

**GUIDELINES FOR THE REVIEW OF
REGULATION
of
THE PROFESSIONS
UNDER NATIONAL COMPETITION
POLICY**

COAG Committee on Regulatory Reform 1999

GUIDELINES FOR THE REVIEW OF PROFESSIONAL REGULATION

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FOREWORD

The following Guidelines are a resource for reviews of existing legislation and for formulating new legislation that regulates the professions.

They were prepared by the Council of Australian Governments (COAG) Committee on Regulatory Reform and have been endorsed by COAG senior officials.

The Guidelines draw on the Competition Principles Agreement that, along with two other Agreements on National Competition Policy, was signed by the Council of Australian Governments in April 1995. These Agreements contain the various commitments made by Governments to implement the National Competition Policy.

The Guidelines do not add to the requirements of the Agreement nor represent an exhaustive exposition of review method. However, they do provide a common reference point for reviews. By elaborating on the Agreement they will contribute to the consistent application of the Competition Principles Agreement across reviews of legislation for different professions and reviews commissioned by different Governments of legislation for the same profession. National reviews will also benefit from these Guidelines.

Some jurisdictions have published Guidelines on the Legislation Review that cover material contained in these Guidelines. In addition the Council of Australian Governments' Principles and Guidelines for National Standard Setting and Regulatory Action apply to national reviews and to national proposals for new regulation that may include regulation of the professions. The Guidelines contained in this document complement and support these Guidelines, some of which, including the COAG Principles and Guidelines on National Standard Setting and Regulatory Action are binding. The Guidelines below may be cited in the terms of reference as either an additional source of guidance for conducting reviews or as a requirement on reviews. Such decisions will depend on the circumstances of the review.

These Guidelines do not contain standards for review. Assessment of the standard of a review would normally be done by reference directly to the commitments contained in the Competition Principles Agreement. Similarly, the publication of these Guidelines does not require a reassessment of completed reviews.

Reviews will draw on a range of expertise, including economic, legal, public policy and disciplines specific to the legislation under review. However, the framework for review has a strong economic flavour. The Guidelines seek to be both accessible and comprehensive when outlining concepts such as market failure. The Guidelines contain a glossary and a number of tables to illustrate the review steps.

Acknowledgement

The Committee would like to acknowledge the efforts of Professor Glenn Withers and Ms Marion Powall who prepared the draft of these Guidelines.

EXECUTIVE SUMMARY

GUIDELINES FOR REVIEW OF PROFESSIONAL REGULATION

1. UNDERSTAND THE CONTEXT FOR LEGISLATION REVIEWS

These Guidelines are concerned with the legislation review for the professions which is to be conducted under the Competition Principles Agreement. They acknowledge characteristic features to be found in professional practice and indicate the implications of these for legislative review.

The presumption under National Competition Policy legislative review is that legislative restrictions should be repealed (or not proceed) unless a public interest case to the contrary can be made. The onus of proof has been placed by governments upon those seeking to provide for restrictions on competition. The Policy presumes that in the majority of cases markets and not governments are the best regulators of economic activity. Unless there are specific circumstances that prevent a market from working efficiently the market mechanism should be preferred over the more costly, complex and limiting alternative of government regulation.

To assist with the conduct of any reviews applied to legislation for the professions, these Guidelines provide operational guidance for the process of examining legislative objectives, legislative impediments to competition, their public interest review and consideration of alternatives.

Naturally these Guidelines are indicative only and they are not exclusive. Particular reviews may choose other approaches where these may be more suitable. Conduct of the legislative reviews is the responsibility of each jurisdiction.

Where there is divergence in professional regulation between jurisdictions, this is accommodated by “mutual recognition”.

2. OVERVIEW THE PROFESSIONAL LEGISLATION BEING REVIEWED

In determining the scope of the review, it is necessary first to specify the actual principal and/or subordinate legislation being reviewed, and to list the key activities and functions which are regulated by that legislation.

Having a clear statement of the aims of the legislation will assist the reviewer to assess the extent to which the regulation has:

- effectively and efficiently addressed any problems which needed to be solved and so improved upon the outcomes of a competitive market; or, instead,

- put in place arrangements which restrict competition and yet produce outcomes which do not adequately address the defined problems.

It will also assist in determining whether there are alternative means available which better achieve those objectives.

The potentially restrictive nature of occupational regulation can be characterised in terms of the effects on the **structure** of the profession, *ie* the conditions of entry and organisation, and on the **conduct**, or behaviour, of the practitioners within that profession.

3. ASSESS THE NATURE AND SIGNIFICANCE OF THE MARKET FOR THE PROFESSIONAL SERVICES

It is necessary to start with some conception of what constitutes a profession. The emphasis here is upon competence and conduct. Competence is based upon high level skills, and conduct is based upon commitment to the wider community, the professional group and the client.

Where development and maintenance of professional competence and conduct standards are purely private in origin without legislative mandate, then they are self-evidently not a matter for legislative review under the National Competition Policy.

This paper is concerned with the consequences for the public interest of restrictions on competition arising from provisions in law controlling the structure and conduct of markets in professional services. Having a good understanding of the characteristics of the market for the particular professional services is an essential pre-requisite for undertaking the further analysis of the effects of the identified legislative restrictions on competition.

4. ASSESS THE NATURE AND SIGNIFICANCE FOR COMPETITION OF THE LEGISLATIVE RESTRICTIONS

Given the objectives of relevant legislation and knowledge of the particular professional market, the next step is to assess the role that the identified legislative impediment to competition has played in forming or conditioning the market. This involves examining the way in which the restrictions affect market structure and market conduct.

With the possession of high-level specialist knowledge and skills as one of the distinctive features of professional occupations, legislation to regulate the professions frequently includes provisions to restrict entry to professional practice to those who possess specified skills and knowledge.

The direct consequences of such restrictions on competition are likely to be higher prices to consumers, higher incomes for providers, reduction of consumption of such professional services, and reduction in some variety, service innovation and in adaptability in meeting changing needs and opportunities.

In a number of professions, the ownership and business structure of professional practices are subject to legislated restriction. In particular, members may be required to practise as individuals

or in partnerships, and in some professions members may be prevented from entering into partnerships with non-professionals.

Overall, such ownership and structural restrictions have the potential to impede professionals from developing full efficiencies in business, and to prevent the formation of practices with individuals who may provide services to both the practice and the public.

Where professional occupations desire to be recognised as possessing a distinctively high level of individual personal conduct, rules or codes of conduct are often adopted to govern the relevant behaviour of their members. If legislated legal sanction does directly or indirectly provide for this, there is then a need for such activities to be carefully assessed for their impact on competition.

Such mechanisms can either reduce or limit the supply of competitive service providers (*eg* licence cancellation) or limit the methods of competition by which providers compete.

Controlling the market behaviour of professional groups through restrictions on advertising and service promotion are further common restrictions on competition to be found in regulation provisions for professions. Restrictions on professional advertising can make it more difficult for clients to obtain relevant non-technical information about the availability, quality and price of services provided by competing practitioners.

The review should also establish the extent to which any fee scales apply and are restrictive, *eg* whether an individual practitioner is able to charge less or more than a specified scale without penalty, and whether they are prohibited from advertising the fact that they charge less or more than the recommended fee scale. It may be that few such arrangements remain in contemporary Australian legislation, though some are evident, *eg* surveyors.

The separate examinations of each of the identified legislative restrictions on competition should be brought together to provide an overview of the competition impact of the legislation.

5. ADDRESS THE NATURE AND SIGNIFICANCE OF LEGISLATIVE RESTRICTIONS FOR MARKET FAILURE AND OTHER PUBLIC INTEREST CONCERNS

In matters of review for purposes of National Competition Policy, what is required for appraisal of benefits and costs of a legislative provision which inhibits competition is to:

- examine the extent to which an actual industry or service area would be likely to diverge, when unconstrained, from the competitive market benchmark; and
- examine the extent to which there are distributional or other public interest concerns likely to operate in the area concerned.

Legislation review of professional markets will need to identify legitimate reasons for legislative intervention by governments. These arguments can then be mapped to assess correspondence to the various forms of market failure, with especial attention to any which may be thought to be quite likely or even common in professional service markets. The arguments should also be

mapped, as applicable, to the other public interest criteria, with especial attention to those predicted to be particularly relevant for professional service markets.

The main objective for the group of **restrictions on entry** to a profession is likely to be to address the issue of information asymmetry in the professional services market. It is often argued that consumers lack sufficient education to evaluate certain professional services.

There may be several objectives for **legislative restrictions on the ownership and control of professional businesses**. A frequently stated purpose is to reduce the potential focus of the practice on commercial relations, as opposed to professional matters, which is likely to arise where third parties are involved in a practice.

The group of **restrictions on professional conduct and standards** is also aimed especially at addressing the problem of information asymmetry in the market, by providing mechanisms for enabling quality control of professional services, and to facilitate wider distributional or social equity concerns.

The main objectives for **restrictions on advertising** are to ensure that consumers choose a professional service on the basis of quality, and not on price. It is argued that advertising could be misleading to consumers as the services can be complex and consumers lack sufficiently detailed knowledge to make an informed comparison between providers.

The main market failure objective which could be met with any **restrictions on fees charged** is to remove the potential risk to consumers that price-cutting will lead to a lower quality of service and a reduced range of services available. They are more common where services are government funded.

Restrictions on competition that result from arrangements between professionals and are not compelled by legislation will be regulated by the Trade Practices Act.

6. ANALYSE THE COSTS AND BENEFITS OF THE LEGISLATION

This section provides the analytical framework to assist the reviewer to fully assess the extent to which the restrictions on competition address market failure and other public interest criteria effectively, and thereby improve on the outcomes of an unfettered market.

The analytic framework is essentially that of benefit-cost analysis. This refers here to the systematic documentation of the flow of all relevant costs and benefits over time that are associated with each regulatory provision that restricts competition, including explicit allowance for risk.

If the legislative restriction produces a benefit-cost ratio greater than one, a necessary condition for the restriction is met. If the ratio is greater than one and greater than for all alternative options, then a sufficient condition for the restriction to be retained is met.

The sequence of steps provided in sections 6 and 7 is consistent with Clause 5(9) of the

Competition Principles Agreement. However, in practice, once the review has established that the restrictions pass the threshold test outlined in sections 2 and 5, reviewers may be more likely to identify alternatives to the existing restrictions than proceed to analyzing the costs and benefits of each alternative against the existing legislative arrangements.

7. IDENTIFY ALTERNATIVE MEANS OF ACHIEVING THE POLICY OBJECTIVE

Professional regulation to control entry and to control conduct has arisen as a response to market failures, especially in the area of asymmetric information, as well as for the other public benefits. However there is a range of options to achieve objectives which need to be considered for such markets before options that would restrict competition.

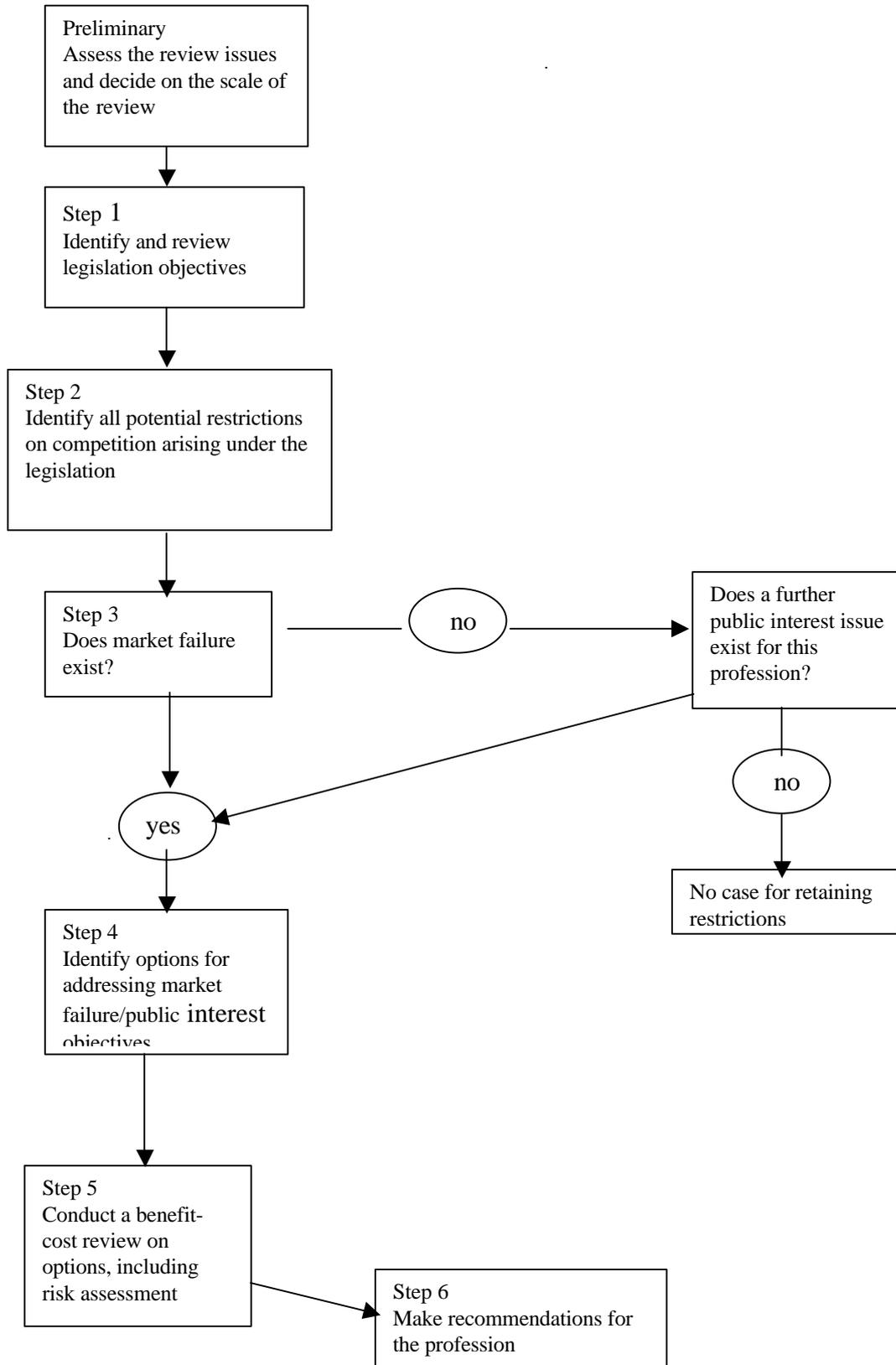
Where a problem has been identified in a particular professional service market, the response which involves least intervention and cost to achieve is preferred. Thus, in the first instance, the following question should be asked: Will the existing general laws be adequate to deal with the problem? Will private individuals have sufficient incentive and means to adequately deal with the problem?

