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APEC-OECD Integrated Checklist on Regulatory Reform: Self-assessment by the Commonwealth of Australia

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The *APEC-OECD Integrated Checklist on Regulatory Reform:* Self-assessment by the Commonwealth of Australia

APEC 2007

This is a self-assessment report, prepared by officials from the Australian Treasury, with contributions from various other Australian Government Department and Agencies. The views expressed in this report are not necessarily those of the Australian Government.

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INTRODUCTION

At the Asia-Pacific Economic Cooperation (APEC) Economics Committee I meeting in January 2007, the Commonwealth of Australia ('Australia') undertook to self-assess its regulatory reform environment, by applying the *APEC-OECD Integrated Checklist on Regulatory Reform* ('the Checklist').

The Checklist is a voluntary tool that economies can use to evaluate their respective regulatory reform efforts. While there is no single model of regulatory reform, the Checklist highlights key issues that should be considered during the development and implementation of regulatory policies, against the prevailing economic, social and political environments.

Applying the Checklist to Australia's regulatory reform settings provided the opportunity to undertake a robust and comprehensive review of Australia's initiatives in this area and consider where possible further improvements could be implemented in order to maximise the efficiency and effectiveness of Australia's regulation.

This exercise was particularly relevant and timely in the context of recent initiatives by the Australian Government to strengthen its regulation-making and review framework in order to guard against the introduction of unnecessary regulation and improve the quality of existing and new regulation.

The application of the Checklist revealed the broad range and depth of the Australian Government's regulatory reform agenda and the significant extent to which systems, processes and institutional arrangements ensure that regulation created and reviewed by the Australian Government appropriately addresses issues of regulatory quality, competition and market openness.

The Checklist also provided a valuable insight and reminder of the importance of ensuring that issues of regulatory quality, competition and market openness are fully integrated into policy development, advice and implementation.

The Checklist is comprised of four sections. The first is a horizontal questionnaire on regulatory reform across levels of government focusing on the degree of integration of regulatory, competition and market openness policies across levels of government, and on the accountability and transparency mechanisms needed to ensure their success.

The other three sections of the questionnaire focus on the individual policy areas, namely regulatory quality, competition and market openness.

PART A: HORIZONTAL CRITERIA CONCERNING REGULATORY REFORM

A1: Integrated policy for regulatory reform

To what extent is there an integrated policy for regulatory reform that sets out principles dealing with regulatory, competition and market openness policies?

The Australian Government is strongly committed to ongoing regulatory reform to ensure that unnecessary regulatory burdens on businesses, individuals and the economy are addressed at all levels of government, now and into the future.

The Australian Government has well-established principles, conventions and procedures by which its regulation making and review systems operate, designed to ensure that these processes operate in a coordinated and consistent manner, and include consideration of all relevant factors, including regulatory, competition and market openness policies.

- Specific detail on the Australian Government's approach to regulatory reform in relation to these issues is provided in response to questions in Parts B, C and D of this Checklist.

The Government's recently enhanced regulation-making and review framework is a tangible demonstration of the integrated approach that Australia takes to regulatory reform. This enhanced framework requires regulation-makers to give full consideration to issues of regulatory quality, competition and market openness in making and reviewing regulatory proposals and ensures that the:

- compliance and competition impacts of regulatory measures are considered by government at an early stage in their development; and that

- cumulative effects of regulations are monitored effectively over time.

These enhancements highlight the Australian Government's commitment to ensuring that all new (and amended) regulation is subject to rigorous analysis to ensure that no regulation is introduced unless the need for government action and the superiority of the preferred option has been transparently demonstrated.

Having such systems and processes in place ensures that appropriate regulatory impact analysis is undertaken and assists in removing unnecessary impediments to efficiency and innovation. It also imposes discipline to identify and minimise any unnecessary compliance costs associated with the administration and enforcement of new regulations, as well as any adverse side-effects.

A2: Support for regulatory reform

How strongly do political leaders and senior officials express support for regulatory reform to both the public and officials, including the explicit fostering of competition and open markets? How is this support translated in practice into reform and how have

businesspeople, consumers and other interested groups reacted to these actions and to the reforms in concrete terms?

The Australian Government recognises that regulatory reform plays an important role in raising economic growth, through increased levels of productivity and that the well-being of future generations of Australians can be improved by government-initiated reforms which raise the productivity levels of the national economy.

In that context, regulatory reform is promoted and supported at the highest level of the Australian Government, with both the Prime Minister and the Treasurer publicly recognising the importance of eliminating inefficient and ineffective regulation and committing to initiatives to reduce burdens on business, individuals and the economy.

The enhanced regulatory framework mentioned above (in response to question A1), is an important example of the Government's support for regulatory reform initiatives. The Government has rigorous and disciplined regulatory impact analysis systems and processes in order to ensure that the regulation created and reviewed by Government explicitly considers issues of regulatory quality, competition and market openness.

- The broad nature and scope of the enhanced regulatory framework is outlined in response to question B6 below.

One of the most successful regulatory reforms introduced was the National Competition Policy (NCP) in 1995. The NCP established for the first time, a consistent national economic regulatory framework directed at maintaining and promoting competition in all forms of business activity. Throughout the 1980s, micro-economic reform tended to focus on individual industries for example, deregulation in finance and domestic aviation. Competition policy also remained fragmented between Federal and State jurisdictions. Recognising the importance of nation-wide business sector competition as a spur to enhanced productivity and improved living standards, leaders of Federal, State and Territory Governments agreed in 1992 to the development of a NCP. A Committee of Inquiry, called the Hilmer Inquiry, was set up to undertake an independent Inquiry into NCP. Following extensive consultations and the assessment of numerous public submissions, the Inquiry presented its report to Heads of Governments in 1993. Subsequently, extensive inter-governmental consultation and Federal financial compensation negotiations undertaken through the Council of Australian Governments (COAG) resulted in the broad scope of the Hilmer proposals being endorsed.

In 2005, the NCP came to a close and the Productivity Commission, the Government's key advisory body on microeconomic policy, found that NCP and related reforms have added at least 2.5 per cent or $20 billion to Australia's annual GDP. Specifically, the NCP has contributed to a productivity surge that underpinned 16 years of continuous economic growth, and associated strong growth in household incomes; directly reduced the prices of goods and services, such as electricity; and stimulated business innovation, customer responsiveness and choice.

One of the main ways in which NCP and related reforms have boosted output is by reducing the costs and prices of many goods and services. NCP not only provided means to improve productivity and thereby lower costs, but by promoting competitive markets, it has created pressure for most of those cost savings to be passed on to consumers.

Though varying in size, the benefits of NCP and related reforms have been spread across the community, including rural and regional Australia. The Productivity Commission found that in the majority of the regional areas, regional output and thus regional income increased.

The Productivity Commission also noted that businesses have greatly benefited from NCP, including through cheaper inputs, better service from input suppliers, greater choice of suppliers and access to improved technology, all of which lead to greater competitiveness. Key business organisations and international organisations such as the IMF and OECD have also applauded the results of NCP.

While there has been substantial progress in implementing NCP, Australia's first wave of competition policy, it was recognised that further benefits could be derived through further increasing efficiencies and performance in key sectors. As a result, COAG in 2005 introduced a second wave of competition reforms, as part of the National Reform Agenda (NRA). The NRA incorporates three broad areas namely, competition, regulatory and human capital.

The competition stream of the NRA is aimed at providing a supportive market and regulatory framework for productive investment in energy, transport and other export-oriented infrastructure, and for its efficient use by improving pricing and investment signals and establishing competitive markets.

The NRA has the potential to deliver, over the next decade, benefits of the same size, if not larger, than those achieved in the last decade from the implementation of National Competition Policy and associated reforms. The Productivity Commission's report, *Potential Benefits of the National Reform Agenda*, found that the NRA has the potential to deliver on the competition and regulation side, an increase in GDP by around 1¾ per cent after 10 years. While there is still work to be done in most areas, the proposals taken together represent a substantial reform agenda, with many of the reforms promoting national markets.

Reforms agreed include:

- the establishment of a National Energy Market Operator for both electricity and gas, encompassing a new national transmission planning function — a key step towards a fully national electricity transmission grid;

- a phased approach to the long-term reform of road and rail freight infrastructure pricing;

- agreement by the States and Territories to undertake, by the end of 2007, public reviews of the regulation and effectiveness of competition in significant ports; and

- agreement to strengthen jurisdictions' regulation-making and review systems and to take action on the ten identified cross-jurisdictional hotspots.

A3: Accountability mechanisms

What are the accountability mechanisms that assure the effective implementation of regulatory, competition and market openness policies?

The Australian Government has established robust institutional structures and processes to ensure the effective implementation of regulatory quality, competition and market openness policies.

One key accountability mechanism that the Australian Government has adopted is the separation of policy formulation from the application and enforcement of the relevant policy. While Commonwealth departments are responsible for the formulation and implementation of policies, external independent bodies are charged with applying and enforcing those policies.

For example, in relation to competition policy, the Australian Treasury has responsibility for the formulation and implementation of competition policies, the Australian Competition and Consumer Commission (ACCC) has responsiblilty for enforcing competition policy and the National Competition Council (NCC) has had responsibility for monitoring the implementation of NCP and providing recommendations on access to infrastructure.

The ACCC was established to enforce the *Trade Practices Act 1974* (TPA) - the restrictive trade practices legislation. The TPA specifically prohibits the relevant Minister with portfolio responsibility for the TPA from giving the ACCC a direction regarding its performance or the exercise of its powers under the competition provisions of the TPA.

The NCC has monitored and provided assessments on State, Territory and Australian Governments' implementation of NCP and made recommendations on access to infrastructure under the national access regime.

Both bodies are statutory bodies and are independent of the executive arm of governments.

In the future, the NCC will continue to make recommendations on access to infrastructure under the national access regime however the Council of Australian Government's Reform Council (CRC) has been established to monitor progress in implementing the new NRA reforms. The CRC will provide annual progress reports to COAG and undertake an ex-post assessment of the benefits and costs once reforms have been implemented.

