Victoria do not cover all aspects of licensing arrangements—for example, industry standards imposed through licence conditions rather than regulation fall outside the current processes. In its report *Regulation and regional Victoria* (VCEC 2005), the Victorian Competition and Efficiency Commission noted that:

*Many types of regulation are not captured by any formal review process. While there are costs in exposing these regulations to formal review, not doing so could mean that such regulations become increasingly common.*  
(VCEC 2005, p. xli)

The commission's concerns are consistent with views noted by the Scrutiny of Acts and Regulations Committee in its 2002 review of the *Subordinate Legislation Act 1994* (Vic.) (SARC 2002). At that time, the government did not accept the committee's recommendation to extend the Act to apply to all instruments of a legislative character, including ministerial directions, orders in council, determinations and standards set by licensing authorities (SARC 2003, p. 1).

The Victorian Competition and Efficiency Commission recommended changes to consultation processes for regulatory impact statements:

*13.1 That a minimum of 60 days be provided for public consultation on regulatory impact statements (RISs), especially where (1) regulation is being introduced to a new area, (2) many different stakeholder groups are likely to be affected, (3) stakeholder groups are not adequately represented by existing peak bodies, (4) the proposals are likely to be controversial, or (5) there is uncertainty about the potential impacts. The RIS should state the time allowed for consultation, and explain why that period was adequate. In its annual report on regulation, the Victorian Competition and Efficiency Commission would report on the time periods allowed for consultation.* (VCEC 2005, p. xlix)

The Government supported this recommendation (Government of Victoria 2005, pp. 19-20).

## A2.3 Reducing red tape and improving government efficiency

Calls from the business sector to reduce the cost of regulation are increasing. A Business Council of Australia report claimed that Commonwealth and state regulation has grown at around 10 per cent a year, imposing significant costs on businesses and restricting their ability to respond to domestic and world markets (BCA 2005, p. vi). Overseas reforms are also putting greater pressure on Australian governments to reduce the costs of regulation. The United Kingdom and The Netherlands, for example, have adopted systematic strategies, with explicit quantitative targets, to reduce the administrative burden that regulation imposes on business (BRTF 2005; Ministry of Finance 2005).

For several years, Victoria has also had a focus on improving the efficiency of regulation. The Victorian 2003–04 budget statement identified ‘administrative efficiencies across departments to achieve ongoing savings of over \$140 million per year’ (Government of Victoria 2003, p. 61) as a key initiative in the government’s commitment to sound financial management. *Getting on with the job: Labor’s plan for growing small business* states the government’s intention to:

*Ease the burden of regulation on small business by requiring that any new regulation takes into account and minimises the variation in compliance costs between small and large businesses, and by continuing a program of industry sector review of regulation to accelerate the removal of regulation that are outdated or obsolete.* (Government of Victoria 2002, p. 1)

The focus on improving the efficiency of regulation and reducing compliance costs was reinforced in *A third wave of national reform* (Bracks 2005), a document that contained the Victorian Premier’s proposals for a new national reform initiative for the Council of Australian Governments. The Premier recognised that regulation can create compliance costs and reduce productivity, and may constrain labour force participation (Bracks 2005, p. 25). The reform proposals included initiatives to reduce the costs of regulation, including:

*Reduced administration costs to business (i.e., the costs of information obligations) of regulatory legislation, subordinate legislation and quasi-legislative instruments by at least 25 per cent, based on an agreed methodology.* (Bracks 2005, p. 26)

More recently the Government has committed to a Victorian program of reducing the administrative burden regulation imposes on business. The 2006 budget announced a program of target cost reductions comprising:

- Cut the existing administrative burden of regulation by 15 per cent over three years and a target reduction of 25 per cent over five years, commencing 1 July 2006.
- Ensure that any increase in administrative burden from new or amended regulation is offset by simplifications in the same or a related area, and
- Undertake a program of reviews to reduce compliance burdens.

The program was further detailed in a booklet released by the Treasurer in 2006, which noted that the Department of Treasury and Finance estimates that a 15 per cent reduction in regulation’s administration burden would result in ongoing savings to business of about \$495 million per year. (Brumby 2006, p. 5)

These initiatives will affect licensing schemes and the agencies that deliver them.

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November 2003
2. *What do we Mean by ‘Vulnerable’ and ‘Disadvantaged’  
Consumers?* March 2004
3. *Information Provision and Education Strategies*  
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4. *Social Marketing and Consumer Policy* March 2006
5. *Designing Quality Rating Schemes for Service Providers*  
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6. *Regulating the Cost of Credit* March 2006
7. *Consumer Advocacy in Victoria* March 2006
8. *Choosing between general and industry-specific  
regulation*, August 2006
9. *Using licensing to protect consumers’ interests*,  
August 2006



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