If, after careful consideration, the response is that none of these options meets the public interest objective, then reviews should consider direct professional government intervention again, in the order of least disturbance to the market and least cost of provision, consistent with meeting the need.

Each completed review should conclude with a series of recommendations which achieve the economic and broader public interest objectives of the legislation with the least restriction on competition.

FIGURE 1

MAIN STEPS IN LEGISLATION REVIEW OF PROFESSIONS



1. UNDERSTAND THE CONTEXT FOR LEGISLATION REVIEWS

(a) Competition Policy

1.1 In Australia over recent years there has been an increasing tendency to require each sector of the economy to experience more competitive market conditions. From agriculture to mining to manufacturing and then utilities and increasingly the service sector, there is a seemingly inexorable process and sequence.

1.2 A benchmark in this process was the adoption by all State and Territory Governments and the Commonwealth Government of a National Competition Policy (NCP) package, on 11 April 1995.

1.3 This package comprised three agreements:

- the Competition Principles Agreement (CPA) which consists of six areas of competition reform - prices oversight for government business, structural reform of public monopolies, competitive neutrality, legislation review, access to essential infrastructure and application of competition principles to local government;
- the Conduct Code Agreement which commits all parties to uniform competition law which is established in the revised Part IV of the Trade Practices Act (TPA). Under the revised TPA, government agencies, corporations and professional bodies (ie. all persons carrying on a business) are now subject to competition law; and
- the Agreement to Implement Competition Policy and Related Reforms which commits all parties to a timetable for reform. It also commits the Commonwealth to making substantial payments to the States and Territories, subject to their meeting agreed milestones for the reform agenda and timetables.

1.4 These Guidelines are concerned with the legislation review for the professions which is to be conducted under the Competition Principles Agreement. However the wider NCP context is important here because it points up that:

- any review of professional regulation is not isolated or selective, but rather is part of a fully comprehensive economy-wide policy agreed by all governments;
- unless legislative exemptions do apply, professions are now subject to the full provisions of the TPA on a uniform national basis; and
- governments have a clear timetable for review (including review of legislation for the professions) and also clear financial incentives to comply with that timetable and to conduct objective and rigorous reviews and to implement reform promptly.

1.5 These Guidelines acknowledge characteristic features to be found in professional practice and indicate the implications of these for legislative review. But, as required by the CPA, they do not accept that there is a sufficient degree of difference in this or any other area that warrants exemption from the competition policy process, particularly recognising that the review process

incorporates a full range of public interest review provisions.

1.6 In relation to legislative review itself, it should be made clear that this applies to new legislation as well as to existing legislation, and that legislation includes all Acts, Regulations, Rules, Proclamations, Notices, Amendments and By-Laws. The timetable requires review of some 2000 pieces of legislation **and** the implementation of consequent reform by December 31, 2000.

1.7 Competition is a process of rivalrous behaviour in a market and operates more effectively where there are many actual or potential buyers and sellers. The objective of the National Competition Policy is to better use such competition as a means to enhance material living standards and to improve social and environmental outcomes for the nation. Competition here is seen as a means, and not as an end in itself. Increased competition therefore is to be adopted only in so far as it increases public benefit overall.

1.8 Nevertheless, the presumption under NCP legislative review is that legislative restrictions should be repealed (or not proceed) unless a public interest case to the contrary can be made. The onus of proof has been placed by governments upon those seeking to provide for restrictions on competition.

1.9 Clause 5(1) of the CPA provides that:

‘The Guiding Principle is that legislation (including Acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:

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

1.10 The approach is predicated on the presumption that there should be no restrictions on competition unless they can be shown to be in the public interest, and that those restrictions are the most appropriate way of meeting the objectives of the legislation. Thus, a public interest defence is a necessary, but not sufficient, condition for retention of legislative restrictions: if the policy objectives can be better achieved by other means, then the restrictions **must** be removed, even if they are in the public interest.

1.11 The balancing of public benefit and public costs is the ‘public benefit test’ in legislation review. Clause 5 (9)(c) of the CPA requires that competition and economic impacts be analysed in this respect. And Clause 1(3) provides guidance on these **and** other kinds of effects of a legislative restriction which may be taken into account. It says that, without limiting other matters, the following shall, where relevant, be taken into account:

- ‘ (a) government legislation and policies relating to ecologically sustainable development;
- (b) social welfare and equity considerations, including community service obligations;
- (c) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- (d) economic and regional development including employment and investment growth;

- (e) the interests of consumers generally or a class of consumers;
- (f) the competitiveness of Australian businesses; and
- (g) the efficient allocation of resources.’

1.12 Clearly a wide array of social and environmental concerns are expected to be considered along with more narrowly economic criteria in arriving at an assessment of overall benefits and costs. Since these are in the Competition Principles Agreement and its enabling legislation they are taken as given for these Guidelines.

1.13 While the CPA does not provide detailed guidance on how to conduct a review which makes this assessment, Clause 5(9) indicates that:

‘Without limiting the terms of reference of a review, a review should:

- (a) clarify the objectives of the legislation;
- (b) identify the restriction on competition;
- (c) analyse the likely effect of the restriction on competition and on the economy generally;
- (d) assess and balance the costs and benefits of the restriction; and
- (e) consider alternative means for achieving the same result including non-legislative approaches.’

(b) Purpose of the Guidelines

1.14 To assist with the conduct of any reviews applied to legislation for the professions, these Guidelines provide operational guidance for the process of examining legislative objectives, legislative impediments to competition, their public interest review and consideration of alternatives.

1.15 The purpose of these Guidelines is to provide a clear specification of the process steps required for reviews of State and Territory legislation for professional regulation in accordance with the Agreement and the Guiding Principle (see 1.9 above). They are intended to inform not only the review teams themselves, but also government officials, competition-related agencies and professional groups.

1.16 Governments have developed general guidelines, or manuals, for the conduct of legislation reviews. These typically include matters such as the process for initiating a review, who is to undertake the review, the reporting arrangements, and the processes for consultation with stakeholders and the community in general. Such matters are not covered in this present paper. An Appendix provides a list of contacts for obtaining the relevant Guidelines in each jurisdiction.

1.17 The Guidelines here apply the Competition Principles to the review of particular groups of activities in the area of professional services. The key steps are summarised in Figure 1.

1.18 While these are the common core components for all reviews, and the Guidelines follow this framework, they are not intended to limit what is examined in any particular legislative review. A government may choose to include additional matters in the review, and these would be incorporated into the terms of reference.

1.19 These Guidelines provide a comprehensive ‘template’ for reviewers, taking a logical, step-by-step approach to covering the core terms of reference, and customising it to specific professions. Examples of professional regulation are used to illustrate the application of the methodology, though the structure and approach must conform to that applicable for all legislative review and so has drawn upon the general guidelines in the various jurisdictions.

1.20 The focus is upon the professions but the approach may extend to some other occupations. Boundaries for delineation of the professions are blurred and some other occupations, *eg* trades, will share some similar characteristics. Equally, in many professional activities the line between professional and business activity can be ill-defined, so that some business dimension of professional service markets will at times intrude despite a desire to maintain a separation.

1.21 Naturally these Guidelines are indicative only and they are neither exclusive nor mandatory. They are a reference. Particular reviews may choose other approaches where these may be more suitable. Also, the Guidelines outline a comprehensive model of legislation review. This will not be required in all cases, and many reviews will not justify a ‘de luxe’ approach. Such threshold issues as the nature of the review and the resources to be committed need to be determined very early on in the review process and will guide how far a comprehensive approach is required.

1.22 It is also important to stress that these key ‘threshold tests’ apply in the sequence illustrated in Figure 1, including: clear relationships to objectives; existence of market failure or public interest issues. There is no need to examine benefits and costs if these threshold tests are not met.

(c) The National Dimension

1.23 Conduct of the legislative reviews is the responsibility of each jurisdiction. At present, where there is divergence in professional regulation between jurisdictions, this is allowed for by a “mutual recognition” process. This has applied since the Mutual Recognition Agreement was adopted by the newly permanent Council of Australian Governments (COAG) meeting in May 1992 (effective March 1993). The Agreement provides, in its second principle, that:

‘if a person is registered to practise an occupation in one State or Territory, he or she should be able to be registered to practise an equivalent occupation in a second State or Territory.’

1.24 Mutual recognition falls short of national uniformity, partly because national uniformity is likely to be much harder to achieve, because there are situations where divergence for local circumstances could be justified, and also because it can be argued that uniformity can inhibit improvements through regulatory competition, benchmarking and innovation. For instance in some regulatory areas South Australia has been testing negative licensing, (*eg* land salespersons), just as the Commonwealth has been testing co-licensing (*eg* migration agents) and Tasmania has been testing zero statutory registration for builders. A uniform scheme might make it difficult to establish costs or benefits of such alternatives.

1.25 On the other hand, concern has been expressed that differences can lead to ‘jurisdiction shopping’ in pursuit of the lowest standards for entry and that this, particularly if accelerated by

competition policy review, could undermine mutual recognition. The Mutual Recognition Acts have sought to meet this concern by providing an explicit mechanism of referral to a Ministerial Council if any registration authority has concerns about the competency of persons registered in another jurisdiction. However, some Ministerial Councils do not well reflect the occupational area and may only meet infrequently.

1.26 In the meantime the increased exchange of information between registration authorities under mutual recognition has itself operated in some areas as a source of pressure for uniformity based on enhanced information, *eg* medical practice.

1.27 The biggest problem of full national uniformity may be factually determining the correct common level to apply to all and in obtaining agreed future change to any such level by all governments, as knowledge, circumstances and experiences change. For instance, it is reported that a Queensland legislation review of barley marketing restrictions reached somewhat different conclusions from a joint South Australian-Victorian review. To rely on a single analysis for a uniform national outcome may therefore miss some benefits which can accrue from competition in a competitive review itself.

1.28 These Guidelines represent a further basis for some increased consistency, though not necessarily uniformity, where that is justified by rigorous analysis of the costs and benefits to the community. Use of a common framework and standard procedure will enhance prospects for justified convergence.

1.29 However it is beyond the specified task of the Guidelines to further develop Mutual Recognition issues, as these are the subject of a separate analysis being conducted by a Committee on Regulatory Reform Review Group commissioned in September 1997.

1.30 Of course where multi-jurisdiction reviews are agreed, whether directly between governments or under the aegis of the National Competition Council, the Guidelines given here can still apply. They do not necessarily presume that multiple reviews will occur. In the end reducing the costs and delays of separate reviews and of disrupting existing agreements needs to be set against the risks of basing recommendations on a single assessment process. This balance may vary from one field to another.

2. OVERVIEW THE PROFESSIONAL LEGISLATION BEING REVIEWED

(a) Specify the Legislation being Reviewed

2.1 In determining the scope of the review, it is necessary first to specify the actual principal and/or subordinate legislation being reviewed, and to list the key activities and functions which are regulated by that legislation. Legislation includes Acts and subordinate legislation such as Regulations, Rules and By-laws, etc, and these should all be specified.

2.2 Many of the professions' activities are regulated not just by the principal act in the relevant state or territory, but also by other state and Commonwealth legislation. For example, state legislation in the business regulation, consumer affairs or fiduciary areas may also apply a measure of regulation to the professions, and should be noted in the review. The common occurrence of self-employment, partnerships etc in markets for professional services is one reason for this.

2.3 Reviews need to give careful consideration to those professions where a government-funded program, provided for in other legislation, can also affect the market structure. For example, while a state reviews its own medical practitioner registration act, it needs to be aware of the broad impact of the Commonwealth's Health Insurance Act (1973), and its subsequent amendments, on the profession (such as subsidising the cost of medical services, and controlling doctors' access to Medicare provider numbers). In the market for medical services, both the government, through the Medicare scheme, and patients/consumers themselves, are purchasers of services. Where the government is a dominant purchaser, legislation may simply support the purchasing arrangement rather than regulate private purchasers and suppliers. For example, a statutory registration scheme may in effect provide supplier accreditation. Similarly, legislative reviews may need to consider other legislation which regulates specific components of practice across a range of professions, *eg* drugs, poisons and controlled substances legislation sets out the prescribing rights for pharmaceuticals. Or again, legislation on radiation hazards may impact especially upon the form of legislation required for dentists and related occupations.

2.4 A broad area of consideration would also be legislation covering complementary, and/or substitute professions, where the restrictions on one have a direct impact on the way in which the other operates, *eg* nursing and medical practitioner legislation. Some reviews may acknowledge this and seek to examine closely related professions as a group. For example, the Queensland Government has embarked on a review of its medical and health practitioner registration Acts, covering 12 Acts and 17 sets of subordinate legislation. Alternatively, the related groups could be taken into account incidentally as they influence analysis of a single profession. This is a matter for the initial terms of reference commissioning the review, **but** reviewers should clearly specify the items of legislation they are reviewing, and distinguish this from related legislation that may impinge.

2.5 Where it is judged that the related legislation has a major impact on the legislation to be reviewed, for example where it establishes government as a purchaser in the market, the impact may be of a sufficient magnitude to warrant an initial scoping study to establish whether review and reform of a particular piece of legislation can be undertaken consistent with the presence of government as a purchaser in the market. In addition, reviewers should note any existing

government commitment to repeal the registration of partially registered occupations which may be operating in the same service market as the profession(s) whose legislation is being reviewed against the NCP.

2.6 These Guidelines focus on the legislation to be reviewed. They do not provide any guidance for undertaking a review of extra-legislation aspects of the profession or of policy. This is not to say that review can ignore broader dimensions of the market under consideration not the numerous non-economic dimensions of the public interest. These are likely to be involved in any review. But where the terms of reference provide for any consideration of matters beyond those required for competition policy review of legislation, separate guidance needs to be sought beyond this paper.

Key Questions to ask about the legislation:

What is the title of the legislation being reviewed?

Does it include amendments?

What subordinate legislation is included?

What other state and Commonwealth legislation regulates this profession directly?

What other legislation closely relates to the operation of this professional services market?

What is the status of other related legislation under the competition policy legislative review process?

(b) Clarify the Objectives of the Legislation.

2.7 Having a clear statement of the aims of the legislation will assist the reviewer to assess the extent to which the regulation has:

- effectively and efficiently addressed any problems which needed to be solved and so improved upon the outcomes of a competitive market; or, instead,
- put in place arrangements which restrict competition and yet produce outcomes which do not adequately address the defined problems.