In relation to the implementation of regulatory quality policies, the Australian Government has established an independent body called the Office of Best Practice Regulation (OBPR), which plays a crucial role in ensuring that the Government's regulation making requirements are effectively carried out. While the Australian Treasury and the Departments of the Prime Minister and Cabinet and Industry, Tourism and Resources are responsible for developing policies in relation to best practice regulation, OBPR ensures that the Government's requirements concerning best practice regulation are fulfilled.

- The OBPR provides a one-stop shop to offer support and guidance to departments and agencies on appropriate quality control mechanisms for the development of regulatory proposals and for the review of existing regulations. Its main purpose is to ensure that regulatory proposals are fully scrutinised and incorporate a comprehensive analysis of regulatory impacts, including business compliance costs.

Also, to further support the Australian Government's regulation-making process, the Cabinet Secretariat within the Department of the Prime Minister and Cabinet, a central policy agency, plays a 'gate-keeping' role to ensure that all Cabinet papers contain appropriate regulatory impact analysis. As part of this role, the Cabinet Secretariat does not circulate regulatory proposals without an adequate Regulation Impact Statement (see response to question B6 below) or compliance cost assessment, unless there are exceptional circumstances.

Additionally, to assist in ensuring that all government policies are effectively implemented, the Cabinet Implementation Unit (CIU) has been established within the Department of the Prime Minister and Cabinet to ensure that policies prepared for consideration by the Prime Minister and Cabinet have clear objectives, a robust assessment of costs and benefits, and are clear regarding how they will be implemented. The CIU also works with departments and agencies to improve implementation planning and the delivery of policy initiatives, including assisting agencies prepare implementation plans and identify, assess and manage implementation risks. The CIU also plays a gate-keeping role, by ensuring that all relevant agencies have been consulted in the development of a policy and in discussion on how its implementation is to be managed. CIU also monitors the progress of the implementation of key Government decisions and reports to the Prime Minister and Cabinet on the status of these decisions.

Further, Australia is committed to maintaining a sound market openness policy. The Department of Foreign Affairs and Trade has overall responsibility for Australia's trade policy. However it works closely with relevant agencies to ensure a whole-of-government perspective.

The Productivity Commission publishes an annual *Trade and Assistance Review* which estimates the total cost of tariff and other assistance for different sectors of the economy. It also reviews recent developments in trade policy. The Productivity Commission and its predecessors have played a key role in highlighting the benefits of trade liberalisation within Australia.

Australia is also subject to regular trade policy reviews by the World Trade Organization. Australia's most recent review was in March 2007. Australia's trade and investment policies were also recently subject to an APEC peer review process. The International Monetary Fund and the OECD also periodically review the progress of liberalisation in Australia's trade and investment policy settings, the former through annual Article IV consultations.

A4: Anti-discrimination policies

To what extent do regulation, competition and market openness policies avoid discrimination between like goods, services, or service suppliers in like circumstances, whether foreign or domestic? If elements of discrimination exist, what is their rationale? What consideration has been given to eliminating or minimising them?

The Australian Government seeks to ensure that policies in general do not discriminate goods, services and providers based on their origin.

In relation to regulatory policies, the Australian Government's best practice regulation making guidelines incorporates a competition assessment that examines whether regulatory proposals discriminate between goods and services, whether domestic or foreign. For example, the competition assessment considers whether a proposed regulation would restrict the entry of new business or products into the market (either domestic or foreign), including through restrictions on investment or trade.

With regard to competition policy, the competition provisions of the TPA apply to all goods or services supplied by domestic and foreign businesses, that operate in the Australian market. The TPA does not discriminate between foreign and domestic goods and services when operating in the Australian market.

The purpose of market openness policies is to minimise barriers to flows of trade and investment across barriers. Since the 1980s, Australia has significantly opened up its economy to global forces. Unilateral tariff reductions have played an important role in Australia's openness policies. Australia has also reduced barriers to trade in services and cross-border investment flows.

Australia maintains a liberal approach to foreign investment and has a comprehensive foreign investment screening regime. While Australia does not have any sectors that are closed to foreign investment, it does impose 49 per cent foreign equity ceilings in three sectors: international aviation, federally-leased airports and domestic shipping.

The purpose of these restrictions is to allow the Australian Government to screen foreign investment proposals for those that might be contrary to the national interest and to preserve majority Australian involvement in key sectors of the economy.

The screening regime does not generally apply to portfolio investment or investments in existing companies valued at less than $100 million (or $200 million in the case of 'offshore takeovers'). Australia's screening regime operates on the presumption that foreign investment is consistent with Australia's national interest and places the burden on the Australian Government to establish that an investment is contrary to the national interest.

Reflecting Australia's liberal approach to foreign investment, no significant foreign business investment proposal has been declined since April 2001.

A5: Coordination of regulatory reform

To what extent has regulatory reform, including policies dealing with regulatory quality, competition and market openness, been encouraged and co-ordinated at all levels of government (e.g., Federal, state, local, supranational)?

Historically, the Australian Government has pursued regulatory reform through COAG. Established in 1992, COAG is the most significant intergovernmental forum in Australia, bringing together the Federal, State and Local tiers of government. Membership of COAG comprises the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association. COAG's objectives are to:

- increase cooperation among governments in the national interest;
- pursue reforms that aim to achieve an integrated, efficient national economy and single national market;
- continue the structural reform of government and review relationships among governments; and
- consider other intergovernmental or whole-of-government issues.

COAG has been instrumental in the implementation of regulatory reform in areas of national significance that require cooperative action by Australian governments.

Recently, COAG has reviewed National Competition Policy and the recommendations from this review has resulted in the introduction of the National Reform Agenda (NRA). The NRA is aimed at further raising living standards and improving services by lifting the nation's productivity and workforce participation over the next decade.

A6: Transparency, consistency, comprehensiveness and accessibility of rules

Are the policies, laws, regulations, practices, procedures and decision making transparent, consistent, comprehensible and accessible to users both inside and outside government, and to domestic as well as foreign parties? And is effectiveness regularly assessed?

The Australian Government recognises that in order to ensure that existing policies, laws, regulations, practices, and decision-making systems and processes remain relevant and appropriate over time, it is important that they be reviewed on a regular basis.

In that context, the Australian Government has recently enhanced its regulation-making and review systems and processes to ensure that:

- existing regulation is regularly and appropriately reviewed to ensure its ongoing relevance, efficiency and effectiveness; and
- new regulation is subjected to systematic and transparent assessment to ensure that the potential impacts of new regulation are fully considered.

Such reviews provide an opportunity to consult with relevant stakeholders and to test whether stated objectives are being effectively and efficiently achieved.

- Additional information relating to the Government's strengthened framework for regulation-making is available at http://www.obpr.gov.au/reform.html, with information regarding regulatory review available on the web-site of the Office of Best Practice Regulation, http://www.obpr.gov.au.

Further, to ensure that robust regulation-making and review systems and processes are implemented in all jurisdictions, COAG has agreed to a Regulatory Reform Plan, setting out jurisdictions commitments to improve regulation-making and review processes, actions to address identified cross-jurisdictional regulatory 'hotspots' and to the Productivity Commission benchmarking regulatory burdens across jurisdictions, to identify optimal regulatory practice.

Further, the Government routinely commissions independent reviews on various policy issues. Examples include:

- establishing in October 2005 a *Taskforce on Reducing Regulatory on Business*, to identify practical options for alleviating the compliance burden on business from Commonwealth Government regulation[1];

- commissioning the Productivity Commission to commence an annual regulation review process to identify regulation that is unnecessarily burdensome, complex or redundant, or duplicates regulation in other jurisdictions[2]

    - The PC conducts public inquiries and research into a broad range of economic and social issues affecting the welfare of Australians. Inquiry and research reports are available from the Productivity Commission's website at http://www.pc.gov.au.

In relation to transparency and availability of laws, policies regulations, practices and procedures:

- The Australian Government publishes all of its laws and regulations on *Comlaw*, the legal information retrieval system administered by the Australian Attorney-General's Department (http://www.comlaw.gov.au). Comlaw contains Commonwealth primary legislation, as well as other ancillary documents and information, in electronic form.

- Futher, regulators are encouraged by the Australian Government to provide guidance material on procedural and administrative requirements on their websites. For

[1] The Banks Taskforce presented its final report to Government on 31 January 2006 and made recommendations across a broad range of regulation, including: health-related regulation; labour market regulation; consumer-related regulation; environmental and building regulation; financial and corporate regulation; tax regulation; superannuation regulation; and trade-related regulation

[2] This rolling programme of reviews will examine all sectors of the economy over a 5-year cycle, commencing with the primary sector this year. The Commission's first review will be completed by the end of October 2007 and will form the basis of a rolling red tape reduction agenda, which will be considered by the Government each year. Details of the review process are available on the Commission's website at www.pc.gov.au

examples see http://www.asic.gov.au, http://www.apra.gov.au and http://www.accc.gov.au.

In relation to competition law, Australia's competitive conduct rules are administered by the ACCC, an independent, statutory regulator. The ACCC is charged with enforcement, compliance and educational activities. In fulfilling its role, the ACCC can reach administrative resolution of matters (including through the acceptance of court enforceable undertakings), or bring civil actions in the Federal Court of Australia.

The ACCC's administrative decisions are subject to review by the Administrative Appeals Tribunal (see http://www.accc.gov.au/content/index.phtml/itemId/3744). Some of the ACCC's decisions are also subject to review by the Australian Competition Tribunal (see http://www.fedcourt.gov.au/aboutct/aboutct_admin_other_act.html).

Foreign investment legislation is available online at http://www.comlaw.gov.au/. All treaties Australia has entered into, including FTAs and bilateral investment treaties (BITs), can be viewed online at the Australian Treaties Library, http://www.austlii.edu.au/au/other/dfat/

A7: Timing and sequencing of regulatory reform

Are the reform of regulation, the establishment of appropriate regulatory authorities, and the introduction of competition coherent in timing and sequencing?