It will also assist in determining whether there are alternative means available which better achieve those objectives.

2.8 The objectives for the regulation of a particular profession or occupation are usually contained in the preamble (or 'recitative') of the relevant act. Where objectives are not spelled out in the legislation, the reviewer may need to infer the purpose or need for the regulation from official sources such as Cabinet Decisions, the Second Reading Speech, Ministerial Statements, and media releases. Secondary sources such as newspapers, academic articles, submissions and reports may assist in interpretation, but their status should be clearly defined.

2.9 Constructive comment on the wisdom and clarity of the legislated objectives is possible and suggestions for improvement may be made. In some cases the problems which the legislation was originally intended to address are historical, and the review should consider the extent to which

the original problem is still of concern today. For example, legislative restrictions on the practice of doctors and lawyers of a kind still sometimes in place today, were first introduced in Britain in the nineteenth century, as a response to then concerns about health and safety problems associated with medical practitioners, particularly surgeons, and concerns about widespread malpractice and corruption amongst solicitors. With the rise in modern times of alternative forms of protection through liability law (supported by legal aid), consumer protection legislation, extensive insurance markets and so on, with a much more educated and informed consumer population, and with increasing and globalised professional service markets, it is appropriate to revisit objectives in legislation and how they can best be achieved.

2.10 Equally, where objectives are implicit, scope for interpretation by the reviewer exists. That this is interpretation should be made clear and the need for explicit new legislative ratification should be canvassed. Reviewers may both clarify objectives of the legislation and consider their continuing appropriateness. Where it is agreed that the objectives are clear, relevant and appropriate, the task of the reviewer is then to evaluate achievement of the legislation's objectives as pursued through the restrictions on competition provided for in the legislation. Accordingly, clarity and comprehensiveness in the explication of the objectives will be one of the most important elements of any review.

2.11 Legislative regulation of a profession is commonly presented as being needed to advance and protect public interest considerations not taken into account adequately by private decision-makers. Legislation may seek to protect consumers from undue problems and risks resulting from 'market failure' in individual professional service markets. The most common broad areas of market failure relevant to professions are identified as:

- monopoly – as when professional associations seek to engage in restrictions on competition in relation to the conduct of their members *eg* fee setting;
- public goods or spillovers – for example, when the activities of professionals influence public health and safety such as in control of infectious diseases or ensuring the safety of public infrastructure;
- information asymmetry – where clients may lack the expertise to judge effectively the quality of the professional services provided; and
- disequilibrium – when the long training process required for professional expertise can lead to ongoing problems of shortages and surpluses of skills needed for meeting community demand.

In addition, non-market public interest criteria are identified as:

- equity, access, social welfare and public safety – such as high costs of professional expertise precluding disadvantaged groups from obtaining necessary service; and
- broader competitiveness and industrial development criteria –for example, ensuring adequate provision of technical and scientific skills to underpin industrial competitiveness.

The nature of these criteria and their detailed application to legislation review for the professions is developed below.

Key Questions on the objectives:

What are the stated objectives of the regulation of the profession?
Where are these formally stated?
If not clearly stated, what are the inferred objectives?
How were objectives inferred?
Is there a need for legislative clarification or modification of objectives?

(c) Identify Provisions with a Negative Impact on Competition

2.12 The next step is to identify those provisions in the legislation which impose restrictions on the individual market for professional services. These are legislated restrictions upon competition that alter market competition processes from their otherwise unconstrained operation. This may apply to potential competitors, providers, clients etc. For example, a patient may not approach a specialist medical practitioner without a referral from a general practitioner, and a client must not approach a barrister without referral from a solicitor. Sanctions supporting these provisions apply to providers, but equally affect the behaviour of consumers who are aware of these restrictions. Thus a reviewer should recognise that in identifying legislative impediments to competition, the impediment may involve parties in the market beyond the professionals themselves. It may also involve potential market participants excluded from the market by the presence of restrictions.

2.13. The potentially restrictive nature of occupational regulation can be characterised in terms of the effects on the **structure** of the profession, *ie* the conditions of entry and organisation, and on the **conduct**, or behaviour, of the practitioners within that profession.

2.14 Some common examples of **structural restrictions** found in professional regulation are

- specific requirements on an individual's entry to the profession, *eg*
 - knowledge /skills (*eg* a specified qualification from a tertiary institution)
 - character/probity (*eg* absence of criminal offence; not bankrupt)
 - apprenticeship (*eg* a period of supervised practice such as 'articles' for lawyers; hospital 'internships' for doctors)
 - registration (*eg* most registration boards in the health professions require a person to be medically fit and to have a sound knowledge of English before they can practise; 'conditional registration' for certain categories within a profession such as students or academics)
 - fee payment (*eg* most boards require payment of an initial registration fee; some require payment of a fee for annual re-registration)
 - requirement to have professional indemnity insurance (*eg* solicitors, builders)
- reserved areas of practice for licensed and certified professionals, *eg*:
 - some jurisdictions do not permit non-lawyers to do conveyancing work;
 - a dental prosthesisist may not supply and fit a partial denture without an oral health certificate (supplied by a dentist)
 - restricted right to use a title (*eg* 'doctor', 'architect', 'veterinary surgeon')

- limitations on consumers' access to facilities
 - access to the court system is first through a solicitor and then through referral to a barrister
- re-registration requirements
 - continuing education (*eg* lawyers)
 - maintaining continuity of practice for a specified period of time (*eg* nurses in most jurisdictions)
- functional splitting/market segmentation
 - lawyers divided into solicitors and barristers
 - the medical specialities
- restrictions on business ownership and partnerships
 - only a registered pharmacist can own a pharmacy business, and the business cannot be incorporated
 - prohibition on sharing business profits with a non-professional (*eg* solicitors)
 - set proportion of business partners to be of a particular profession (*eg* architects)
 - requirement that barristers be sole practitioners.

2.15 Some examples of legislative restrictions on the market **conduct** of professionals are:

- prescribed professional and ethical standards, and related disciplinary procedures and sanctions
 - a binding code of conduct
 - inhibitions on referral of clients to other professionals
 - professional indemnity insurance and other fidelity requirements
 - disciplinary processes and sanctions, including de-registration, for misconduct
- regulations which impose or oblige recommended fees for professional services
 - use of fixed price scales
- prohibitions on advertising, promotion and solicitation of business.

2.16 Legislative Reviews should identify which of the above restrictions, or any others, are present in the specific legislation under consideration, and the extent to which they are mandated or discretionary (*eg* whether the relevant clause in the legislation is prefaced by the word 'must' or 'may'):

- for example, in Queensland, occupational therapists, speech therapists and podiatrists 'may' form partnerships with a range of like practitioners, but 'must' have the name of their business practice approved by the registration board;
- in Western Australia, an architect 'must' have the content of an intended advertisement approved by the registration board; where an architect fails to do so, the board has the discretion to impose one or more of the following sanctions - a reprimand, fine, suspension or deregistration.

2.17 Legislative review should specify how the legislative provisions are to be administered. For example, the legislation may provide for the appointment of a registration board to undertake the administration of all or part of the regulation. The review should list those features (*eg* structure, appointment procedures, composition, powers and functions) which are contained in the legislation. The review should also note any provisions whereby a professional association undertakes regulatory functions which are formally recognised in the legislation (*eg* setting standards for individual admissions to a profession and issuing the licenses to practise, as in medicine and law).

2.18 The focus in legislative review is upon the provisions made in law for professional regulation. As such, administrative discretion and decision-making by professional bodies are not within the formal requirements of the National Competition Principles, but may be considered by reviews in some jurisdictions. In such cases the review may examine how discretion applies in relation to independence, use of criteria, onus of proof, right of review, consumer participation *etc.*

2.19 The reviewer will find it helpful to obtain comparative information about regulation of the profession, and its main competitors in the market, from other state jurisdictions. Broader information can sometimes be obtained from the Commonwealth Trade Practices Commission's Studies of the Professions, which include reports on architecture, accountancy and law. Overseas professional regulation may provide further information, particularly in relation to experience not found in Australia, *eg* deregulation, alternative forms of regulation.

Key Questions on legislative restrictions on competition:

What components of this legislation have an impact on competition?

Are these provisions mandatory or discretionary?

What are the powers/functions etc of the administering body?

What is its structure and composition?

Who appoints members?

What is the formal relationship with a state/national professional association?

How do these provisions compare with other Australian jurisdictions?

How do these provisions compare with relevant overseas provisions?

3. ASSESS THE NATURE AND SIGNIFICANCE OF THE MARKET FOR THE PROFESSIONAL SERVICES

(a) Markets for Professional Services

3.1 It is necessary to start with some conception of what constitutes a profession. According to Dr John Webster (1997) Chair of the Competition Policy Committee of the Australian Council of Professions, a profession is characterised by the following attributes:

- ‘(a) a requirement for special knowledge and skills in a widely recognised body of learning, derived from research, education and training at a high level;
- (b) a high requirement that practitioners exercise their knowledge and skills in the interests of others;
- (c) standards of competence and conduct that are established and enforced by an association or similar body which represents the profession as a whole and which operates under a charter or articles of association which define its gatekeeper role; and
- (d) adherence by practitioners to a code of conduct which includes requirements that they place the health, safety and welfare of the wider community ahead of any loyalties to clients, colleagues or the professions, and that they practice only within their area of competence.’

3.2 The emphasis here is upon competence and conduct. Competence is based upon high level skills, and conduct is based upon commitment to the wider community, the professional group and the client. The emphasis on competence, in terms of high level education, skill and training, has significant implications for the operation of professional service markets. It can mean that there is an asymmetry in information between professionals and their clients. Clients come to a professional precisely because they lack the same knowledge.

3.3 Moreover the knowledge is often conveyed on an inter-personal basis. This has a number of ramifications. It means that the service is often customised to meet the needs of the particular client. It also means that clients cannot easily ascertain service quality before they purchase the service. The contrast of such an ‘experience good’ is with a manufactured product which can be examined and inspected prior to purchase. This distinction can be one of degree, but it clearly holds as a broad contrast.

3.4 A further feature of professional service markets deriving from their competence base is that long training periods may be required in producing skilled professionals, with the possibility of market conditions changing between a decision to train for a profession and emergence as a practising professional.

3.5 These features of:

- information asymmetry;
- customisation;
- experience-based consumption; and

- lengthy training,

which relate to the skill basis of professional service markets, all have significant implications for regulatory concerns, to be discussed further below.

3.6 Also important is the fact that the embodied skill and personalised nature of professional service, can make the small firm (self-employees, partnerships etc) a common vehicle for professional business organisation. This means in turn that professional service markets, like the markets for trades such as plumbers and carpenters, may have many individual suppliers, in a manner quite divergent from, say, much commodity manufacturing in terms of scale. However, such small firm provision does, at the same time, overlap with matters of business and commerce that cannot be entirely separated from professionalism. Also, future trends under globalisation may well challenge further such traditional conceptions of professional service organisation. Large national and indeed global firms point the way already in areas such as accounting.

3.7 Some other professionals too have for some time not operated on a small firm business model. For example, professional engineers or nurses or teachers are rarely self-employed. Typically, they are employed by large organisations. Yet even as employees, the customised and direct service characteristics of professional work are likely to ensure a distinctive degree of autonomy, compared to many other occupations. Hence, again, the emphasis upon personal conduct – upon trust, integrity, honesty, probity – that is associated with traditional conceptions of the professions, applies irrespective of the employment status. It arises from the implications of the competence characteristics elucidated above.

3.8 Professional employees may also seek representation through trade unions, as bodies with standing for the determination of remuneration and working conditions under industrial law. As these are matters embraced by separate reform of industrial relations law outside National Competition Policy, such aspects of professions are not treated further here. Where a particular profession has legislative restrictions which may go beyond those provided in existing industrial law, these matters are discussed below, in section 5.

3.9 Professions also differ from many occupations in the extent to which their competencies and conduct are supported by government legislation, though this varies significantly from one profession to another, and from one jurisdiction to another. At one extreme, economists are an example of a professional group with high levels of systematic advanced education and training in a coherent body of knowledge and with commonly avowed commitments to advancing community interests, including ahead of client and personal interests. However they have no professional legislation, and membership of their professional associations is voluntary and open to all interested in economic issues. At an intermediate level professions such as engineers (though there are some registration provisions in NSW and Queensland) and accountants generally do not have legislated licensing requirements for practise or for use of occupational title nor sanctions to enforce standards backed by regulation. They do however have strict requirements for membership of their voluntary professional associations, both in relation to qualifications for entry and in relation to conduct. At the other end of the spectrum, lawyers and doctors have typically operated as professions with legislative sanction for their entry and conduct standards, and with direct or indirect legislative support for associated registration boards and/or their professional associations as key agents in implementing these requirements.

3.10 Outside the normal spectrum may be groups such as trades or even public servants who share many of the characteristics enunciated for the professions. Civil service executives, for instance, have high training, education and experience, exercise their skills for others and operate under legislated codes of conduct enforced by a gatekeeper body such as a Public Service Commission. To the extent of this commonality, principles enunciated here may also apply to other occupational contexts.

3.11 Where development and maintenance of professional competence and conduct standards are purely private in origin without legislative mandate, then they are self-evidently not a matter for legislative review under the National Competition Policy. They may or may not be a matter for trade practices attention by the Australian Consumer and Competition Commission under the 1996 extension of such law to the professions. But that is not the direct subject of these Guidelines for legislative review. This paper is concerned with the consequences for the public interest of restrictions on competition arising from provisions in law controlling the structure and conduct of markets in professional services.

3.12 The issues for consideration in the broad relate to a potential conflict between an elevated conception of the professions, operating in partnership with legislatures to advance the public interest, and an alternative more cynical view that emphasises self-interest, monopoly and protection. According to the Australian Council of Professions:

‘There is a significant public benefit in the maintenance of the highest levels of professional practice in this country and the concept and pursuit of “professionalism” is essential to meeting the needs and aspirations of each and every citizen, thus contributing to the preservation of the social fabric’.

By contrast, the *Sunday Times* once opined:

‘It is regrettable that the public has to be on its guard whenever an occupation sets out to establish its status as that of a profession. For one thing, customers tend to be transformed into clients, which means that pounds are automatically converted into guineas.’

3.13 Of course it is possible that both conceptions have elements of truth. If so, the balance for the public interest is what review of legislative impediments to competition is meant to assess. Some may not fully appreciate the potential for a proper public interest focus, and instead mistakenly aver that legislative reviews of the professions are being undertaken with the predetermined outcome of removing any and all restrictions to competition

3.14 But it does remain true that the onus is upon those who wish to retain or impose restriction to make that case, and that the content of some broader elements of the public interest are ill-defined relative to the tight definition of competitive benefits (and, it must be said, of market failure). Of course, lack of tight definition could be said to favour, not hinder, creative public interest argument and, at times, such an approach might even have the blessing of Adam Smith, who said in the *Wealth of Nations*:

‘ We trust our health to the physician, our fortune and sometimes our life and reputation to the lawyer and attorney. Such confidence could not safely be reposed in people of very low or mean condition. Their reward must be such, therefore, as may give them that rank in society which so important a trust requires.’

(b) Defining and Describing the Particular Market

3.15 Having a good understanding of the characteristics of the market for the particular professional services is an essential pre-requisite for undertaking the further analysis of the effects of the identified legislative restrictions on competition.

3.16 Careful description of the particular market will help to ensure that the assessment is appropriately focussed, and does not unnecessarily limit or expand the scope of the examination. The Australian Competition Tribunal (formerly the Trade Practices Tribunal) has described a market as:

‘...the area of close competition between firms or, putting it a little differently, the field of rivalry between them (if there is no competition there is of course a monopolistic market). Within the bounds of a market there is substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong competition, at least in the long run, if given a sufficient price incentive’.

3.17 This is a standard definition of a market and, given Competition Tribunal endorsement, can be used as an initial guide for legislative review purposes. For example, the market for an architect’s services could be defined broadly as ‘the market for building services’, and would include a wide range of other professional and occupational groups such as engineers, draftsmen, surveyors, landscape architects, builders, project managers, valuers, bricklayers, concreters, plumbers, carpenters and so forth. A narrow definition would be ‘the market for architectural design services’, covering architects, landscape architects and design engineers. A somewhat intermediate definition is that of ‘the market for building design services’, covering the occupational groups of architects, landscape architects, architectural draftspersons, interior designers, builders, building consultants, design engineers, project managers and quantity surveyors. The last definition was used by the then Trade Practices Commission (TPC) in its 1992 report *Architects*, as it best met the following criteria for defining a market for services, in the view of the Commission:

‘The market for a particular class of services includes those services which are substitutable for, or otherwise competitive with, those services, either in production or consumption.’

The key concept here is ‘substitutability’. A competitive market requires easy substitution between suppliers. This may be on the basis of quality or product differentiation, as well as occurring in response to price. If it is difficult to turn to an alternative supplier of same or alternative services that meet the customer’s need, then competition is inhibited. Close substitution implies strong competition. Weak substitution indicates poor competition. A search

for a notable gap in the chain of substitutes is one way of delimiting one market from another.

3.18 A related concept is ‘complementarity’. This refers to a tendency or even requirement for one service to be delivered in conjunction with another, *eg* medical and nursing care, medical practice and pharmacy practice, senior and junior counsel. Where such close complementary links exist, activities in one market can affect those in the complementary market. In this case the effect of restrictions could be transmitted, but the remedy may lie in a different area, *eg* legislation for another profession. A review will need to be aware of these linkages in defining its own market focus.

3.19 In determining which definition of the scope of the market is appropriate to the professional legislation review being undertaken, it may be appropriate for reviews to describe clearly the nature of the market, in terms of the following parameters:

- identify the product or products which the profession produces
 - *eg* architects produce building and house plans which are sold to owners/builders; and
- the range of professional/occupational groups which provide that product(s)
 - *eg* qualified architects (regulated) and qualified draftspersons (unregulated)
- locate the market within the production process;
 - both architects and draftspersons sell skills in different segments of the same labour market to builders/developers;
 - builders/developers sell project homes in the product market to home buyers
 - architects/draftspersons may extend their operation down the production chain to the product market and sell plans as final products to owners/builders.

3.20 Having described the service market, and listed the professional and/or occupational groups which supply the services, the assessment could also provide some comparative data on the supply of services such as:

- number of licensed/registered providers in each group (and specialist subgroup) , over time
- education and skill qualifications of providers
- income ranges for providers
- costs of services
- number and size of businesses (employee numbers)
- business turnover
- services provided
- personal characteristics of providers, *eg* age, gender, ethnicity
- geographical location of providers.

3.21 Suitable data are often available from the annual reports of the relevant licensing authority or professional board. National data compiled from the other states and territories can provide a useful benchmark against which to compare the trend in the supply of professional services in a

given jurisdiction. The Australian Bureau of Statistics provides a range of data which provide insight into the nature and significance of particular professions and should be approached. As well as general sources such as the Census, Labour Force Survey, Household Expenditure Survey, Small Business Survey etc, which provide relevant data, the ABS also provides reports on particular professions, *eg*:

- Legal and Accounting Services, Australia (8768.0)
- Consultant Engineering Services, Australia (8693.0)
- Private Medical Practice Industry, Australia (8585.0).

The Annual Reports of the Australian Taxation Office also can provide income and cost data, especially for self-employed professionals.

3.22 Some professions have identifiable characteristics, *eg* the health professions tend to have a predominance of single practitioner businesses; legal services are an almost equal mixture of single practitioner businesses (the suburban solicitor) and multi-practitioner businesses (major legal firms with a range of specialists operating in the corporate market). Any significant divergence in the market situation of a profession in a particular state indicates that those regulations which might have an associated impact on the supply of services should be closely analysed.

3.23 It is also necessary to have information about the demand for the services, including the size and significance of the market, and the characteristics of consumers. For example, the potential market for health services, including preventative/promotional services, is the entire population of Australia - both as individuals and as family groups. However, the demand for specialist medical services is predominantly from persons who are suffering identified ill-health. The demand for legal services is also wide-ranging, covering activities such as conveyancing, making wills and advocacy in the courts for individuals, as well as company and administrative law for large corporations. On the other hand, the demand for architectural services comes mainly from business enterprises, and, to a much lesser extent, from individuals, who are predominantly in the higher income brackets.

3.24 Also on the demand side, it is important to have some understanding of the socio-demographic characteristics of consumers. Issues of age, gender, ethnicity, geographic location and the like may be especially important in relation to assessing public interest considerations.

3.25 It is increasingly important in some professional markets to also consider dimensions of the market beyond even national borders. While the focus for many small professional firms is often local, there are in many professional areas increasingly national and international markets of relevance. And in such markets different professions may be increasingly in competition with each other *eg* law, accounting, banking. Trade in professional services is itself an increasing focus of international negotiation under the World Trade Organisation and in regional fora such as APEC. (Asia Pacific Economic Review, 1996)

3.26 Having examined the major dimensions which characterise the nature of the particular market for professional services, the review should proceed to provide an overall assessment of the significance of the market to the economy as a whole. This would embrace relative size of the market in output and employment, linkages with other sectors, including commercial sector,

important for industry competitiveness and the centrality of this market to the economy and broader social spheres. It is also important to assess the social and environmental implications of the market if these are likely to be involved in public interest concerns relevant to sustaining legislative restrictions on competition in some instances.

Key Questions on the market for professional services:

How many registered/licensed professionals are there in the state?

What are the income/fee ranges?

How many firms/enterprises/professional employees?

What are the sizes of the firms?

How do these compare to the profession in the other states?

What is the average turnover for the different size groups of firms?

What are the main consumer characteristics?

What is the relative size of the market nationally?

What is its share of total employment?

What are the main links with other professions and sectors of the economy?

What are the main social and environmental dimensions of the particular market?

4. ASSESS THE NATURE AND SIGNIFICANCE FOR COMPETITION OF THE LEGISLATIVE RESTRICTIONS

(a) Examine the Anti-Competitive Restrictions

4.1 Given the objectives of relevant legislation and knowledge of the particular professional market, the next step is to assess the role that the identified legislative impediment to competition has played in forming or conditioning the market. This involves examining the way in which the restrictions affect market structure and market conduct. That is, precisely how do these particular legislative restrictions operate so as to impede competition structure and competitive behaviour?

4.2 The commencing benchmark is the structure and conduct which characterises a genuinely or fully competitive market. In such a situation a range of providers will vie with each other for custom. A range of consumers in turn will choose from those rival producers, selecting the type and quality of service preferred at the lowest price on offer that is consistent with the standard chosen. Such competition has no selective restrictions on:

- who can provide goods /services;
- ownership and control of business;
- personal conduct of providers;
- advertising and other information provision;
- prices/fees charged for goods and services;

Where restrictions apply, they are those provided in law applying to all markets, *eg* corporate law, trade practices law, criminal law, industrial law.

(i) Restrictions on Who can Provide Professional Services

4.3 Section 3 above identified the possession of high-level specialist knowledge and skills as being one of the distinctive features of professional occupations. Correspondingly, legislation to regulate the professions frequently includes provisions to restrict entry to professional practice to those who possess specified skills and knowledge. Some regulations go further, and impose restrictions on the numbers of new entrants, the geographic areas where persons can provide a service, and which sub-groups can provide certain services within a profession. These are collectively referred to as “barriers to entry”. Types of restriction include:

- requirement to possess a specific licence to practise a profession and to perform specified professional services, and provision of penalties for unlicensed persons who seek to represent themselves as a member of that profession and. Obtaining a licence may include some or all of the following:
 - specified higher education qualifications
 - passing an examination(s)
 - supervised practice for a set period
 - demonstration of “good character”
 - membership of a specific professional association

- paying a fee
- there may be limited categories of licence with conditions imposed on the extent of practice.
- specialist licensing required within a profession, requiring some or all of:
 - specified graduate qualifications
 - passing an examination
 - supervised practice for a set period
 - membership of a specific professional association
 - paying a fee
- reservation of practice itself for designated professions or practitioners
 - restricts certain registered/licensed occupation groups in the market from competing with each other, *eg* a podiatrist may not practise physiotherapy; a veterinary nurse may not perform specified veterinary science duties; a licensed land broker may not undertake legal work
 - restricts work within a profession to a designated group, *eg* within the legal profession, only a barrister may represent a client in a court of law
 - specific limitations on practice within a professional service area, *eg* optometrists may not use surgery.
- requirement to re-register periodically, or to demonstrate continuing competence:
 - paying a fee
 - undertake continuing professional development/training
 - requirement to meet specified standards
- numerical quotas
 - limits on the numbers of individuals to be admitted to relevant required training
 - limits on the number of licences granted
- geographic requirements
 - recognises only those licences issued in a particular state
 - recognises a limited and specific range of overseas registrations/qualifications
 - mutual recognition
- restriction on the use of a title, *eg* ‘doctor’, ‘architect’
- limiting direct client access
 - requirement to obtain a referral from another professional first, *eg* a from a general practitioner to a medical specialist; from a solicitor to a barrister

4.4 Such regulations are designed expressly to restrict entry into a professional market and thus they reduce the range of providers who can compete for custom in meeting consumer service needs. The direct consequences of such restrictions on competition are predicted from standard economic theory of demand and supply to be higher prices to consumers, higher incomes for providers, reduction of consumption of such professional services, and reduction in some variety, service innovation and in adaptability in meeting changing needs and opportunities.

(ii) Ownership and Control of business

4.5 In a number of professions, the ownership and business structure of professional practices are subject to legislated restriction. In particular, members may be required to practise as individuals or in partnerships, and in some professions members may be prevented from entering into partnerships with non-professionals. These restrictions are often supported on the grounds of preserving the confidentiality and trust of the client/professional relationship, and reducing commercial pressures on the practice of the profession and reducing potential for conflicts of interest. This may or may not be true and is a judgement to be made by a review in an overall benefit-cost assessment. Such assessment is considered separately below, and needs to be considered along with reviews of alternative means of achieving these ends. For example, advice that could impact significantly on the income and wealth of clients may be of concern. It could be considered important that this be provided competently, as poor advice could financially ruin the individuals affected. Yet legal advice from lawyers on such matters is highly regulated by law, while advice from accountants or financial planners is regulated by the professions themselves without supporting legislation. Careful comparative analyses of costs and consequences of these options could be expected in a good practice review.

4.6 The first and prior step is simply the objective one of establishing and describing the fact and nature of the identified ownership or business control restriction and its impact on competition in the professional market. In these terms, prohibition or limits on forms of business ownership and structure do self evidently reduce the capacity for excluded business entities to be used as a comparative vehicle. The ‘degrees of freedom’ by which providers in such a market can compete are reduced. Further evaluation in relation to broader conceptions of the public interest follow separately and are dealt with below. However, note that one competition-derived case for considering legislative restriction on ownership could be that removal of prohibitions could lead to the growth of professional ‘chains’ or even provision of professional services in supermarkets where the associated market conditions of such large chains are highly concentrated or oligopolistic and hence themselves could be potentially anti-competitive. It cannot necessarily be assumed that removal of a legislative restriction produces competition. This requires further review of particular market circumstances.

4.7 Reductions in competition through business restrictions can take the following common forms, which reviewers should seek to identify and describe:

- restrictions on forming companies or partnerships with other professionals and non-professionals, *eg*:
 - prohibition on barristers acting as other than sole practitioners;
 - prohibition on lawyers sharing profits from legal practice with non-lawyers;
 - only persons with formal qualifications in pharmacy being permitted to legally own or operate pharmacies, (and prohibited from incorporation);
 - ownership of optometry practices being restricted to optometrists;
 - registration of architectural practices, with a requirement that two-thirds of the principals be architects;
- barristers can practise only from chambers approved by the Bar;

- practice name (or company name) to be approved by the licensing authority, *eg* podiatrists, dentists;
- other professions/occupations in the practice to be approved by the registration authority (*eg* occupational therapists); and .
- licensing of the premises, *eg* veterinary hospitals required to meet specified construction, fitout and equipment standards.

4.8 Overall, such ownership and structural restrictions have the potential to impede practice entities from developing full efficiencies in their business, and to prevent the formation of practices with individuals who may provide services to both the practice and the public. In particular, they can restrict persons with managerial skills, but lacking in professional qualifications, from substantial involvement in running certain professional businesses. Nevertheless in some markets they could serve to maintain atomistic competition when oligopoly is the most likely free market alternative.

(iii) Restrictions on Personal Conduct of Professionals

4.9 A second distinctive feature of professional occupations is the desire to be recognised as possessing a distinctively high level of individual personal conduct, especially in relation to ensuring:

- a high degree of detachment and integrity in exercising judgement on behalf of a client;
- honesty and propriety in fiduciary and personal relations with a client; and
- acceptance of collective responsibility for maintaining standards for the profession as a whole and for the community generally.