The Australian Government recognises the importance of ensuring that the timing and sequencing of regulatory reforms are appropriate in order to deliver comprehensive regulatory reforms.

Australia recognises that regulatory reform is an ongoing process. Markets are in a continual state of evolution. It is crucial that governance, regulatory and institutional frameworks are able to adapt to ensure that they continue to serve their purpose over time.

A8: Managing and co-ordinating regulatory reform

To what extent are there effective inter-ministerial mechanisms for managing and co-ordinating regulatory reform and integrating competition and market openness considerations into regulatory management systems?

In relation to coordinating inter-jurisdictional regulatory reform in Australia, there are over 40 Commonwealth-State Ministerial Councils and forums that facilitate consultation and cooperation between the Australian Government and state and territory governments in specific regulatory reform areas.

- For further detail see http://www.coag.gov.au/ministerial_councils.htm

Responsible ministers from each government participate in these councils with the councils initiating, developing and monitoring policy reform jointly, and taking joint action in the resolution of issues that arise between governments. In particular, Ministerial

Councils develop policy reforms for consideration by COAG, and oversee the implementation of policy reforms agreed by COAG.

At the Commonwealth level, reform in specific areas is also carried out through inter-ministerial coordination involving relevant Ministers and departments to ensure that the Government decision-making process:

- contributes to consistency in public policy formulation;
- supports Ministers in meeting their individual and collective responsibilities;
- facilitates coordinated and strategic policy development; and
- enables informed decision-making on all issues requiring collective determination.

A9: Resourcing

Do the authorities responsible for the quality of regulation and the openness of markets to foreign firms and the competition authorities have adequate human and technical resources, to fulfil their responsibilities in a timely manner?

The Australian Government recognises the importance of providing adequate funding to policy makers and enforcement authorities in order for them to effectively fulfil their obligations.

Significant resources are allocated to Commonwealth Departments and statutory bodies responsible for the development and enforcement of regulation quality, competition and market openness policies. Funding is allocated through the Australian Government budget measures, which are transparent and clearly allocate funds to different activities of the relevant Department and statutory bodies.

In addition, as part of the Australian Government's regulation making process, it is necessary to consider how regulatory proposals will be implemented, including an assessment of practical considerations, such as whether the relevant authorities are adequately resourced to carry out the regulatory proposal.

For example, the ACCC receives funding for various enforcement and investigation activities in order to carry out its functions under the TPA. In the past ten years, funding for the ACCC has increased significantly, rising by 156% in real terms from the 1996-97 Budget to the 2006-07 Budget.

The OBPR, the central body charged with oversight of the Government's regulation making requirements, has also been allocated significant resources to fulfil its obligations. From 2006-07, the Government will provide $12.5 million over four years to the Productivity Commission to undertake the annual review of regulation and for the enhanced role of the OBPR, including $0.7 million in capital for accommodation and information and communications technology fit out.

A10: Training and capacity building

Are there training and capacity building programmes for rule-makers and regulators to ensure that they are aware of high quality regulatory, competition and market openness considerations?

The OBPR provides training and guidance to government officials to assist them in meeting the assessment requirements to justify regulatory proposals, including undertaking adequate cost-benefit analysis and conducting consultation processes. In addition, each Australian Government department and agency has appointed a best practice regulation coordinator, at a senior level, to champion sound policy development processes. The OBPR works closely with the best practice regulation coordinator to facilitate compliance with the Government's regulatory assessment and consultation requirements.

The Department of Foreign Affairs and Trade, along with other relevant agencies, provides regular training to Australian Government officials on trade policy issues. It is also involved in capacity building with other countries, including with Australia's Free Trade Agreement negotiating partners.

A11: Legal framework

Does the legal framework have in place or strive to establish credible mechanisms to ensure the fundamental due process rights of persons subject to the law, in particular concerning the appeal system?

The Australian legal system is a well-established system based on the common law with legislative power reposed in parliaments at the Commonwealth (or federal) level as well as in each of the States and Territories (i.e. at the sub-national level).

Criminal and civil matters are dealt with by the courts in accordance with comprehensive fair trial and due process requirements.

Australia has a hierarchical system of courts with the High Court of Australia operating at the head of the system, as the final court of appeal for all other courts. It is also the court which has primary responsibility for interpreting the Australian Constitution. Within each State and Territory there is a Supreme Court which may take appeals from the decisions of lower courts and tribunals. Parallel to the Supreme Courts in the States and Territories is a Federal Court that is primarily concerned with the enforcement of Commonwealth Law, including those related to trade practices.

Administrators who make decisions that that are potentially adverse to persons are required to comply with the principles of natural justice (or procedural fairness). Decisions of administrators are subject to judicial review by the courts and, in many circumstances, are also subject to merits review by specialist administrative tribunals. Merits review has been said to involve the administrative review tribunal 'standing in the shoes' of the original decision-maker. Unlike the situation with judicial review, administrative review tribunals are accordingly concerned with more than determining whether a decision was lawfully made. For example, in Australia there is an

Administrative Appeals Tribunal (AAT), which has a general jurisdiction to review a large range of government administrative decisions. The AAT considers the decision under review and determines whether it is the correct or preferable decision. The above aspects of the Australian judicial and administrative system apply equally to foreign entities and nationals as they apply to Australian entities and nationals.

In relation to competition law, Australia also has the Australian Competition Tribunal - an independent body with the primary function of hearing appeals from decisions made by the ACCC in relation to authorisations, notifications and access to essential facilities. The Tribunal operates in a similar manner to a court, holding hearings at which evidence and submissions are given.

PART B: REGULATORY POLICY

B1: Ensuring principles of quality regulation are applied

To what extent are capacities created that ensure consistent and coherent application of principles of quality regulation?

In order to ensure that the regulation developed and implemented by the Australian Government is efficient and effective, the Government has endorsed the following six principles of good regulatory process[3]:

- governments should not act to address 'problems' until a case for action has been clearly established. This should include establishing the nature of the problem and why actions additional to existing measures are needed, recognising that not all 'problems' will justify (additional) government action;
- a range of feasible policy options - including self-regulatory and co-regulatory approaches - need to be identified and their benefits and costs, including compliance costs, assessed within an appropriate framework;
- only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted;
- effective guidance should be provided to relevant regulators and regulated parties in order to ensure that the policy intent of the regulation is clear, as well as the expected compliance requirements;
- mechanisms are needed to ensure that regulation remains relevant and effective over time; and
- there needs to be effective consultation with regulated parties at all stages of the regulatory cycle.

The Australian Government has systems, processes and structures in place to ensure that these principles are adhered to, including establishing the independent OBPR as an operating unit within the Productivity Commission and providing the OBPR with a central role in delivering the Government's best practice regulation requirements. The OBPR also serves a similar role for the Council of Australian Governments (COAG) in relation to national regulatory proposals (see http://www.coag.gov.au).

The OBPR promotes the Australian Government's objective of effective and efficient legislation and regulations and advises Government, departments and agencies on appropriate quality control mechanisms for the development of regulatory proposals and for the review of existing regulations.

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[3] These principles were recommended by the *Taskforce on Reducing Regulatory Burdens on Business*, established by the Australian Government in October 2005 (see http://www.regulationtaskforce.gov.au).

The OBPR also examines Regulation Impact Statements (RIS) for regulation proposals (see http://www.obpr.gov.au/ris/index.html), and advises whether they contain adequate cost-benefit and risk analysis. Further, the OBPR reports annually on compliance with the Government's requirements for RIS, compliance cost assessment and consultation, and on regulatory reform developments generally.

The OBPR focuses its efforts on regulations that have a medium to significant impact on business and individuals or the economy (for example if regulation restricts competition or imposes a compliance burden) and ensures that effects on small business of proposed new and amended legislation and regulations are made explicit and given adequate consideration.

To further support Government decision making regarding proposed regulation, the Cabinet Secretariat within the Department of the Prime Minister and Cabinet (a central policy agency), plays a 'gate-keeping' role to ensure that all Cabinet papers note, as a minimum, any compliance cost to business. As part of this role, the Cabinet Secretariat does not circulate final submissions and memoranda without an adequate RIS or compliance cost assessment.

Additionally, as part of the COAG National Reform Agenda, COAG agreed that effective regulation is essential to ensure markets operate efficiently and fairly, to protect consumers and the environment and to enforce corporate governance standards.

In that context, COAG agreed to implement a range of measures to ensure best-practice regulation making and review in their jurisdictions including commitments to establish and maintain 'gate-keeping' mechanisms as part of the decision-making process, improve the quality of regulation impact analysis, better measurement of compliance costs, and annual targeted reviews to reduce the burden of existing regulation.

- Further information in relation to the COAG commitments is available at http://www.coag.gov.au.

B2: Review of the economic and social impacts of new regulations

Are the legal basis and the economic and social impacts of drafts of new regulations reviewed? What performance measurements are being envisaged for reviewing the economic and social impacts of new regulations?

The Australian Government's regulation-making requirements require consideration and assessment of the impacts of proposed regulation, including identifying and categorising the expected economic, social and environmental impacts of the proposed options as likely benefits and costs.[4]

Detail of the analysis of benefits and costs required for regulatory impact analysis is described in detail in section 4.4 of the Australian Government's *Best Practice Regulation*

[4] For further information, see the *Best Practice Regulation Handbook,* http://www.obpr.gov.au/bestpractice/index.html, Part 4.

Handbook, however, broadly, benefit and cost analysis is used to analyse the positive and negative effects of a proposal, with:

- a benefit including any item that makes any person better off, regardless of whether it can be easily measured or quantified; and

- a cost being any item that makes someone worse off, or that reduces a person's sense of wellbeing. Cost items should include 'opportunities forgone' because a particular proposal has been adopted.

The Government's regulation-making processes require that the benefits and costs of the options to business, consumers, government, other affected groups and the community at large should be identified and described, with the overall expectation being that the benefits to the community of the recommended option exceed its costs and have the greatest net benefit to the community of all alternative approaches considered.

B3: Review of the legal basis and economic and social impacts of existing regulations

Are the legal basis and the economic and social impacts of existing regulations reviewed, and if so, what use is made of performance measurements?