4.10 To protect the way a profession is viewed by the public, rules or codes of conduct may be established to govern the relevant behaviour of their members. Claimed breaches of these behavioural rules may be examined by a disciplinary mechanism (such as a tribunal) and findings of unprofessional conduct/malpractice can result in varying degrees of penalties being imposed. Penalties for breach can range from “warning letters” to the offending professional, fines, cancellation of the licence to practice for a specified period of time, restriction of practice to specified fields of the profession only, and permanent disbarment from the profession. Legislative review should identify the relationship between such rules of conduct and provisions of the legislation; for example, whether any code of conduct is contained in the subordinate legislation (*eg* the regulations), or whether a decision to suspend or cancel registration, a licence, practising certificate etc is legally enforceable.

4.11 Where legislated legal sanction does apply, there is then a need for such activities to be carefully assessed for their impact on competition. These activities include, but are not limited to:

- personal behaviour such as ‘not being of good character’, however defined;
- ethical guidelines/rules governing dealings with clients or other members of the

profession:

- restrictions on ‘touting’, or approaching the client of another provider without the other provider’s agreement;
 - not publicly criticising the practice of another professional;
- requirements for the maintenance of trust accounts and professional indemnity insurance.

4.12 Such mechanisms can either reduce or limit the supply of competitive service providers (*eg* licence cancellation) or limit the methods of competition by which providers compete. For example, rules enforcing ‘no touting’, or no public criticism of colleagues, mean that competition through providing information of this type to consumers is thereby limited to that extent.

4.13 Where restriction of conduct is not sanctioned by professional legislation but is adopted anyway within a profession, this may restrict competition. But that is not a matter for the legislative review process itself under the National Competition Principles Agreement. Rather it is a matter for separate consideration under trade practices law, just as if advertising is dishonest or misleading this too can be a matter for consumer protection law. Of course, if any such anti-competitive conduct could be shown to be better met by profession-specific legislative provision, it could be open to a review to recommend legislative amendment or new legislation for this purpose, where that also meets the objectives of the legislation and is not subject to other counter-vailing public interest offset.

4.14 The mechanisms available for handling consumer complaints and for hearing potential breaches of professional conduct under legislation should also be identified, and their composition and powers documented. It is particularly useful to be able to list the extent to which consumers are represented on any of these mechanisms and the extent to which the profession itself controls the processes. Any redress available to consumers whose complaints are upheld should be listed. Consumer satisfaction with the process could also be considered where such evidence can be obtained. The number and types of complaints and issues which are handled by the disciplinary bodies can provide an indication of the extent to which they are addressing market failure through the competitive restriction, or not.

4.15 A professional disciplinary body may operate in such a way as to appear to put the collegiate interests of the profession ahead of the consumer and public interest, which might undermine the purpose of legislative restriction. For example, the ACT Medical Board is reported recently to have taken four years to make a finding of misconduct against a surgeon who had falsified medical records after becoming aware of likely litigation by a former patient. The Board then took disciplinary action in the form of a reprimand. As the *Canberra Times* (30/8/1998) commented in an editorial widely read in the ACT:

‘Traditionally, professions regulated themselves. They acquired legal protections and privileges..... because they claimed that when they were doing so they were acting in the public interest and not in the protection of the doctors’ private interests. After this case, however, it is almost impossible to resist the conclusion that lay participation, public interest, public information and public accountability need to be injected into the ACT medical registration system.’

Similarly, in South Australia, solicitors disciplined by the Legal Practitioners' Conduct Board are not named in the Board's annual report or elsewhere and are therefore able, unless struck off, to go on practising without clients having any knowledge that their solicitor has been charged and found guilty of misconduct.

4.16 It is also useful to identify the extent to which matters handled under these professional disciplinary mechanisms are duplicating provisions more generally available under State or Commonwealth laws governing consumer affairs, trade practices and fraud.

(iv) Restrictions on Advertising

4.17 Controlling the market behaviour of professional groups through restrictions on advertising and service promotion are further common restrictions on competition to be found in regulation provisions for professions. These controls can be contained in the relevant registration acts, or in the rules of the professional body, as discussed above. Although there have been recent moves to reduce such controls in different professions, where they still exist they typically include requirements in relation to:

- the type of medium which can be used for advertising;
- the size, content and style of signs, nameplates, entries in newspapers, directories and stationery, including particularly any reference to fees and payment arrangements;
- the use of testimonials or endorsements;
- false, misleading or deceptive advertisements; and
- prior approval of proposed advertisements by the professional body.

4.18 Accurate and truthful information can assist consumers to make an informed choice when selecting a service provider from amongst those competing in the market. Restrictions on professional advertising can make it more difficult for clients to obtain relevant non-technical information about the availability, quality and price of services provided by competing practitioners. In particular, it is arguable that restrictions can especially reduce competition by new entrants and smaller practices who wish to inform potential clients about their existence, specialisation, fee scales and features of client service.

4.19 In another respect it could be that permitting unrestrained advertising could undermine competition. In many consumer markets firms use advertising to create barriers to new entry, *eg* where advertising creates consumer loyalty or where it enjoys economies of scale. However, such effects are typically found in highly concentrated (oligopolistic) industries and not in the small business context that characterises many professions. Nevertheless, a particular review might wish to consider conflicting possibilities in relation to the impact of advertising restriction on the state of competition, and judge their pertinence in the particular case. Reviews should note that, even if profession-specific advertising were to be removed, advertising would not be totally unregulated, as Part V of the Trade Practices Act continues to apply along with state-based Fair Trading Acts. This will also apply to the argument that advertising may induce unnecessary usage, *eg* would unrestricted advertising for surgery enhance demand for this including associated risks?

(v) Restrictions on amounts of fees charged

4.20 Restrictions on the amounts of fees charged by the professions can take a number of forms, such as fixed minimum, maximum, or recommended fee scales. Some fee scales are subject to legislative sanction, *eg* court powers to review legal fees; others can be set by professional associations; fees for medical services are a combination of both, with the Commonwealth setting the amount of fee refundable to clients, and the AMA recommending the amounts to be charged by members.

4.21 Fixed fees provided for by legislation could provide the consumer with greater certainty about the costs of transactions (especially if these are disclosed through advertising or advance client notification), and could increase competition through perceived quality in the absence of price competition. However, in both of these cases the overall degree of competition remains reduced, as the capacity to fully vary price as a competitive instrument is removed from the array of competitive devices otherwise available. All other devices for competition remain available as before. This one has been limited. The ‘degrees of freedom’ are reduced.

4.22 Different professions have different rules in relation to pricing, with the legal profession typically having the most extensive and complex system for establishing and determining fees. Common methods of charging fees for professional services are:

- item based charging
 - a specified amount for each particular service (eg as in medical practitioners’ charges)
- time based charging
 - an hourly rate is specified, and the amount paid is the rate multiplied by the actual number of hours of work done
- *ad valuer* charging,
 - the fee is a specified proportion of the value of the subject of the work, eg legal fees for property conveyancing; architectural fees as a proportion of the final cost of the building.

4.23 The review should establish the extent to which any fee scales apply and are restrictive, *eg* whether an individual practitioner is able to charge less or more than a specified scale without penalty, and whether they are prohibited from advertising the fact that they charge less or more than the recommended fee scale. It may be that few such arrangements remain in contemporary Australian legislation, though some are evident, *eg* surveyors.

4.24 Also, legislative review is only concerned with price restrictions sanctioned directly or indirectly by legislative provision. Price controls or ‘stickiness’ that arise from private professional conduct independently of legislative reinforcement are separate matters for trade practices law. Nevertheless a review could well consider how likely implicit price co-ordination in a free market will be, since such behaviour may fall short of effective trade practice sanctions (unless it is explicit and co-ordinated) so that the deregulated alternative could be less than fully competitive and hence not such as to reap full competitive benefits.

4.25 It may also be that with no restriction on fees, price undercutting could be used to drive out

new competitors (*eg* new entrants) and this price flexibility could therefore limit competition. But this would be a matter for trade practices law. The more general application of the principle of specifying the most effective mechanism for dealing with a problem is therefore set out further below. It should be recognised that a review may still show that a particular restriction is more beneficial in any one case than other alternatives including more generic provisions. In some cases, removal of fee restrictions may result in fee increases and others fee decreases. Generally, however, it is predicted that the most likely, though not inevitable, effects of this group of restrictions on the market would be higher prices, and maybe more homogeneous prices, and a possible under-use of services. It should also be noted that in arriving at conclusions, close examination may be required of other government interventions in the market. For example, income thresholds for eligibility for Legal Aid may be used as a quasi measure for determining minimum legal charges.

(b) Summarising the General Effect of Legislative Restrictions on Competition

4.26 The separate examinations of each of the identified legislative restrictions on competition may now be usefully brought together to provide an overview of the competition impact of the legislation. This will include any relevant impediments in the major classes identified, plus any other additional impediments..

4.27 The following table provides one format for consolidating the examination of the main impacts of the legislative restrictions on competition, and includes an assessment of the degree of severity of the restriction in relation to competition. As all the restrictions identified will not be of equal importance, it may, therefore, be inappropriate to undertake a detailed follow-on analysis and assessment of the public benefit of each restriction identified. A prior decision as to the potential broad significance of legislative restriction will have been made in the first place in commissioning reviews. To take the further step of classifying the individual restrictions within a body of legislation may therefore not be required or practical in many cases. However for particularly complex or wide-ranging legislation, for example, this additional classification could be useful.

4.28 In such cases, two key questions to ask in assisting a judgement as to whether or not an individual legislative restriction is major in its effects on competition are:

- Is having or not having this restriction likely to make a significant difference to stakeholders? (The answer would draw on the information produced in undertaking the assessment of the nature and significance of the market which is described in Section 3 above);
- Is a detailed analysis of costs and benefits needed in order to decide whether the restriction is in the public interest? (The answer would draw on the review's implicit balancing of the likely benefits and cost).

4.29 For further guidance on assessing the relative severity of legislative restrictions on competition, it is recommended that reviews consult the relevant sections of the more generic guidelines for undertaking legislative reviews produced by individual jurisdictions. Clearly, this issue involves careful judgement. Correspondingly, a good precautionary principle could apply:

when in doubt, err on the side of closer analysis. This would especially apply also where there is a possibility in the particular market that removal of a restriction could damage competition. Some instances of how this could occur have been advanced, although they are not listed in Table 1 – which focuses on the more common adverse effects of restriction on competition. Further consideration of such anti-competitive effects of removal of restrictions is considered best left to review of public interest concerns under the monopoly area in market failure, to be discussed in the next section.

TABLE 1 POTENTIAL COMPETITION EFFECTS OF LEGISLATIVE RESTRICTIONS IN RELATION TO COMPETITION CONSIDERATIONS

Type Of Restriction	Competition Effects	Severity of Restriction
Barriers to entry	<ul style="list-style-type: none"> • Prevent entry into market by competing providers • Limit the number and availability of providers • Keep prices high and reduce consumption • Limit choice of substitute providers for a service 	<ul style="list-style-type: none"> • Minor/moderate/major
Controls on business ownership	<ul style="list-style-type: none"> • Limits potential economies of scale • Inhibits introduction of wider management capabilities 	<ul style="list-style-type: none"> • Minor/moderate/major
Personal conduct of professionals	<ul style="list-style-type: none"> • Limit competition between providers • Limit information base for consumer choice • Inhibit innovation 	<ul style="list-style-type: none"> • Minor/moderate/major
Controls on advertising	<ul style="list-style-type: none"> • Reduce information to potential consumers about the availability of services • Prevent consumers from making better informed choices about purchase of service • Inhibit new entrants from competing for business 	<ul style="list-style-type: none"> • Minor/moderate/major
Fee scales	<ul style="list-style-type: none"> • Prevent competition on the basis of price 	<ul style="list-style-type: none"> • Minor/moderate /major

5. ASSESS THE NATURE AND SIGNIFICANCE OF LEGISLATIVE RESTRICTIONS FOR MARKET FAILURE AND OTHER PUBLIC INTEREST CONCERNS

(a) Competition, Market Failure and the Public Interest

5.1 The starting point for National Competition Policy is the presumption that competitive markets can be expected to result in the provision of the quantity and quality of products and services that maximise net benefits for society. This is the contemporary reinstatement of Adam Smith's 'invisible hand' proposition, which first clearly demonstrated how competition through markets is a remarkable human invention for ensuring that people get what they want within their means at least possible resource cost to society.

5.2 However for the competitive claim to hold two key requirements must be met:

- competitive markets must actually work; and
- competitive markets must be fair.

If such markets do not actually work properly there is "market failure", and if they do not work fairly there is "distribution failure". In either situation there is a new presumptive case supporting collective intervention to remedy the market failure or distribution failure in the public interest. In that case government intervention is seeking to enhance efficiency or equity over the private provision approach. If the intervention does not succeed, then there is "collective failure".

5.3 In matters of review for purposes of National Competition Policy, what is required for appraisal of benefits and costs of a legislative provision which inhibits competition is to:

- examine the extent to which an actual industry or service area would be likely to diverge, when unconstrained, from the competitive market benchmark; and
- examine the extent to which there are other distributional or similar public interest concerns likely to operate in the area concerned.

The former examination is termed 'market failure audit' and the latter 'distributional audit'. Sometimes 'market failure' is used as an overall term for all problems with competitive market provision (including equity or distributional matters), but the distinction is retained here as the narrower market failure grouping has much more precise analytical content to guide its review.

5.4 Specifically 'market failure' in this narrower sense occurs where genuine competition does not apply or where complete markets do not exist for all relevant transactions. This can arise in four well-defined circumstances:

- significant market power, called 'monopoly' for short-hand purposes but referring to any capacity to raise price above competitive cost levels. This need not mean literally a single seller as the power to raise prices above competitive returns can occur in other highly concentrated circumstances such as 'oligopoly' or, indeed, in local monopoly circumstances *eg* favoured supplier to a market niche. The key test is the capacity for

sellers to obtain returns on a sustained basis in excess of those competitive rates of return to be found in markets more generally;

- spillovers, whereby social benefits and costs of an activity exist which are not reflected in the market transactions. These effects are sometimes also called ‘externalities’, meaning that important consequences take place for others who are not parties to the calculus of the market place arrangements being made *eg* pollution of a widespread area due to poor quality engineering in a particular firm. In some cases the effect on others is so pervasive that the supplier cannot exclude others from experiencing those effects and they become available to all. In these circumstances a ‘public good’ is said to exist and it will be poorly provided for by the market due to this boundary problem *eg* Australia’s reputation as a disease-free meat exporter may be built by many responsible firms adopting good veterinary inspection practices. Were one firm to ignore this need and export diseased products, all exporters may then suffer a ‘public bad’ from loss of reputation for Australian produce;
- information asymmetry, whereby market participants systematically do not have the same knowledge about product or service quality. What this means is that there is inequality of bargaining power in transactions, because greater knowledge lies with one party **and** this gap is hard to eliminate by purchase of information itself in the market. Thus in highly skilled open heart surgery, say, it is difficult, if not impossible, for an individual patient to judge the technical merits of the alternative surgeons and surgical techniques;
- disequilibrium, where markets take some time for market signals to adjust to properly reflect competitive costs of provision. This means people can experience shortages as buyers or surpluses as suppliers. If this occurs over extended periods or, as sometimes happens, occurs in a cycle of ‘boom’ and ‘bust’, then the market is not adjusting effectively in meeting social needs. A classic example of this was when the ‘Minerals Boom’ of the early 1980s in Australia led to big increases in training for engineers. The collapse of that boom, just as new graduates were pouring into the market, led to prolonged underemployment and unemployment for engineers.