The Australian Government recognises that in order to ensure that existing regulation remains relevant and appropriate over time, it is important that regulations be reviewed on a regular basis.

In that context, the Productivity Commission, the Government's principal independent review and advisory body on microeconomic policy and regulation, is undertaking an annual regulation review process, to examine the existing stock of Australian Government regulation and identify inefficient regulation that is unnecessarily burdensome, complex or redundant, or duplicates regulations in other jurisdictions.

- The Productivity Commission will develop a short list of priority areas with options to alleviate regulatory burden and identify reforms to enhance regulatory consistency across jurisdictions.

To ensure that all industry sectors are examined by the Productivity Commission, and to provide certainty for businesses, the reviews will be conducted according to a five year cycle.

- Australia's primary sector is the focus of the first review and, in subsequent years, the manufacturing sector and distributive trades, social and economic infrastructure services, and business and consumer services sectors will be examined. The fifth year of the cycle is reserved for a review of economy-wide generic regulation, and regulation that has not been picked up earlier in the cycle.

The Productivity Commission will report the findings of the first annual review at the end of October 2007, with the second annual review to commence in February 2008. The terms of reference for the annual reviews of regulation are available at:

http://www.treasurer.gov.au/tsr/content/pressreleases/2007/007.asp.

Further, to ensure the continuing effectiveness of regulation created from 2007, the government has committed to review new regulation five years after implementation. Accordingly, from 2011, the Annual Regulatory Plans (ARPs)[5] of all departments and agencies will list regulation introduced from 2007 and, following an assessment against a checklist developed by the OBPR, will indicate if a full review of this regulation is to be undertaken.

Additionally, as part of their commitments under National Competition Policy, all Commonwealth, State and Territory governments undertook to review and change legislation that restricts competition.

The objective of the legislation review program was to remove restrictions on competition that were found not to be in the interests of the community, for example, legislation that restricts entry into markets or constrains competitive behaviour.

Governments agreed that legislation should not restrict competition unless it could be shown that:

- the benefits of the restriction to the community as a whole outweighed the costs, and
- the objectives of the legislation could only be achieved only by restricting competition.

More than 1,200 pieces of legislation were reviewed, extending across a range of industries and sectors:

- Further information regarding the National Competition Policy legislation review programme is available at http://www.ncc.gov.au.

Further, under the National Reform Agenda, governments agreed to undertake targeted public annual reviews of existing regulation to identify priority areas where regulatory reform would provide significant net benefits to business and the community.

- Further information is available at http://www.coag.gov.au.

B4: Transparent, clear and predictable rules, institutions and processes

To what extent are rules, regulatory institutions, and the regulatory management process itself transparent, clear and predictable to users both inside and outside the government?

The Australian Government's regulation-making requirements and process are publicly available, with all relevant process and guidance documentation available on the web-site of the OBPR, including the *Best Practice Regulation Handbook* and related guidance material (see http://www.obpr.gov.au/bestpractice/index.html). The OBPR also plays a central

[5] Annual Regulatory Plans prepared by departments and agencies provide stakeholders with an early indication of potential regulatory changes. These plans contain information about proposed regulatory activities, including a description of the issue, information about consultation opportunities and an expected timetable. These plans are publicly available.

role in promoting these regulation-making requirements, providing training and guidance to departments and agencies to assist them in meeting the regulatory impact assessment requirements.

As a further element of transparency in the regulation-making process, after government has approved a regulatory proposal, the final regulatory impact assessment (either a RIS or a Business Cost Calculator (BCC) report (see http://www.obpr.gov.au/reform.html)), generally is made available to the public.

- Where a regulatory proposal is tabled in Parliament, the RIS or BCC report prepared at the decision-making stage must be included in the explanatory memorandum (for primary legislation) or the explanatory statement (for legislative instruments). RISs or BCC reports for treaties will be tabled along with the National Interest Analysis. RISs or BCC reports for other instruments and new or amended quasi-regulation should be made available to affected groups and individuals and, ideally, be published on the internet.

The OBPR also reports publicly about compliance with the Government's regulation review and reform requirements.

- In particular, the OBPR will report on the number of bills, treaties and legislative instruments introduced into Parliament, and the number of other instruments and quasi-regulations made during the relevant financial year for which a RIS or BCC report was required.

- Furthermore, the OBPR will note the number and type of instances in which a RIS or BCC report was prepared and whether each RIS contained an adequate level of analysis.

B5: Public consultation mechanisms

Are there effective public consultation mechanisms and procedures including prior notification open to regulated parties and other stakeholders, non-governmental organisations, the private sector, advisory bodies, accreditation bodies, standards-development organisations and other governments?

The Australian Government has made a commitment to improving mechanisms for consultation with business and supporting appropriate consultation with all relevant stakeholders.[6] Consultation ensures that both the regulator and the regulated have a good understanding of the problem, alternative options to address it, possible administrative and compliance mechanisms and associated benefits, costs and risks. Lack of consultation can lead to regulation that is inappropriate to the circumstances, compliance is costly and adherence is poor.

The Australian Government has adopted a whole-of-government policy on consultation, which sets out seven principles for best practice consultation that need to be followed by all agencies when developing regulation, including the following:

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[6] *Rethinking Regulation: Australian Government Response*, 15 August 2006.

- *Continuity* — Consultation should be a continuous process that starts early in the policy development process.

- *Targeting* — Consultation should be widely based to ensure it captures the diversity of stakeholders affected by the proposed changes. This includes State, Territory and local governments, as appropriate, and relevant Commonwealth departments and agencies.

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

- *Accessibility* — Stakeholder groups should be informed of proposed consultation, and be provided with information about proposals, via a range of means appropriate to those groups.

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

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

- *Evaluation and review* — Policy agencies should evaluate consultation processes and continue to examine ways of making them more effective.

Related to this policy are three specific consultation mechanisms: Annual Regulatory Plans; a business consultation portal; and the requirement for policy 'green papers' and exposure drafts for matters of major significance.

- Annual Regulatory Plans prepared by departments and agencies provide stakeholders with an early indication of potential regulatory changes. These plans contain information about proposed regulatory activities, including a description of the issue, information about consultation opportunities and an expected timetable. These plans are publicly available.

- A business consultation portal has been established by the Department of Industry, Tourism and Resources to enable registration of relevant stakeholders prepared to be consulted on particular regulations; automatically notify stakeholders, including businesses and Government agencies, of consultation processes in areas where they have registered an interest; provide information on the Government's public consultation objectives and policies; provide links to current and past consultation processes; and include information about new and upcoming changes to regulation. This portal is available at http://www.consultation.business.gov.au.

- Policy 'green papers' and exposure drafts are released, as appropriate. For matters of major significance, an initial policy 'green paper' is made available to relevant parties as a basis for consultation. Prior to finalisation, the details of complex regulations are

tested with relevant stakeholders, including through exposure drafts for significant matters.

The whole-of-government consultation policy is to be applied to all major initiatives and covers all aspects of developing regulation: from the policy proposals/'ideas' stage through to post-implementation reviews. The nature and extent of consultation should be commensurate with the potential magnitude of the problem and impact of proposed regulatory and non-regulatory solutions.

B6: Methodologies and criteria to analyse regulatory impacts

To what extent are clear and transparent methodologies and criteria used to analyse the regulatory impact when developing new regulations and reviewing existing regulations?

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

- All proposals are required to undergo a preliminary assessment to establish whether they are likely to involve an impact on business and individuals or the economy.
- If the preliminary assessment shows that a proposal potentially involves medium compliance costs, a full assessment of the compliance cost implications should be carried out using the Australian Government's *Business Cost Calculator* (BCC) (see http://www.obpr.gov.au/businesscostcalculator/index.html).
- Proposals that have a significant impact on business and individuals (whether in the form of compliance costs or other impacts) or that restrict competition, require more detailed analysis documented in a RIS (see below for further detail regarding the elements of a RIS). If the impacts include medium or significant compliance costs, the BCC report forms part of the RIS.

The Government's best practice requirements for regulation apply to:

- all proposals with regulatory and quasi-regulatory obligations being brought to the Cabinet by Ministers;
- letters with regulatory and quasi-regulatory obligations being referred to the Prime Minister by Ministers for approval; and
- proposals (regulatory and quasi-regulatory) of Ministers, statutory authorities, boards and regulators.

The Government's best practice requirements for regulation apply to *all* government entities which review or make regulations that have an impact on business and individuals, including agencies or boards with administrative or statutory independence.

Regulation Impact Statements (RIS)

Preparation of a RIS formalises and documents the steps that should be taken in policy formulation. It provides a consistent, systematic and transparent process for assessing

alternative policy approaches to problems. It includes an assessment of the impacts of the proposed regulation, and alternatives, on different groups and the community as a whole. The primary role of the RIS is to improve government decision-making processes by ensuring that all relevant information is presented to the decision maker when a decision is being made. In essence, a RIS codifies good regulatory practice.

A RIS has seven key elements which set out:

- the problem or issues which give rise to the need for action;
- the desired objective(s);
- the options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s);
- an assessment of the impact (costs and benefits) on consumers, business, government, the environment and the community of each option;
- a consultation statement;
- a recommendation statement; and
- a strategy to implement and review the preferred option.

In addition, relevant to all seven criteria is an overriding requirement that the degree of detail and depth of analysis must be commensurate with the magnitude of the problem and with the size of the potential impact of the proposals.

- For more information on RIS, see http://www.obpr.gov.au/ris/index.html and Parts 3 and 4 of the *Best Practice Regulation Handbook* (http://www.obpr.gov.au/bestpractice/index.html).

B7: Assessing alternatives to regulation

How are alternatives to regulation assessed?

The Australian Government recognises that alternatives to regulation can be less costly, more flexible, and therefore more effective than prescriptive regulation. In that context, it is a requirement that an impact assessment of a regulatory proposal should test the effectiveness and appropriateness of alternative - non-regulatory as well as regulatory - options for achieving the stated objectives, to help decision makers select the most effective and efficient approach. The option adopted should be targeted at the identified problem so that it does not lead to unintentional impacts.