In any or all of these cases, competitive markets are not themselves operating efficiently and hence are not delivering the claimed superior benefits in price, quality, flexibility and innovation.

5.5 In terms of the public benefit test for National Competition Policy, market failure can be seen to directly compromise the achievement of the following objectives explicitly listed in Clause 1(3) of the CPA:

- the interests of consumers (‘monopoly’, ‘information asymmetry’, and ‘disequilibrium’)
- efficient allocation of resources (all sources of market failure)
- competitiveness of Australian business (‘monopoly’)
- ecologically sustainable development (‘spillovers’)

The other explicit public interest criteria of the National Competition Policy also listed in CPA Clause 1(3) relate to equity or distribution failure in markets, so that they are essentially concerned that the ‘playing field’ may not be a level one. These are:

- industrial relations, and occupational health and safety, which seeks to balance worker and employer interests;
- access and equity and employment, which seeks to ensure fair market involvement for individuals and groups in terms of their personal or socio-demographic characteristics;
- social welfare and equity considerations and classes of consumers which seeks to ensure fair outcomes in service provision especially for the more disadvantaged;
- regional development, which seeks to ensure equitable participation in market growth geographically across the nation; and
- economic and investment growth, which seeks to take account of future as well as present generations.

5.6 To these can also be added ‘merit goods’, whereby a social judgement is imposed that market decisions freely made are nevertheless intrinsically unacceptable to society because of the nature of the goods or services themselves *eg* drugs (a ‘demerit’ good), children’s education (a ‘positive merit’ good) or the so-called oldest profession, prostitution (a ‘demerit’ good on grounds of morality). In such cases a legislative restriction is said to be justified by the inherent merit (or demerit) of the activity. Decisions which are risky, with potentially tragic consequences for the individual, may also enter this category, whereby society wishes to override the preferences of such individuals- though to the extent in this and other cases there is concern for effects on other persons, then the matter is one of spillovers to that extent.

The true nature of a merit good then is that it represents a need to override the preferences or wishes of individuals freely operating in the market – not because the market is not working and not because of inequality, but because a higher social need or morality is being sought. A clear example might be that individual short-sightedness might lead to inadequate future provision for those individuals or for the needs of future generations. Compulsory superannuation and defined contribution superannuation schemes, imposed by Government, respond to such concerns. There are therefore legitimate reasons beyond market failure and distribution failure for governments choosing to legislate in the public interest.

But such ‘merit’ concerns need explicit articulation and justification and the value judgements involved must be made clear in what may be very few tricky areas. For example, a restriction on the practice of abortion by health professionals may be sought in legislation – as was the case in Western Australia in 1998. Such morally derived legislative restrictions on professional practice are a prerogative of government that goes beyond matters of markets or distribution. But they, and other less controversial variants of ‘merit good’ concerns, will remain valid considerations in some reviews of legislation.

5.7 Employment is not listed as a separate criterion in Clause 1(3) of the CPA documentation, but is embraced explicitly as a subsidiary part of ‘economic and regional development’ and can also be interpreted as implied by either resource allocation efficiency or social welfare criteria. Hence it should not be neglected as a possible ‘public interest’ criterion in legislative review. Moreover, both in relation to “merit” and “employment” concerns, it should be recognised that the CPA agreements are inclusive not exclusive as regards “public interest” criteria. Hence additional criteria can be incorporated where required and this may be significant for some professional services. There may be particular or special criteria in some cases not well articulated in more

general classifications or guidelines such as these.

5.8 When market failure or other public interest criteria establish a *prima facie* case for collective intervention, two remaining issues remain:

- recognition that intervention may itself be imperfect, due to implementation failure; and
- determination of the most appropriate form of intervention.

The former is a matter of social judgement and relates to issues such as political will, interest group influence, bureaucratic competence etc. It is not considered further here though NCP reviews may wish to offer judgements on such matters based especially upon comparative or past experience in the particular or like area. The economics literature on public choice (Mueller 1989) and the political science literature (Parsons 1995) offer systematic guidance to these concerns.

5.9 The issue of alternative means of intervention, however, is the subject of the next section of these Guidelines. But first the remainder of this section is devoted to the likely particular application of market failure analysis to the case of the professions.

(b) Market Failure in Professional Service Markets

5.10 In this section the likely relevance of the various forms of market failure to professional services markets are considered, bearing in mind the particular characteristics of such markets as considered above.

5.11 In the case of **monopoly**, there is presently limited concern in professional service areas for market failure on natural monopoly grounds. The nature of embodied skills and customisation in professional services might seem to imply a wide range of suppliers (and also a wide range of buyers). This may be mitigated by the special skills of ‘super-stars’ where the talent required is extremely rare, but the consequences of this are arguably a matter for general taxation policy not competition policy. Monopoly could also be a problem where voluntary professional associations co-ordinate individual activities in an anti-competitive manner. This is collusive (as opposed to ‘natural’) monopoly and is a matter for trade practices policy. Other monopoly concerns that might arise from legislation itself are subject to review under the National Competition Policy Legislative Review process.

5.12 In this context, ownership restrictions may themselves be a source of competition in professional service markets. With their removal, large professional service firms could come to dominate markets. For instance, the legal profession might follow trends evident in accountancy or, indeed, they both might merge into multi-service corporates. In a globalised era it is possible that such oligopolistic developments may be in the public interest, to enhance international competitiveness, even if they compromise domestic competition in other respects. The point is, again, that this outcome can be judged under the public interest criteria available in trade practices law. For legislative review, sufficient reasons would need to be given as to why it is better for such consequences to be assessed and determined in relation to particular professional legislation rather than through trade practices processes. In doing so, a forward-looking approach may be helpful, so that a fresh look, in light of modern needs and trends, can apply. Other ways in which removal

of restrictions could also impede competition (*eg* creating advertising barriers to entry) have also been anticipated from time to time in the discussion in section 4 of effects of legislative restriction on competition. These and other such adverse impacts can be considered here under the public interest market failure criteria relating to monopoly.

5.13 Where monopoly is important for legislative review it is necessary to assess consequences. Conventional assumptions of price increase and quantity restriction, become less straightforward in service markets where quality is important (Mussa and Rosen 1978). In particular if professionals practice monopolistic price discrimination, the outcome may not be allocatively divergent from a competitive outcome - though distribution will be different. And, it is clear that price discrimination is commonly practised by professionals *eg* discounts for aged persons, students, concession card-holders. In such cases profit maximisation and social goals can nicely reinforce each other: a rare case of having your cake and eating it.

5.14 **Spillovers** may be a concern upon occasion in a number of professional areas. Public safety issues, infectious diseases or environmental spillovers are key triggers for concern that may relate to the skills, activities and expertise of a number of professions.

5.15 In some instances the spillover will be a negative one- as with a medical practitioner who is incompetent and fails to diagnose an infectious disease that becomes an epidemic. In other cases the spillover is positive - as with competent legal practitioners creating legal precedents and information of benefit for other practitioners and the community at large. In this latter case the spillover is close to being a 'public good' - a commodity from which it is too difficult to exclude new consumers and for which it is difficult to charge all users. This issue may arise most in relation to whether consumer information is not more usefully provided by government than through markets, since 'free-riding' means markets will underprovide such services.

5.16 But such issues and effects are not necessarily applicable to all professions, nor are they absent from many other occupations from plumbers and electricians to bus drivers. Where they occur for professions, they may apply more to some particular professions and, especially, to some areas of practice within professions. Response in legislation must be guided by the need to restrict competitive restriction to just those specific areas or practices within the conduct of professions requiring it on market failure grounds, and no more than that - and only then after reviewing alternative options to meet the need *eg* general liability, safety or environmental laws.

5.17 **Disequilibrium** has played little role in most competition policy analysis. Yet in the context of professions and of cost-benefit analysis it is potentially important. This is because the lengthy training periods of professionals when combined with changing demand patterns (including education budget and fee changes), produce substantial surges and collapses in entry to (and completion of) professional training and in entry/exits from the profession by experienced professionals. This phenomenon is known as a 'cobweb' or 'hog cycle' in economic literature and arises from long gestation periods. It is known to typify professions (Freeman 1971) and it is especially relevant to competition review because the time taken to adjust in a free market should explicitly be taken into account under cost-benefit analysis (which seeks to introduce serious boom and bust behaviour in the price, quality and quantity characteristics of professional markets, due to imperfect forecasting of professional market conditions). High levels of training mean that this matters more in professional occupations, than in most areas. The significance of this is that a

natural tendency for professional markets to produce shortages or surpluses of practitioners over time may justify legislative intervention or restriction to smooth out the availability of professional services for the community.

5.18 Any such case for entry controls, to avoid cycles in professional services supply, is subject to the usual caveat of this being effective and the best instrument for the purpose. It is possible for instance that better forecasting of professional incomes and employment opportunities for prospective students may work to smooth out enrolments and graduations, with major social benefit (Freebairn and Withers 1979). But this requires belief in a superior forecasting capability by a public agency for this purpose. The past record on this capability is not promising, *eg* forecasting shortages as a basis for immigration selection.

5.19 The remaining market failure is **asymmetric information**. This is likely to be the market failure most relevant to markets for professional services. The asymmetry of information between supplier and client, arising from the asymmetry of knowledge and the non-storable and relatively non-predictable nature of the service provision itself, has been defined earlier. This will be even more the case where the professional service is complex, purchasing is infrequent and where clients may be suffering impairment or distress. The particular services may also be central to the health, wealth and well-being of the individual client. In these circumstances competence guarantees, ethical conduct assurance and/or service standards guarantees may be sought by customers or clients, but may require government intervention (including through legislation) to ensure that this happens.

5.20 There is a growing and rigorous body of economic analysis of information that supports these concerns and opens the case for improving community welfare by diverging from free market competitive provision. For example, asymmetric information can drive high quality from the market (Akerlof 1970) or produce reputational premia above cost (Shapiro 1983). Secondary information markets to solve this can be restricted by libel law and insurance markets to deal with such issues can incur 'moral hazard' (Arrow 1970). In these circumstances, legally enforceable minimum standards can reduce average cost and raise average quality, though at the expense of excluding low quality suppliers and customers. The issue becomes empirical and distributional, but not one of economic efficiency.

5.21 Issues of risk and uncertainty are a further dimension of information. Competitive markets can readily accommodate the absence of perfect information through the provision of insurance and futures markets, where it is important to allow for risk and uncertainty. But problems of particular relevance to professions may still arise in relation to:

- tragic risk
- catastrophic risk.

5.22 In the case of **tragic risk**, matters such as infectious disease or water supply contamination can lead to tragic loss of life. But these are spillovers, and so are readily discussed in these terms. More complicated is individual tragic risk *eg* open-heart surgery. To choose a poorly qualified practitioner is likely to prove tragic and irreversible. Liability law or insurance payout may be no compensation. Hence, there may seem to be a clear case for legislative entry barriers to protect consumers from quacks, charlatans and the incompetent in life-threatening circumstances.

5.23 In doing this, governments can be seen to be providing a merit good. A paternalistic decision is made to deny clients a wider array of choice than those deemed qualified under legislation. Many would see this as reasonable for tragic choices of the open-heart surgery kind. But what of home-birthing, or minor day surgery or house conveyancing, as further examples? At what point does a need for paternalism cut in, in these and other areas? Reviews will need to provide clear threshold guidance on their recommendations in this area. The issue of fatal trade-offs is raised (Viscusi 1992) and discussed further below.

5.24 The other risk and uncertainty area singled out above was **catastrophic risk**. Catastrophic risk refers to choices with broader serious consequences for others. In part this can be seen as a spillover issue and considered in that context. However it need not be only that. A bridge that collapses with considerable loss of life or a nuclear reactor that explodes are catastrophes where the possible consequences were known and allowed for in the market transaction, *eg* in engineering design. But a low probability, high impact event of this kind may be impossible to insure, indicating capital market failure. And, anyway, society may judge any such market level of risk management as unacceptable even if insurance were possible – for merit good reasons of the tragic risk kind. It may also have subjective risk assessment divergent from objective probabilities, that need to be taken into account.

5.25 Thus catastrophic risk collapses formally to either a spillover or merit good concern – but either way it may be of major relevance for significant areas of professional practice, and review will be necessary to determine if such problems exist and, if so, are best dealt with by legislative restriction or conduct of professional service markets. These matters are discussed on more detail below.

(c) **Other Public Interest Issues**

5.26 Beyond market failure as a basis for legislative restriction in the public interest, the National Competition Agreement singled out a number of other explicit criteria deemed appropriate for a public interest defence of a legislative restriction. Little guidance on their content is offered in the guidelines, so some further comment is offered here. It is even more suggestive only, not prescriptive, than for competition and market failure issues – as the precise content of the criteria become increasingly subjective.

5.27 The first of these referred to **industrial relations and occupational health and safety concerns**. The industrial relations issue can arise in those professions where significant employer-employee workplace relations exist. This is clearly the case for professions such as engineers, surveyors, nurses, teachers etc. The point to be established under review will be whether there are any matters requiring selective professional legislative impediments upon competition, that go beyond what can efficiently be provided for under general industrial legislation. As industrial legislation increasingly allows for tailored agreements it is difficult to see scope for such a case, except in most unusual circumstances.

5.28 There is a more evident base for occupational health and safety issues, because of the health and safety risks of important areas of professional practice, *eg* radiography, infectious diseases. The task is to find the most effective instrument that deals with such legitimate concerns – and no

more. This may or may not be legislative restriction or, where it is, it may be very narrowly targeted restriction.

5.29 Matters of **access and equity** can be a very important public interest concern. Clear definition of equity criteria will be needed and for this a considerable body of knowledge exists (Burton 1988). The focus is upon fairness in opportunities for individuals, especially, but not exclusively individuals from commonly identified disadvantaged socio-demographic groups to

- enter and practice a profession; and/or
- receive suitable service delivery by a profession.