As it is impractical to assess in detail every possible alternative solution to a problem, it is necessary to cover the most feasible range of options. However, the reasons for rejecting options without detailed analysis should be stated.

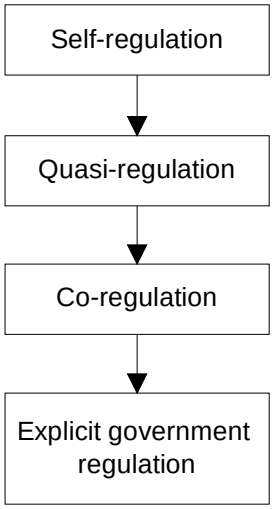
The forms of regulation and alternatives are listed in the *Best Practice Regulation Handbook* (see http://www.obpr.gov.au/bestpractice/index.html, Appendix B). In some cases, a

mix of alternatives may be most suitable, however, in all cases, the methods adopted to deal with a perceived problem ideally should have the following characteristics:

- administrative simplicity;
- flexibility;
- efficiency; and
- equity.

The principal forms of regulation may be viewed as part of a continuing spectrum of regulation - from self-regulation to explicit government regulation - as illustrated in the diagram below. The principal regulatory forms have various characteristics, advantages and disadvantages - such as their cost-effectiveness, flexibility, responsiveness, accessibility and level of scrutiny — all of which are important in assessing which form might be best for addressing a particular problem.

A simplified spectrum of regulation



There are a variety of factors relevant to choosing the best regulatory form to address specific problems including: the severity of the problem; the extent of risk (where applicable); the nature of the industry concerned; the need for flexibility or certainty in regulatory arrangements; and the availability of resources.

The *Best Practice Regulation Handbook* provides guidance regarding the most appropriate regulatory form, and should be used by officials considering proposals for new or amended regulation. The checklist is intended to supplement the RIS process by providing additional information to help determine which regulatory forms are worth considering, prior to the more formal testing in the RIS of the effectiveness and likely costs and benefits of different regulatory options.

The *Best Practice Regulation Handbook* also provides detail on alternative instruments for policy officers to consider, including

- no specific action;

- information and education campaigns (including labelling requirements or media campaigns);
- market-based instruments (including taxes, subsidies and user charges);
- tradeable property rights (marketable rights);
- pre-market assessment schemes (such as listing, certification and licensing);
- post-market exclusion measures (such as bans, recalls, licence revocation provisions and 'negative' licensing);
- codes of conduct/practice (including service charters);
- standards (including voluntary and regulatory standards); and
- other mechanisms, such as public information registers, mandatory audits and quality assurance schemes.

B8: Assuring compliance with and enforcement of regulations

To what extent have measures been taken to assure compliance with and enforcement of regulations?

The Australian Government requires that as part of the regulation-making process, it is necessary to consider how the proposed option will be implemented and enforced, including an assessment of practical implementation considerations, such as:

- administrative issues, for example, as which authority will administer the option proposed and how it will function;
- identifying all the departments and agencies that will have a role in implementing or enforcing the proposal, including an assessment of the resource requirements and costs; and
- how the option would be enforced (including the resourcing of enforcement).

In some cases, alternative compliance and enforcement strategies are required to be identified, including:

- administrative versus civil versus criminal sanctions;
- corporate versus director liability;
- the desirability of risk-based enforcement strategies; and
- the desirability of enforcement pyramids (that is, warnings for initial or low-level breaches, fines for subsequent and/or high level breaches, leading to licence suspension or revocation as ultimate sanctions).

PART C: COMPETITION POLICY AND LAW

C1: Policies to promote efficiency and minimise distortions to competition

To what extent has a policy been embraced in the jurisdiction that is directed towards promoting efficiency and eliminating or minimising the material competition distorting aspects of all existing and future laws, regulations, administrative practices and other institutional measures (collectively "regulations") that have an impact upon markets?

The Australian Government's regulation-making process includes a practical approach for considering the impacts on business and individuals and on competition potentially flowing from regulatory proposals through a set of threshold questions (a competition checklist) followed by, where appropriate, a competition assessment.

The competition checklist includes considering whether the regulatory proposal would:

- affect the number and range of suppliers;
- change the ability of suppliers to compete; and
- alter suppliers incentives to compete vigorously

If the answer to any of these questions is 'yes', further analysis may be required, including possibly undertaking a full competition assessment with a comprehensive evaluation of the impact (for primary and relevant related markets) of the regulatory proposal on: Incumbent business; Entry of new businesses; Prices and production; Quality and variety of goods and services; Innovation; Market growth; and Related markets.

The results of the assessment should be compared with assessments of feasible alternative policy options that would equally obtain the policy goal but be less anti-competitive. If there are no available alternatives, the proposal should be assessed from the perspective of economic well-being; whether there are net benefits from the regulation, taking into account the costs of the anti-competitive impacts.

In particular, the RIS must examine whether the recommended/preferred option is the only way of achieving the desired objective. This is because the RIS should not recommend an option that restricts competition unless it is demonstrated that the benefits of the restriction to the community as a whole outweigh the costs, and the desired objective can be achieved only by restricting competition.

- Further information regarding competition assessments is available in OBPR's *Best Practice Regulation Handbook* (competition checklist, page 2-9, competition assessments, page 4-16).

C2: Objectives to promote and protect competition

To what extent do the objectives of the competition law and policy include, and only include, promoting and protecting the competitive process and enhancing economic efficiency including consumer surplus?

Section 2 of the *Trade Practices Act 1974* (TPA) states that '[t]he object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.'

Enhancing the welfare of Australians entails maximising consumer wellbeing, and the promotion of competition is central to this objective. Many of the provisions of Part IV of the TPA, which deals with anticompetitive conduct, adopt a 'substantial lessening of competition' test for determining whether conduct is unlawful. By prohibiting conduct that substantially lessens competition, the provisions in Part IV promote well functioning markets and lower prices and greater choice for consumers. The other provisions of Part IV, though not containing a 'substantial lessening of competition' test, are also fundamentally concerned with competition.

The 2003 *Review of the Competition Provisions of the Trade Practices Act* (Dawson Review) stated that the ultimate goal of competition law is the achievement of economic efficiency, and competition is the means to that end. The Government response to the Dawson Review agreed that the competition provisions of the TPA are designed to protect the competitive process rather than individual competitors or a specific market structure. The Government response stated that competition laws are not a means of achieving social outcomes unrelated to the encouragement of competition, or of preserving businesses that are not able to withstand competitive forces.

The approach of Australian courts when interpreting the TPA is also focused on enhancing the wellbeing of consumers. In *Re QCMA and Defiance Holdings* (1976) 25 FLR 169, the Australian Competition Tribunal said that competition is 'a mechanism, first, for discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way.' In *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, the High Court said that the object of the misuse of market power provisions of the TPA is 'to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end.'

C3: Competition Authority mandate and resources

To what extent does the Competition Authority or another body have (i) a clear mandate to advocate actively in order to promote competition and efficiency throughout the economy and raise general awareness of the benefits of competition, and (ii) sufficient resources to carry out any advocacy functions included in its mandate?

The ACCC has broad responsibilities for administering the TPA and associated legislation. In administering the TPA, the ACCC adheres to the objective stated in section 2 of the TPA, which is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.'

The ACCC also has a clear mandate to raise awareness of the benefits of competition. Section 28(1) of the TPA provides that the ACCC has the function of making the public aware of matters affecting the interests of consumers, and making known for the guidance of consumers the rights and obligations of persons under the laws that are designed to protect consumer interests. This is one of the key areas of focus set out in the ACCC's 2006-07 Corporate Plan. In fulfilling this objective, the ACCC releases various publications which inform consumers of their rights, and assist businesses in complying with the TPA.

Significant resources are allocated to the ACCC to enable it to carry out its functions under the TPA. Funding is allocated to the ACCC in the Australian Government budget measures, and is to be used to achieve the outcome of enhancing social and economic welfare of the Australian community by fostering competitive, efficient, fair and informed Australian markets.

C4: Neutralising advantages accruing to Government businesses

To what extent are measures taken to neutralise the advantages accruing to government business activities as a consequence of their public ownership?

The *Competition Principles Agreement* (*CPA*), signed by the Australian and all State and Territory governments on 11 April 1995, committed them to apply competitive neutrality principles to government activities. The CPA provided the background for the development of the Australian Government's *Commonwealth Competitive Neutrality Policy Statement*, which was released in June 1996.

The principle of competitive neutrality requires that governments at all levels (Federal/State/local) ensure that they do not provide any competitive advantage to any government-owned businesses in their "business activities" simply because they are government owned.

- The aim of competitive neutrality is to facilitate efficient competition between public and private businesses, thereby improving the overall business environment and ensuring that public money is spent on providing better public services.

All Australian governments have established competitive neutrality complaint mechanisms, and these serve an important role in enhancing transparency and ensuring that a forum exists for private sector competitors to complain where they perceive that competitive neutrality principles are not being applied by governments.

The Australian Government and each State and Territory must report in its National Competition Policy Annual Report on compliance with competitive neutrality policy, including handling of complaints received.

At times, market evolution requires competitive neutrality arrangements to be revisited and updated. For example, competitors may enter into a market where there was previously a market gap which the government owned business filled.

Competitive neutrality implementation under the Competition Principles Agreement involves:

- adoption of a corporatisation model for significant government business enterprises;
- payment of all relevant Commonwealth, State and Territory direct and indirect taxes or tax equivalents;
- payment of debt neutrality charges or commercial interest rates, directed towards offsetting competitive advantages provided by explicit or implicit government guarantees on commercial or public loans;
- compliance with those regulations to which private sector competitors are normally subject, for example, planning and approvals processes; and
- pricing of goods and services provided in contestable markets to take account of all direct costs attributable to the activity and the applicable competitive neutrality components.

In 2006, as part of the new NRA, the Australian and all State and Territory Governments signed a Competition and Infrastructure Reform Agreement. This Agreement contained a commitment to principles to enhance the application of competitive neutrality to government business enterprises engaged in significant business activities in competition with the private sector. Competitive neutrality principles in the Agreement included:

- ensuring that enterprises do not exercise regulatory or planning approval functions in circumstances in which they compete with private sector enterprises;
- that any payments to the government for the purposes of competitive neutrality, such as taxes, tax equivalent payments, special dividends and capital repayments, are identified in a transparent manner; and
- that any directions given to the enterprise by the government are published.

C5: Autonomy of the Competition Authority

To what extent does the agency responsible for the administration and enforcement of the competition law (the "Competition Authority") operate autonomously, and to what extent are its human and financial resources sufficient to enable it to do its job?

The ACCC is an independent statutory authority. Therefore, while it is a government organisation, it acts independently in enforcing the law. The ACCC consists of a chairperson, deputy and five full-time members (commissioners). Commission members are appointed by the Governor-General for terms of up to five years. An appointment is made after the majority of State and Territory jurisdictions support the selection.

The ACCC's 2006-07 Corporate Plan states that 'the ACCC is charged with administering the Trade Practices Act and associated legislation without fear or favour.' The Minister with portfolio responsibility for the TPA cannot give the ACCC directions regarding its functions under the competition provisions of the TPA. However, section 29 of the TPA

enables the Minister to give the ACCC general directions that do not relate to its functions under the competition provisions in Part IV.

One of the reasons for the ACCC's independence is to ensure that its decisions in relation to specific cases and contraventions of the law are, and are seen to be, separate from the political process.

The ACCC has been allocated substantial funding in the Australian Government Budget measures. The Budget measures are transparent and clearly allocate funds to different activities of the ACCC. Funding for various enforcement and investigation activities of the ACCC has increased significantly in the past ten years, with an increase in funding to the ACCC in real terms of 156% from the 1996-97 Budget to the 2006-07 Budget.

C6: Transparency of enforcement decision-makers

To what extent is the role of enforcement decision makers transparent, especially when there are multiple government bodies involved in decision making, for example, regarding who the decision maker was, factors taken into account by such a decision maker, and their relative weighting?

The ACCC is the only agency dealing generally with competition matters and the only agency with responsibility for enforcing the TPA.

The ACCC's decision making process for merger clearances and authorisations provides transparency and certainty. The ACCC has issued detailed guidelines which outline its administration and enforcement of mergers, including the factors it will take into account in applying the competition tests under the Act.

The ACCC administers formal and informal merger clearance systems that operate in parallel with one another. Under the informal merger clearance system, where a proposed acquisition is in the public domain, the ACCC will not give a final decision on a proposed acquisition without making market inquiries, which involves consulting with various market participants including competitors, suppliers, customers, industry associations and government agencies.

The formal merger clearance system came into operation on 1 January 2007. It is expected that under the formal system, a body of precedent will be developed that will increase certainty in the ACCC's decision making process.

There is a public register which includes all mergers considered by the ACCC. In relation to mergers considered under the informal system, the register includes brief details of the proposed merger and brief reasons for the ACCC's response, but does not include confidential information. In relation to mergers considered under the formal system, the TPA requires the ACCC to include on the register all documents given to it, and particulars of all oral submissions made in relation to the application.

The decision making process in the Federal Court and the Australian Competition Tribunal is similarly open and transparent. Applications are publicly listed, decisions are publicly available, and there is an established body of precedent.

In relation to applications for non-merger authorisation, the TPA provides that prior to making a final determination, the ACCC must prepare a draft determination and invite the applicant and interested parties to require the ACCC to conduct a predetermination conference in relation to the draft determination. If the ACCC is notified that a predetermination conference is required, it must convene the conference within a specified time period.

C7: The Competition Authority and sectoral regulatory authorities

To what extent is there a transparent policy and practice that addresses the relationship between the Competition Authority and sectoral regulatory authorities?

In general, the ACCC has responsibility for competition matters at the economy-wide level. However, the energy and telecommunications sectors are subject to specific sectoral arrangements.

Energy

There are three agencies which have responsibility for the energy market in Australia. The Australian Energy Market Commission (AEMC) is responsible for rule making and market development.

The Australian Energy Regulator (AER) was established in 2005 as a constituent part of the ACCC, but operates as a separate legal entity. The AER is responsible for regulating electricity transmission networks under the National Electricity Law and Rules and the enforcement of the National Electricity Law and Rules. Pursuant to the Australian Energy Market Agreement, the AER will also assume responsibility for regulation of electricity distribution networks and electricity and gas retail markets (other than retail pricing), regulation of gas transmission and distribution pipeline systems, and the enforcement of national gas pipeline access laws.

The ACCC is responsible for functions affecting the energy sector including enforcement of the anticompetitive conduct and consumer protection provisions of the TPA, access regulation under Part IIIA of the TPA, and price monitoring under Part VIIA of the TPA.

A Memorandum of Understanding (MOU) between the AEMC, the AER and the ACCC sets out the arrangements agreed to promote effective cooperation, communication and coordination between the three agencies in the performance of their different, but complementary, roles in Australia's energy markets. The MOU is a public document and communicates, in a transparent way to all energy market stakeholders, the administrative arrangements that operate between the agencies.

Telecommunications

The respective roles of the two regulators of the telecommunications sector are clearly defined by legislation. The ACCC is responsible for the telecommunications industry-specific competition provisions of Parts XIB and XIC of the TPA. Part XIB contains specific prohibitions against anticompetitive conduct by telecommunications, while the Part XIC

access regime provides the ACCC with the power to declare specific telecommunications services if no commercial agreement can be reached between carriers.

The Australian Communications and Media Authority (ACMA) was formed in July 2005 as a result of the merging of the Australian Communications Authority (ACA) and the Australian Broadcasting Authority (ABA). ACMA is responsible for various elements of broadcasting and telecommunications regulation, including spectrum management and carrier licensing. These functions are set out under the Telecommunications Act 1997.

C8: Deterring cartel conduct, abuse of market power and anti-competitive mergers

To what extent does the competition law contain provisions to deter effectively and prevent hard-core cartel conduct, abuses of dominant position or unlawful monopolistic conduct, and contain provisions to address anti-competitive mergers effectively? To what extent does the broader competition policy strive to ensure that this type of conduct is not facilitated by government regulation?

The competition provisions are set out in Part IV of the TPA. Section 45 prohibits certain anticompetitive agreements, section 46 prohibits a corporation with a substantial degree of market power from misusing its power for a prescribed purpose, and section 50 prohibits acquisitions that have the effect or likely effect of substantially lessening competition in a market. Section 45, along with section 45A, also prohibits cartel conduct such as price fixing and market sharing. Contravention of these prohibitions carries a maximum civil penalty of, for individuals, $500,000, and for corporations, the greater of $10 million or three times the value of the benefit from the cartel, or where the value cannot be determined, 10 per cent of the corporation's annual turnover (section 76).

The ACCC, and in some circumstances, the Australian Competition Tribunal, may grant immunity for anticompetitive conduct that breaches the TPA:

- the ACCC may authorise anticompetitive conduct if the public benefit arising from the conduct outweighs the anticompetitive detriment (section 88);
- a corporation may obtain protection for exclusive dealing if it notifies the ACCC of the conduct and the ACCC deems the conduct not to substantially lessen competition (section 93);
- the ACCC may clear a merger if it is satisfied that the acquisition is unlikely to substantially lessen competition in a market (section 95AC). Alternatively, a proposed merger party may request that the Tribunal authorise a merger (section 95AT);
- the ACCC may accept a court-enforceable undertaking from a corporation where, for example, a corporation seeks to avoid proceedings for breach of the TPA (section 87B).

On 2 February 2005, the Government announced that it would amend the TPA to introduce criminal penalties for serious cartel conduct. The proposed criminal cartel offence will prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output,

divide markets or rig bids, where the contract, arrangement or understanding is made or given effect to with the intention of dishonestly obtaining a gain from customers who fall victim to the cartel. The maximum penalty will be a term of imprisonment of five years and a fine of $220,000 for individuals, and for corporations a fine that is the greater of $10 million or three times the value of the benefit from the cartel, or where the value cannot be determined, 10 per cent of annual turnover.

In relation to broader competition policy, in 1995 the Commonwealth and State governments agreed on a set of National Competition Policy reforms. This included the extension of the anticompetitive conduct provisions of the TPA to all businesses, including unincorporated businesses, and the review and reform of all laws that restrict competition unless it can be demonstrated that the restrictions are in the public interest. The various governments also agreed to put forward legislation to establish an access regime in relation to essential facilities. This led to the introduction of Part IIIA of the TPA, which established a legal framework to enable competitors to gain access to natural monopoly facilities.

C9: Broad application of competition law

To what extent does the competition law apply broadly to all activities in the economy, including both goods and services, as well as to both public and private activities, except for those excluded?

Australia's Commonwealth Government has a set of limited powers listed in the Commonwealth Constitution, while State and Territory governments hold residual powers. The primary constitutional basis for the TPA is the Commonwealth power to legislate with respect to corporations. Other heads of power relied upon in circumstances where the corporations power is found to be insufficient include the trade and commerce power and the Territories power.

In response to the National Competition Policy reforms, the competition provisions now apply as broadly as is possible within constitutional limitations, to all business activities within the economy. Sections 2A, 2B and 2BA of the TPA clarify that, in so far as they carry on a business, the Commonwealth Government and authorities, State and Territory governments and authorities, and local government bodies are subject to the TPA. The competition provisions in Part IV of the TPA also apply to the business activities of natural persons. This aspect of the National Competition Policy reforms was achieved by an agreement between the Commonwealth, State and Territory governments in 1995 which inserted a 'Competition Code' into a Schedule of the TPA that replicated the competition provisions in Part IV, with the references to 'corporations' changed to 'persons'. Each State and Territory then enacted laws to apply the Competition Code to individuals in their jurisdiction, enabling the Schedule version of Part IV to apply to natural persons because unlike the Commonwealth, the States and Territories are not limited to legislating with respect to corporations.