5.30 It is arguable that the free competitive market operates to eliminate discrimination, because suppliers who discriminate raise costs or lose business. However social customs and widely-shared values within occupations can mute this competitive pressure. In such circumstances a presumptive case could be developed for intervention – but with particular attention to judging the most effective instrument for this, including on the basis of evidence of performance in terms of the access and equity objective. In this respect there is a body of opinion that maintains that it is legislative restriction itself that denies more socially diverse involvement in professional practice *eg* overseas born, (Iredale 1997). With such counter-posed views, careful review of market *versus* non-market processes is required for the particular professional field.

5.31 **Social welfare and equity considerations and the interests of classes of consumers** are an extension of the access and equity concerns. There is a subtle shift in emphasis from process to outcomes, from individual to group concerns and from professional occupational participation to service delivery to consumers – but the criteria do overlap,

5.32 And certainly it is clear that competitive market services are provided primarily on the basis of capacity to pay. Political markets are one vote one person. Competitive markets are one vote one dollar. Given the often highly important services provided by many professionals, services frequently central to the health and welfare of individual consumers, society may wish to adjust market outcomes to ensure fairer availability of services than income basis alone would deliver.

5.33 In this respect many professions argue that their codes of conduct are in substantial part a vehicle for provision of services on the basis of need as well as capacity to pay. *Pro bono* work, discount fees etc are illustrations of this and as such are commendable. But whether this fully meets the needs of the disadvantaged and adequately avoids discrimination does, in all fairness, remain a matter for assessment on the evidence, just as does the question of whether other forms of public intervention might not be more effective, *eg* social security and tax arrangements, vouchers, direct targeted service provision, anti-discrimination legislation.

5.34 **Regional development and economic and investment growth** public interest criteria have also been put forward as relevant for legislative review. It is commonly recognised that the competitive market process can bring decline to some regional areas (*eg* rural, regional, suburban) and that where mobility is slow or difficult, this can correlate with social issues of considerable concern.

5.35 The question is how relevant are such issues to professional service markets? And will

legislative restriction on professional structure and conduct enhance pertinent outcomes, and do so ahead of other alternatives? Professionals themselves are typically ‘far-sighted’ This is meant here in the technical sense that persons entering professional training are required often to forgo the immediate incomes possible in other employment in order to gain later access to professional employment, including the deferred incomes that go with that. The implicit discount rates required to undertake long periods of training prior to receiving professional incomes are demonstrably much higher than the discount rates evident in choice of less skilled occupations. However to the extent legislative restrictions impose entry barriers, they impede this ‘long-termism’ from being pursued by all those who are willing to undertake the necessary training, rather than assist it.

5.36 Assistance to growth and investment by professionals can come in other ways – but this is taken fully into account in the market transactions for professional services, unless there are externalities which are fully considered separately. It may be for instance that mistakes by poorly qualified veterinarians in certifying Australian meat exports could cast a shadow over a whole export sector. This effect is an externality and an important one. But once established as significant, the usual review issues follow: is this addressed effectively by legislative restriction? What restriction is needed – all or some veterinarians and all or some areas of practice? Are there other mechanisms?

5.37 Assistance on regional development may be important too, but it does not seem to be an issue much canvassed in regulation of professions. The McKinsey (1995) report on creative regional development for Australia does not obviously point to any distinctive professional role that that would support legislative restriction. A competitive market may lead to declining service in declining areas. But unless innovative restrictions are imposed, it is difficult to see how professional regulation alters this favourably. Entry barriers can actually prevent newcomers who would establish themselves in less attractive practice areas, or quasi-professionals can be prevented from limited service provision entitlements. Countervailing arguments or new approaches (eg Medicare provider numbers for outback nurses or foreign doctors or recent graduates) are required for this element of public interest to be used as a basis for legislative restriction.

(d) Linking Market Failure and other Public Interest Concerns to Legislative Restrictions

5.38 Legislation review of professional markets will seek to identify the arguments used to justify each of the key legislative impediments. These arguments can then be mapped to assess correspondence to the various forms of market failure, with especial attention to any which may be thought to be quite likely or even common in professional service markets. The arguments should also be mapped, as applicable, to the other public interest criteria, with especial attention to those predicted to be particularly relevant for professional service markets.

5.39 The main objective for the group of **restrictions on entry** to a profession is likely to be to address the issue of information asymmetry in the professional services market. These restrictions are aimed at overcoming difficulty in making an informed choice where consumers are relatively poorly informed about the nature and quality of service compared to the supplier, and in ensuring public confidence in the quality of the professional service. In relation to market failure from

information asymmetry - the most commonly occurring type in professional markets - it is essential for reviews to make a realistic assessment of its extent and significance in the particular professional market. Reviews should distinguish between situations where there are only simple transaction costs from becoming informed about a product from situations where consumers lack technical expertise or there is an absence of secondary markets in product information, so that even with a willingness to acquire or pay for information it is difficult to do so effectively.

5.40 There may be several objectives for **legislative restrictions on the ownership and control of professional businesses**. A frequently stated purpose is to reduce the potential focus of the practice on commercial relations, as opposed to professional matters, which is likely to arise where third parties are involved in a practice. It is argued, these restrictions also assist in maintaining the integrity of the professional relationship, inducing trust between the professional and the client, promoting the personalised nature of the service and ensuring that the professional has direct liability for the service provided

5.41 The group of **restrictions on professional conduct and standards** is also aimed especially at addressing the problem of information asymmetry in the market, by providing mechanisms for enabling quality control of professional services. It is argued that consumers are particularly exposed to potential risks arising from inadequate information where they are purchasers of 'one-off', complex services from a single provider. In the professional services market these risks can be the inappropriate selection of the type of service as well as the possibility of exploitation by the service provider. Complaints handling and discipline processes are aimed at providing both consumer redress in the event of incompetence or malpractice, as well as maintaining public confidence in the integrity of the profession itself.

5.42 The main objectives for the group of **restrictions on advertising** are to ensure that consumers choose a professional service on the basis of quality, and not on price. It is argued that advertising could be misleading to consumers as the services can be complex and consumers lack sufficiently detailed knowledge to make an informed comparison between providers.

5.43 The main market failure objective which could be encouraged with any **restrictions on fees charged** is to remove the potential risk to consumers that price-cutting will lead to a lower quality of service and a reduced range of services available. Restrictions on fee charging could also have the aim of reducing transaction costs for consumers.

5.44 The possibility may need to be entertained that there will be trade-offs between different economic or efficiency objectives from time to time, in addressing market failure. For example, regulations for law firms may seek to protect clients from improper dealings by introducing a compulsory regime for retainer agreements with clients and for cost agreements on individual matters. But these can be a deterrent to large international and local clients who can turn to merchant banks, accounting firms and corporate advisers, where such regulations do not apply. This reduces the competitiveness of the law profession. The remedy may be improved regulatory drafting, like regulations in other markets, replacement of regulation by other mechanisms *etc* **but** the sometime need to balance diverse impacts in a holistic way should be recognised.

5.45 Table 2 summarises potential effects for each of the identified major restrictions for professional service markets and the associated market failure or other public interest categories.

TABLE 2 POTENTIAL EFFECTS OF LEGISLATIVE RESTRICTIONS IN RELATION TO MARKET FAILURE OR OTHER PUBLIC INTEREST CONSIDERATIONS

Type of Restriction	Effects of Restriction	Market Failure/ Public Interest
Barriers to entry	<ul style="list-style-type: none"> Excludes persons lacking in knowledge/skills to provide a service where an unqualified provider could cause serious problems – reduces risk of ‘harm’ 	<ul style="list-style-type: none"> Public goods Externalities Information asymmetry Disequilibrium Competitiveness Consumer interests Social welfare
Controls on business ownership	<ul style="list-style-type: none"> Confidence that all partners /associates are suitably qualified Providers can pursue the interests of clients to the exclusion of commercial interests 	<ul style="list-style-type: none"> Public goods Externalities Consumer interests
Personal conduct of professionals	<ul style="list-style-type: none"> Minimises likelihood of malpractice Removes incompetent practitioners Redress for consumer complaints 	<ul style="list-style-type: none"> Public goods Consumer interests Externalities
Controls on advertising	<ul style="list-style-type: none"> Minimise likelihood of inaccurate, misleading or dishonest claims 	<ul style="list-style-type: none"> Information inadequacy Consumer interests
Fee scales	<ul style="list-style-type: none"> Removes risk that price-cutting would reduce service quality Price stabilisation and financial certainty about cost of service 	<ul style="list-style-type: none"> Consumer interests Disequilibrium

6. ANALYSE THE COSTS AND BENEFITS OF THE LEGISLATION

(a) Criteria for Benefit-Cost Analysis for Professional Services

6.1 The objectives of the legislation have provided the rationale for regulating the market and imposing restrictions on competition. They are a guide to determining the extent to which the restrictions are intended to be of public benefit. This section provides the analytical framework to assist the reviewer to assess the extent to which the restrictions on competition address market failure and other public interest criteria effectively, and thereby improve on the outcomes of an unfettered market. It describes how to assess the net public benefit of the major restrictive provisions in the legislation.

6.2 The analytic framework is essentially that of benefit-cost analysis. This refers here to the systematic documentation of the flow of all relevant costs and benefits over time that are associated with each regulatory provision that restricts competition. Ideally all costs and benefits can be assessed quantitatively in dollar terms. Discounting of these flows by an appropriate time preference allows the time profiles to be summarised as a single benefit-cost ratio. If costs equal benefits the ratio is equal to one.

6.3 If the legislative restriction produces a benefit-cost ratio greater than one, a necessary condition for the restriction is met. If the ratio is greater than one and greater than for all alternative options, then a sufficient condition for the restriction to be retained is met.

6.4 The measurement of benefits and costs in the analysis should reflect all social effects and not merely those of the immediate parties in the relevant market for professional services. The test is not a narrow financial one, but one of community benefit.

6.5 In implementing such an analysis for professional legislation, the major relevant elements for inclusion have been outlined in sections 4 and 5. These should be fed into the general benefit-cost framework outlined in the various State and Territory general Guidelines for competition policy legislative review. In implementing this framework a standard range of analytic factors will need consideration: measurement of market distortions *eg* shadow planning, measurement of non-market or social effects *eg* spillovers, community service objectives, choice of discount or time preference rate *eg* cost of capital, social time preference rate. These matters are discussed in the general guidelines available *eg* Western Australia, and in standard sources on benefit-cost analysis *eg* Department of Finance (1990).

6.6 There are some benefit-cost matters particularly pertinent to application to professional service markets:

- it is likely that many benefits and costs are difficult to quantify where quality is uppermost and service dimensions are multi-faceted. Valuation methods to accommodate this include recent developments in contingent valuation, originally applied to environmental goods but useable more widely (Withers, Throsby and Johnston, 1994);
- where quantification is still not feasible or cost-effective, it is not possible to complete a

full benefit-cost computation. This will not be uncommon. The general benefit-cost approach still remains essential since, quantification apart, it provides a systematic framework for the assembly of all relevant review material. Where the benefits cannot be quantified but costs can be, cost-effectiveness analysis is possible. Also separate cost assessment, benefit assessment, discounting, risk assessment and risk-risk analysis can be undertaken. These are all separable components of the more comprehensive notion of benefit-cost analysis. (Viscusi 1992b) Where gaps in quantification are pervasive then a threshold analysis or planning balance sheet is appropriate (Williams 1967);

- there is limited guidance available in the literature on assessing matters of disequilibrium. Yet these are of some potential importance to professional service markets and relevant techniques based on consumer surplus measurement are available and have been developed in Australia specifically for the professions (Freebairn and Withers 1979);
- where uncertainty exists as to the correct value of quantified components of the benefit-cost analysis as will be the case for much professional review, it is good practice to employ sensitivity analysis in order to make clear which factors make the most difference to the outcome (Williams 1967);
- historical and comparative analysis, whereby the effects of different degrees or forms of legislative restriction can be contrasted, can be an essential tool to discover the effects of the presence or absence of different legislative provision. Changes in provision over time and differences between jurisdictions provide the social experiments needed for assessment.

6.7 Benefit-cost analysis is most comfortable with the efficiency dimensions of review, albeit including a healthy range of non-market aspects *eg* environmental, community service obligations, unemployment improvements. But it does mostly operate on the presumption that ‘a dollar is a dollar’. Where this calculus is accepted and distribution is considered, it is still very important to recognise that a gain to consumers at the expense of providers is, for the most part, a redistributive transfer. The actual efficiency gain can be much smaller. A large gross gain to one group may be only a small net gain for the whole community (Withers 1981).

6.8 If an alternative distributional judgement is made, the benefit-costs can accordingly vary *eg* a dollar to a rich person might be valued less than a dollar for a poor person. If such alternative valuations are made they should be made very openly and explicitly. Willingness to specify such quantitative value judgements is rare. Easier is balance sheet information on the major distributional effects, at the expense of transparency. Even this is a major improvement over total neglect of distributional matters or *ad hoc* specification.

6.9 For a review in which the major distributional consequences relate to the balance between practitioner, consumer and community as a whole, a simple illustrative balance sheet approach is indicated in Tables 3 and 4 – which present benefit information and cost information, respectively. Naturally these distributional valuations may be much greater than efficiency valuations since they involve transfers to winners and losers. Efficiency gains net out these transfers, but make no judgement about the winners and losers in the process. The efficiency process however points out the potential for net gains (and hence, in principle, for compensating losers and still coming out

ahead).

6.10 It is worth noting, in relation to Table 4, that reviewers should be careful of the potential for double counting of administrative costs, particularly if those costs listed, for example, under ‘Entry restrictions’ cannot be separated from those listed under ‘Personal conduct of professional’.