C10: Investigate powers and sanctions for anti-competitive behaviour

To what extent does the competition law provide for effective investigative powers and sanctions to detect, investigate, punish and deter anti-competitive behaviour?

Part XII of the TPA contains significant powers for the ACCC to investigate, before it initiates proceedings, possible breaches of the TPA, by requiring information and documents to be provided to it. In addition to those provisions, new search and seizure provisions in Part XID commenced on 1 January 2007, which enable the ACCC to determine whether there has been a contravention of the TPA.

Part VI of the TPA provides a broad range of sanctions for contravening conduct. The Federal Court may make orders for the recovery of a pecuniary penalty for breach of a Part IV prohibition (section 76), injunctive relief (section 80), divestiture (sections 81 and 81A), damages (section 82), community service orders, probation orders (including to implement compliance programs or education and training) and disclosure orders (section 86C), publication orders (section 86C), adverse publicity orders (section 86D), disqualification orders (section 86E), other remedial orders (section 87) and prohibition, certiorari, mandamus and declarations (section 163A).

The TPA also provides for substantial penalties to be imposed for engaging in anticompetitive conduct. The maximum penalty for corporations in breach of the anticompetitive conduct provision is the greater of $10 million or three times the gain from the contravention or, where the gain from the contravention cannot be readily ascertained, 10 per cent of the Australian turnover of the body corporate and all its related bodies corporate. The TPA also enables a court to make an order disqualifying a person involved in anticompetitive conduct from managing a corporation, and prohibits corporations from indemnifying officers, employees or agents against the imposition of pecuniary penalties.

C11: Access to the Competition Authority and relevant court(s) or tribunal(s)

To what extent do firms and individuals have access to (i) the Competition Authority to become apprised of the case against them and to make their views known, and (ii) to the relevant court(s) or tribunal(s) to appeal decisions of the Competition Authority or seek compensation for damages suffered as a result of conduct contrary to the domestic competition law?

The ACCC is an independent statutory authority with responsibility for administering the TPA.

The ACCC generally informs firms or individuals if they are being investigated for a possible contravention of the TPA, and seeks their views on the allegations made against them. The ACCC will explain the basis of the allegations to the firm or individual concerned.

The Australian Competition Tribunal is an independent body with the primary function of hearing appeals from decisions made by the ACCC in relation to authorisations, notifications and access to essential facilities. The Tribunal operates in a similar manner to a court, holding hearings at which evidence and submissions are given.

The Federal Court of Australia is vested with jurisdiction with respect to trade practices matters. The Federal Court's trade practices jurisdiction is cross-vested with the jurisdiction of the State and Territory Supreme Courts.

Australia's merger system provides a good example of the avenues available to businesses to gain information about unfavourable decisions, or to apply for review of decisions. Parties seeking the ACCC's approval for a proposed merger can apply for informal clearance. Under the informal clearance process, the ACCC is not required to give detailed reasons for its decision and there is no direct mechanism for review of informal clearances. However, the ACCC conducts market inquiries before reaching a final decision, and provides brief reasons for its decisions on the public register of mergers. It should also be noted that the ACCC has issued guidelines for the informal merger system which contains timelines and processes that guide its approach to an application for informal clearance and improve the transparency and accountability of its decisions.

Reforms were recently introduced which have introduced a new formal clearance system to operate in parallel with the existing informal system. Under the new formal system, the ACCC must provide applicants with the reasons for its decision on whether to grant a clearance, and applicants can apply to the Australian Competition Tribunal for a review of an unfavourable decision.

The coexistence of the two systems retains the many benefits of the informal system, which is speedy, inexpensive and accessible, while providing parties with the option of using the formal system to gain a better understanding of the reasons for the decision and the opportunity to seek a review of an unfavourable decision by the Australian Competition Tribunal.

Alternatively, applicants can seek authorisation for a proposed merger from the Australian Competition Tribunal. The Tribunal will seek information and assistance from the ACCC in completing its inquiries. While there is no appeal from Tribunal decisions, the Tribunal must provide reasons for its decision and the decision is subject to judicial review if there are errors of law in the decision.

The TPA also provides for a statutory right of access to documents obtained by the ACCC in the course of an application for authorisation or proceedings for civil penalties, an injunction, divestiture or remedial orders. The ACCC must provide all documents in connection with matters which establish the person's case, other than documents prepared by the ACCC.

The TPA also provides that persons can take private action against corporations who have engaged in anticompetitive conduct, which can include actions for damages or compensatory orders for loss or damage suffered as a result of the breach.

C12: Framework for deterring and addressing private anti-competitive conduct

In the absence of a competition law, to what extent is there an effective framework or mechanism for deterring and addressing private anti-competitive conduct?

Australia has extensive competition laws that address anticompetitive agreements including price fixing, misuse of substantial market power, and acquisitions that substantially lessen competition in a market.

PART D: MARKET OPENNESS POLICIES

D1: Mechanisms to foster awareness of trade and investment implications

To what extent are there mechanisms in regulatory decision making to foster awareness of trade and investment implications?

The Australian Government's best practice regulation requirements provide for the consideration of all feasible options to achieve particular government objectives, regulatory and non-regulatory, including consideration of the trade and investment implications of proposed regulation.

The Regulation Impact Statement (RIS) must include an assessment of all the likely impacts of a regulatory proposal on business and individuals or the economy. This includes, where relevant, an assessment of the likely impact on competition.

The competition assessment would need to consider in particular whether the proposed regulation would create any geographical barriers to the capacity of firms to provide goods, services and labour and invest capital.

Where a proposed regulation is likely to have an effect on trade, a Trade Impact Statement is required to be incorporated into the RIS to assess the overall impact on Australia's international trade.

D2: Government promotion of trade-friendly regulation

To what extent does the government promote approaches to regulation and its implementation that are trade-friendly and avoid unnecessary burdens on economic actors?

Australia is committed to maintaining open markets and continues to work for genuine trade liberalisation. In seeking to achieve this goal, Australia has reduced trade barriers in its domestic market. Together with a series of far-reaching reforms aimed at generating greater competition, this has resulted in a more internationally competitive economy. Australia's outstanding economic performance over the past decade is testament to the success of this policy approach.

The successful conclusion on the Doha Round of multilateral negotiations continues to offer the best path to removal of the significant distortions that remain in the international trading system. Whilst recognising that the greatest trade benefits will come from multilateral liberalisation, Australia is also pursuing comprehensive Free Trade Agreements that offer earlier gains in market access than can be achieved in the multilateral round. To date Australia has concluded agreements with New Zealand, Singapore, Thailand and the United States of America. Australia ensures that all FTAs are fully consistent with WTO commitments.

The Australian Government has worked hard in recent decades to enhance the competitiveness of the Australian economy through a process of domestic reform and trade opening. The costs and benefits of public policies are subject to regular scrutiny and debate. Australia's trade regime is transparent and designed to build greater engagement with the global economy. Australia actively participates in WTO transparency measures such as the Trade Policy Reviews and recent Committee on Regional Trade Agreement transparency exercises.

The Australian Government's approach to regulation and its implementation supports the aim of increased openness to international trade. Proposals for regulation likely to have a significant impact on business and individuals or the economy require cost benefit analysis. This would include an analysis of the impact on trade. The cost benefit analysis should assist decision makers in ensuring that regulation meets its intended objective without unduly restricting Australia's openness to trade.

D3: Design and implementation of Customs and border procedures

To what extent are customs and border procedures designed and implemented to provide consistency, predictability, simplicity and transparency so as to avoid unnecessary burdens on the flow of goods? To what extent are migration procedures related to the temporary movement of people to supply services transparent and consistent with the market access offered?

Australia is committed to managing international trade without impeding the flow of legitimate goods across the border. Actions already underway in the APEC work program will lead to simplified cargo procedures, increasingly automated and faster systems with improved customs auditing techniques based on post entry audits and risk assessment. This provides the foundations for modern and efficient customs procedures that facilitate trade without compromising appropriate standards of customs control.

Australian Customs is committed to achieving high standards of client service under a Client Service Charter. These standards cover such issues as: response times to inquiries; conduct during baggage searches; the availability of cargo reporting systems; and processing times for tax refunds under the Tourist Refund Scheme. Reflecting a worldwide trend towards end-to-end supply chain management rather than management at the border Australia implemented a new IT system in 2005, the Integrated Cargo System (ICS), to replace outdated reporting and processing measures. The ICS pulls together border, commercial and profiling applications, streamlining the flow of information relating to Cargo in order to provide better facilitation to the movement of legitimate trade.

Origin Advice Rulings are issued to importers, exporters or any other person who requires a Ruling on the origin of goods imported into Australia, particularly for preferential duty purposes. A significant number relate to imports from those countries that have a bilateral free trade agreement with Australia. Information on the application of rules of origin for such agreements is also available to importers via a dedicated phone number or email address.

On-line access to Australian Customs laws, regulations, procedures and administrative rulings is available, together with a wide variety of Customs information, through the Australian Customs website, www.customs.gov.au. Customs supplies information and regular updates, via an automated process, on a range of Customs information that is used by importers to assist in the clearance of their goods.

Australia's temporary business entry arrangements aim to address the demands of a modern and dynamic economy through a flexible and transparent regulatory framework. All procedures are streamlined to ensure an efficient, expeditious and transparent service to skilled entrants and companies seeking to obtain visas necessary for the conduct of their businesses. Australia has a universal visa system and seeks to facilitate the movement of people across the Australian border, while protecting the community and maintaining appropriate compliance.

Australian business entry arrangements allow for short stay business travel to Australia. The business short stay visa provides bona fide business people with single or multiple entry to Australia. The visa may be granted for multiple entries for a stay of up to three months on each occasion with a maximum validity of ten years.

D4: Consultation mechanisms and procedures

To what extent has the government established effective public consultation mechanisms and procedures (including prior notification, as appropriate) and do such mechanisms allow sufficient access for all interested parties, including foreign stakeholders?

The Australian Government has adopted a whole-of-government policy on consultation, which sets out best practice principles that need to be followed by all agencies when developing regulation (see B5 for further information).

In the context of Australia's policies on trade and investment, the Australian Government has well established consultation mechanisms for seeking input from all interested parties.

Throughout the negotiation of free trade agreements, the Australian Government consults business, state and territory governments, non-government organisations and the public. Ministers, negotiators and departments hold public information sessions. The Australian Parliament's Joint Standing Committee on Treaties examines the text of draft agreements, including holding public hearings where appropriate, and reports to Parliament before an agreement is signed.

Australia's free trade agreements with the United States, Singapore and Thailand include provisions requiring Australia and the other party to consult on matters covered by the agreement.

Australia consults with multilateral forums such as the OECD, WTO and APEC, and members of those forums, to influence multilateral work on trade and investment liberalisation. Australia is required under the OECD *Code of Liberalisation of Capital Movements* and the *Code of Current Invisible Operations,* to notify the OECD of any measures of liberalisation or any other measures relevant to the Codes.

D5: Open and transparent Government procurement processes

To what extent are government procurement processes open and transparent to potential suppliers, both domestic and foreign?

The Australian Government procurement market is open to, and does not discriminate between, potential products or suppliers of domestic or foreign countries. The Australian Government procurement framework is built around the core principle of achieving value for money through competition, non-discrimination and efficient, effective and transparent processes.

The centre-piece of the Australian Government's procurement framework is the *Commonwealth Procurement Guidelines* (CPGs). Among other things, the CPGs establish that accountability and transparency are primary considerations throughout a procurement process, from the initial identification of need through to the final disposal of any property.

In addition, the CPGs include a Division on Mandatory Procurement Procedures (MPPs). Consistent with the Australia-United States Free Trade Agreement, the MPPs apply to procurements exceeding set financial thresholds and that are not specifically exempt. The MPPs establish the presumption of procurement through Open Tendering but also allows for the use of Select Tendering or Direct Sourcing under specified conditions.

Full information on all the laws, regulations and policies governing procurement in the Australian Government is available through a series of publications, all of which are available through the website http://www.finance.gov.au/procurement/.

The Australian Government operates a single web-based procurement information system known as "AusTender":

AusTender provides

- centralised publication of all publicly available Australian Government business opportunities, multi-use lists, annual procurement plans and reported contracts;
- automatic notification to registered suppliers as new opportunities are posted; and
- secure electronic lodgement of tender responses, where agencies specify its use.

This information can be found at www.tenders.gov.au.

D6: Regulation of foreign investment and foreign ownership/supply of services

Do regulatory requirements discriminate against or otherwise impede foreign investment and foreign ownership or foreign supply of services? If elements of discrimination exist, what is their rationale? What consideration has been given to eliminating or minimising them, to ensure equivalent treatment with domestic investors?

Australia's foreign investment policy framework comprises the *Foreign Acquisitions and Takeovers Act 1975* (FATA), regulations made under the FATA, and other requirements set

down by way of Ministerial statement. Australia operates a transparent foreign investment screening regime to ensure that acquisitions of significant Australian businesses are not contrary to the national interest.

While Australia does not have any sectors that are closed to foreign investment, it does impose 49 per cent foreign equity ceilings in three sectors: international aviation, federally-leased airports and domestic shipping. It also imposes foreign share ownership restrictions in relation to Qantas Airways and Telstra Corporation Limited. These restrictions do not apply to domestic investors. In relation to the telecommunications sector, there are no foreign equity limits on investments apart from Telstra.

The purpose of these restrictions is to allow the Australian Government to preserve majority Australian involvement in key sectors of the economy.

The national interest in relation to a particular application is determined by the Treasurer. While the national interest is not defined, it may include for example national security and economic development. Australia's foreign investment screening regime is premised on the assumption that foreign investment is beneficial to Australia. As a consequence, it is necessary for the Treasurer to establish that a foreign investment proposal would be contrary to the national interest in order for approval not to be granted.

Reflecting Australia's liberal approach to foreign investment, no significant foreign business investment proposal has been declined since April 2001.

D7: Harmonisation with international standards

To what extent are harmonised international standards being used as the basis for primary and secondary domestic regulation?

Australia's general approach to international standards is that, where such standards exist and are judged to be relevant, effective and appropriate in the Australian context to achieving regulatory objectives, Australia may consider adopting them. This is consistent with Australia's commitments under WTO agreements.

As part of the process for assessing proposed regulation, if one or more of the options being considered would involve establishing domestic standards that deviate from directly relevant international standards, the Regulation Impact Statement must specifically address the implications of this variation. The RIS should document the relevant international standards, discuss any reasons why it may not be appropriate to adopt those standards unchanged, and examine the implications of having a domestic standard that differs from international standards

If the preferred option is to adopt a standard that deviates from relevant international standards, the RIS must demonstrate that the benefits of this approach outweigh the costs to stakeholders of having divergent domestic and international standards and that such deviations are permitted under international (for example, WTO) agreements to which Australia is a party.

D8: Domestic acceptance of measures implemented in other countries

To what extent are measures implemented in other countries accepted as being equivalent to domestic measures?

As an open trading economy and a signatory to the WTO Technical Barriers to Trade Agreement, Australia has a policy of adopting relevant international standards as the basis for technical regulations. At the Federal level (and in most Australian States and Territories) new regulatory measures require a Regulation Impact Statement. In addition, the decisions of Ministerial Councils and National Standards Setting Bodies are governed by Council of Australian Governments' (COAG) "Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies". As part of these processes there is a requirement that new regulations should not impede international trade.

The Trans-Tasman Mutual Recognition Arrangement (TTMRA) between Australia and New Zealand is a leading edge mechanism for the implementation of equivalence. The TTMRA provides that a good (with some exemptions) that may legally be sold in Australia may be sold in New Zealand, and a good that may legally be sold in New Zealand may be sold in Australia. This is regardless of differences in standards or other sale-related regulatory requirements between Australia and New Zealand. The TTMRA works on a negative list basis and overrides virtually all other Australian and New Zealand legislation. The TTMRA provides a powerful incentive for regulators in both Australia and New Zealand to consider each others regulatory framework (as well as international developments) before implementing new regulations.

Many Australian regulators also unilaterally accept as equivalent, international and other national standards as well as test reports and certifications undertaken by recognised bodies in other economies. Examples of these include electrical and communications products.

D9: Procedures to ensure conformity

To what extent are procedures to ensure conformity developed in a transparent manner and with due consideration as to whether they are effective, feasible and implemented in ways that do not create unnecessary barriers to the free flow of goods or provision of services?

Australian regulators use a range of conformity assessment measures including reliance on supplier declaration of compliance, pre-market certification/approvals and post market surveillance. The level of control used by regulators in relation to a product is dependent on the likely level of risk to human health and safety and subject to regulation impact analysis.

Australia has played a leading role in the development of mutual recognition agreements (MRAs) on conformity assessment at both the government-to-government and voluntary level. MRAs provide for the acceptance of conformity assessment procedures undertaken in other economies by Australian regulators and help reduce the need for duplicative testing and certification.

APPENDIX A – BACKGROUND ON APEC-OECD CHECKLIST

The following are extracts from the *APEC-OECD Integrated Checklist on Regulatory Reform* to provide further context on the development and structure of the Checklist.

Development of the Checklist

Member countries of APEC and the OECD have recognized that regulatory reform is a central element in the promotion of open and competitive markets, and a key driver of economic efficiency and consumer welfare. As a result, agreement for an APEC-OECD Co-operative Initiative on Regulatory Reform was reached in June 2000 and was endorsed at the APEC Ministerial Meeting on 12-13 November 2000 in Brunei Darussalam, in order to promote the implementation of the APEC and the OECD principles by building domestic capacities for quality regulation

The first phase of the APEC-OECD initiative was completed in October 2002, at the high level Conference in Jeju, Korea, where economies agreed on the need to elaborate an APEC-OECD Integrated Checklist for self-assessment on regulatory, competition and market openness policies, to implement the APEC and OECD principles. The second phase of the initiative focused on the development of the integrated checklist which has been presented for approval to the respective Executive Bodies of the APEC and the OECD in 2005.

The Checklist is a voluntary tool that member economies may use to evaluate their respective regulatory reform efforts. There is no single model of regulatory reform, but this does not mean that standards, goals and well-structured institutions do not matter.

Based on the accumulated knowledge of APEC and the OECD, the Checklist highlights key issues that should be considered during the process of development and implementation of regulatory policy, while recognizing that the diversity of economic, social, and political environments and values of member economies require flexibility in the methods through which the checklist shall be applied, and in the uses given to the information compiled.

Structure of the Checklist

The Checklist is comprised of four sections. The first is a horizontal questionnaire on regulatory reform across levels of government that invites reflection on the degree of integration of regulatory, competition and market openness policies across levels of government, and on the accountability and transparency mechanisms needed to ensure their success. Regulatory reform refers to changes that improve regulatory quality to enhance the economic performance, cost-effectiveness, or legal quality of regulations and related government formalities. Reform can mean revision of a single regulation, the scrapping and rebuilding of an entire regulatory regime and its institutions, or improvement of processes for making regulations and managing reform. Deregulation is a subset of regulatory reform and refers to complete or partial elimination of regulation in a sector to improve economic performance.

The other three sections of the questionnaires focus on individual policy areas and the factors that may be considered to improve their specific design and implementation. The policy areas are defined as follows:

- **Regulatory Policies**: Those designed to maximise the efficiency, transparency and accountability of regulations based on an integrated rule-making approach and the application of regulatory tools and institutions.

- **Competition Policies**: Those that promote economic growth and efficiency by eliminating or minimising the distorting impact of laws, regulations and administrative policies, practices and procedures on competition; and by preventing and deterring private anti-competitive practices through effective enforcement of competition laws.

- **Market Openness policies**: Those that aim to ensure that a country can reap the benefits of globalisation and international competition by eliminating or minimising the distorting effects of border as well as behind-the-border regulations and practices. These policies influence the range of opportunities open to foreign suppliers of goods and services to compete with domestic counterparts in a particular national market (for example, through trade and investment).