TABLE 3 INCIDENCE OF BENEFITS OF RESTRICTIONS

Type of restriction	Who benefits	Value of benefit
Entry restrictions	Practitioner Consumer Community as a whole	<ul style="list-style-type: none"> • Reduced competition, due to fewer suppliers, resulting in higher fees able to be charged • Knowledge that provider has met a competent standard – value of benefit depends on nature and frequency of service provided; (the more significant the service to the consumer, the higher the value placed on competence) • Minimises flow-on effects of malpractice (value depends on nature of market and potential impact of externality effects)
Controls on business ownership	Practitioner Consumer	<ul style="list-style-type: none"> • Maintains existence of individual professional practice • Reduced competition through monopoly control over service delivery • Maintains higher fees • Maintains professional service standards by minimising distractions due to running a business corporation • Minimises any potential conflicts of interest between professional service provider and business priorities • Maintains confidentiality and trust between client and professional

	Community as a whole	<ul style="list-style-type: none"> • Confidence in the integrity of the profession as not only business motivated
Personal conduct of professional	Practitioner	<ul style="list-style-type: none"> • Maintains integrity of profession as a whole, by penalising/weeding out incompetent and/or corrupt practitioners (value depends on numbers of complaints and outcomes of discipline processes)
	Consumer	<ul style="list-style-type: none"> • Redress for complaints about service quality and price (depends on volume of complaints and types of redress available)
	Community as a whole	<ul style="list-style-type: none"> • Minimises flow-on effects of malpractice (extent depends on nature of market and potential impact of externality effects)
Controls on advertising	Practitioner	<ul style="list-style-type: none"> • Reduces competition by limiting the information available about the cost and quality of other professionals and substitute providers • Maintains high fees and reduces costs
	Consumer	<ul style="list-style-type: none"> • Protection against false or misleading advertising • Assists choice of provider on basis of quality • Reduces professional costs
	Community as a whole	<ul style="list-style-type: none"> • Reduces volume of resources devoted to persuasive advertising
Fee scales	Practitioner	<ul style="list-style-type: none"> • Maintains higher fees • Avoids commercialisation of profession through 'price wars'
	Consumer	<ul style="list-style-type: none"> • Certainty about fee rates • Reduces transaction costs in

	Community as a whole	<p>finding out about fee differences</p> <ul style="list-style-type: none"> • Reduces flow-ons to other incomes/prices
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TABLE 4 INCIDENCE OF COSTS OF RESTRICTIONS

Type of restriction	Who bears cost	What costs
Entry restrictions	<p>Practitioner</p> <p>Potential practitioners</p> <p>Consumers</p> <p>Government (and community indirectly, through taxes or alternative expenditure foregone)</p>	<ul style="list-style-type: none"> • Licence fees • Obtaining qualifications • Professional association fees • Annual re-registration fees • Continuing education fees • Deterred from entering profession because of high costs (may be studies or surveys estimating numbers deterred) • Higher prices, as providers recoup their costs in fees charged (actual cost depends on frequency of use of service, price of service items etc) • Limited choice of provider because of a) deterrence effect and b) inability to substitute an alternative non-licensed provider – b) also contributes to higher prices • Administration costs (net of any offsetting registration fees) : a) registration board sitting fees and expenses b) staff support c) administration
Controls on business ownership	Practitioners	<ul style="list-style-type: none"> • Higher taxes than would be payable as an incorporated body • Higher practice costs as denied the choice of more efficient business structure – no economies of scale

	Consumers Community	<ul style="list-style-type: none"> • Higher prices due to higher practice costs incurred by professional providers • Inhibits innovation by restricting entry of capital and entrepreneurial expertise • Maintains inefficient businesses
Personal conduct of professional	Practitioners Consumers Government/community	<ul style="list-style-type: none"> • Contribution to complaints handling and discipline process is included in registration fee above • Administration costs of discipline bodies incorporated in higher fees charged for services • Transaction costs of accessing complaints process, especially if it duplicates other (including State) consumer complaints mechanisms • May have limited or no capacity to obtain financial redress (such as refund) • Net administration costs for a) Tribunal members and hearings b) support staff c) administration
Controls on advertising	Practitioners Consumers	<ul style="list-style-type: none"> • Barrier to new providers entering the market as have limited capacity to inform potential consumers of the availability of their services • Limited capacity for innovators to obtain greater market share of custom • Lack of information inhibits capacity of consumers to make informed choice about provider based on availability, quality and price • Higher prices for services • Lack of information about poor quality professional services

	Community	<ul style="list-style-type: none"> • Potential oversupply of services without commensurate reduction in cost • Contributes to maintenance of inefficient and incompetent providers
Fee scales	Practitioners Consumers Community	<ul style="list-style-type: none"> • Efficient practitioners inhibited in gaining more clients due to inability to reduce fees • Higher prices • More homogenised services as innovation is not able to be rewarded

(b) Criteria for Risk Analysis

6.11 Risk can be defined as the exposure to the possibility of such things as economic or financial loss or gain, physical damage, injury or delay, as a consequence of pursuing a particular course of action. The concept has two elements:

- the likelihood of something happening; and
- the consequences if it does happen.

Risk is an inherent part of everyday life, but when averaged over the entire population the odds of an adverse event are often relatively small. Where these small probabilities are coupled with catastrophic consequences, the risk cannot be ignored. According to Viscusi (1992), the task for the individual as well as for society at large is to choose which risks will be incurred. As risk cannot be eliminated, it is inevitable that there must be some trade-off - some offsetting advantage of the risky activity - that leads to the choice to engage in an activity despite its risks. The fact that government can sometimes legislate the means for improving safety or reducing the likelihood of loss or damage, does not mean that it invariably should. The key issue for reviews is to consider whether the merits of doing so would be in society's best interests. The fundamental issue is not the level of risk *per se*, but whether the risks can be reduced, and whether the cost of these efforts is warranted by risk reduction.

6.12 Risk analysis is useful in many professional service markets as an explicit element in addressing the threshold issue of whether or not to regulate or whether existing regulation is appropriate. In making such an assessment the analysis would involve:

- an appraisal of the current level of risk to the exposed population due to the identified problem in the absence of regulation;
- the reduction in risk from the regulation;
- whether the regulation is the most effective tool available to deal with the risk; and
- whether there is an alternative use of available resources which would result in greater

overall benefit to the community.

6.13 Risk analysis would involve the following steps:

- identifying the risks
- analysing the risks
- assessing the risks
- prioritising the risks
- managing the risks

6.14 **Identify the risks** against the existing restrictions, by documenting the possible sources of risk (*eg* health and safety, professional liability, commercial relationships, legal relationships, financial matters, property etc) and possible areas of risk impact (*eg* individuals, community, cost, environment, economy etc);

Key questions in identifying the risks in aspects of a particular profession are:

- What is the process or activity?
- What are its strengths and weaknesses?
- Who are the stakeholders?
- What problems have been identified (*eg* in reviews, discipline tribunals, the media?)
- What are the risks?
- When, where, why and how are the risks likely to happen?
- Who might be involved?
- Who bear the risks?
- What are the existing legislative controls and accountability mechanisms?

6.15 **Analyse the risks** in terms of the likelihood of problems happening (*eg* frequency or probability) and the possible consequences if they do happen (*eg* impact or magnitude of the effect). This can be done in two basic ways:

- qualitatively – using the experience, judgement and intuition of the review team. This type of analysis is commonly used where the level of risk does not justify the time and resources needed to do a full analysis, or where the data are inadequate for a more quantitative analysis. It is also useful in performing an initial screening of those risks which may require further, more detailed analysis. In this approach, the level of risk is determined from the relationship between the likelihood and the consequence, and can be set out in a table, as shown below:

Likelihood	Consequences				
	extreme	high	medium	Low	negligible
Almost certain	H	H	H	M	M

Likely	H	H	M	M	S
Moderate	H	H	M	S	L
Unlikely	H	M	S	L	L
Rare	M	M	S	L	L

H = high risk

M = major risk

S = significant risk

L = low risk

Reviews must decide how much weight to place on risks of low probability but high impact, particularly where a situation or circumstances may be a focus of media attention (*eg* the collapse of part of the Westgate Bridge construction). Studies have shown (Viscusi 1992) that people tend to over-estimate the likely impact of low probability events (*eg* a terrorist attack), and underestimate the larger risks (*eg* exceeding the speed limit).

- quantitatively – where there are readily available data on the likelihood of occurrence and the consequences (*eg* mortality and morbidity data for certain medical procedures; epidemiological data on the spread of infectious diseases). Some commonly used quantitative methods include probability analysis, statistical analysis, fault tree and event tree analysis and simulation/computer modelling. Rather than focusing on worst-case scenarios, reviews could obtain a more accurate measurement by using the mean of the probability distribution.

6.16 **Assess the risks** in relation to the following key questions:

What are the current legislative and other controls which may detect or prevent potential or undesirable risks/events?
 What is the potential likelihood of the risks happening with/without legislative restrictions?
 What are the potential consequences of the risks if they do occur?
 What is the acceptable level of risk?

Documentation of the assessment comprises:

- stating the rationale for initial screening of very low risks; and
- for all other risks, stating the existing controls, the likelihood of occurrence with/without the legislative controls, and the resulting level of risk.

6.17 **Prioritise the risks**, by comparing the level of each risk, as calculated above, against the level of acceptable risk. The major risks are then ranked to identify the priorities for treatment. Decisions about the acceptability of risk must take into account the wider public interest matters already discussed in section 5 above, as well as:

- the degree of control over each risk;
- the cost impact;
- the benefits and opportunities presented by the risks;

- the risks borne by other stakeholders who benefit from the risk.

Note that this assessment is simply an extension of the methods outlined in Tables 3 and 4 above, for the assessment of the potential benefits and costs of legislative restrictions on competition. It adjusts those for key risk elements of the review, in this context. In assessing these costs and benefits, what matters is the value of the **expected** gains, or payoffs, that will accrue to society, where this expectation refers to statistical probability.

Level of risk to public health and safety in the professions:
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To what extent does the practice of the profession involve the use of materials and processes which could cause a serious threat to public health and safety?

To what extent does the failure of a practitioner to practise in particular ways (*eg* follow certain procedures, observe certain standards) result in a serious threat to public health and safety?

Are intrusive techniques used in the practice of the occupation, with particular emphasis on pharmacological compounds, dangerous chemicals or radioactive substances?

Is there significant potential for practitioners to cause damage to the environment through air, water, soil or noise pollution?

To what extent does a small error in the practice of a profession have the potential to cause substantial public health and safety risk?

How could regulation be harmful to the public? (*eg* by controlling the availability of practitioners if standards are more restrictive than necessary or by increasing the cost of goods and services to consumers if administrative costs are excessive)

If a high degree of independent judgement is not required, is it necessary to regulate both the provider and the supervisor? (this especially relates to the situation where like professions [and occupations] are in group practice, and there is reservation of work or one profession may legally be responsible for the practice of others – lawyers are in the former and health practitioners in the latter.)

6.18 **Management of the risks** needs to be appropriate to the significance of the risk and the importance of the activity or process. As a general guide, the following recommendations might apply:

- low levels of risk for the profession as a whole can be accepted and legislative restrictions are considered to be unnecessary;

- major or significant levels of risk should be treated, but less restrictive means of treatment than the current legislative restrictions should be considered; and
- high levels of risk may require continuation or strengthening of existing legislative provisions.

6.19 The options for managing the identified risks can be summarised as:

- avoiding or reducing the risk, by legislative provisions, where that is effective;
- reducing the level of risk, by reducing the likelihood of occurrence or consequences, or both, without resort to legislative restrictions. This could include self-regulatory mechanisms such as accreditation, and continuing professional development, as well as documented risk management procedures (*eg* infection control procedures) and explicit contract conditions, including penalties, (*eg* for major building works);
- transferring the risk, by shifting responsibility for all or part of a risk to a third party, such as an insurer, who ultimately bears the costs if the event occurs. To be effective, the risk should be allocated to the party which can exercise the most effective control over the risks;
- accepting the risk, particularly where the cost to avoid or transfer the risk is not justified because the likelihood and consequences are low.

6.20 The costs of managing risks needs to be commensurate with the benefits obtained from removing restrictions on the operation of the market, the significance of the activity and the risks involved. The total cost impact of the risks, and the cost of managing those risks, should be determined. The selection of the most appropriate option(s) involves balancing the cost of implementing each option against the benefits obtained.

6.21 Methodologically, these matters are not always easy to determine, and explicit and open judgement by reviewers will be necessary. However, focus groups, surveys and contingent valuation procedure can help for significant cases. A systematic, informed and disciplined survey of consumers as to their choice between, say, higher fees from entry barriers and higher resultant quality of service *eg* reduced risk, can help form that judgement. In the form of contingent valuation, it can provide a quantitative estimate of the risk trade-off, including in dollar terms. Of course, just as surgery should not be for amateurs, nor should surveys. A high degree of expertise is needed to go beyond simplistic and potentially misleading polling of superficial opinion (Withers, Throsby & Johnston 1994).

6.22 ‘Contingent valuation’ refers to a specific form of survey or experiment that elicits willingness-to-pay or willingness-to-be-compensated valuations in circumstances where the market itself provides no clear guidance *eg* for particular components of a service which is offered only as a ‘bundle’ or for aspects of a service that have no market *eg* spillovers. There are related techniques that can also sometimes assist *eg* ‘hedonic pricing’ whereby the varying characteristics of services can be statistically related to the fees paid. A useful review of the available techniques is given in Viscusi (1992) and Executive Office of the President (1993).

7. IDENTIFY ALTERNATIVE MEANS OF ACHIEVING PUBLIC BENEFITS

7.1 Professional regulation to control entry and to control conduct have arisen as responses to market failures, especially in the area of asymmetric information, as well as for the other public benefits. However there is a range of options to achieve objectives which need to be considered for such markets.

7.2 Where a problem has been identified in a particular professional service market, the response which involves least intervention and cost to achieve is preferred. Thus, in the first instance, the following question should initially be asked:

- Will the existing general laws be adequate to deal with the problem? *eg*
 - trade practices legislation
 - planning and environmental law
 - consumer protection legislation
 - torts law
 - business licensing
 - regulations governing the use of drugs, poisons, and dangerous substances
 - regulations prohibiting cruelty to animals.

- Will private responses be adequate to deal with the problem? *eg*
 - secondary markets in information provision provided through consumer associations, media reports, Internet listings etc (such as for health promotion, and for housing designs and extensions);
 - insurance schemes to cover risks and uncertainties (such as are available for some health services);
 - professional associations providing certification of standards or accreditation of services (such as the accountancy profession); and
 - warranties or guarantees of quality performance (as provided by some manufacturers, retailers and trades).

7.3 In many cases these responses may meet the need. In other cases problems can persist. For example, libel laws can limit information markets, warranties and insurance can lead to over-use ('moral hazard'), associations can re-introduce reputational premia above costs etc. There should be no automatic assumption that torts law works efficiently or consistently in each jurisdiction. Much depends on the form of liability adopted and the efficacy of the court and legal system itself. The provisions for financial compensation under consumer protection legislation vary between jurisdictions, and may not always be adequate or cost-effective, or be sufficient to prevent a particular professional from repeating an offence, even though it is sometimes argued that certification, combined with free flow of information, should be able to address any residual problems of practice quality. Clearly, the nature of risk and its incidence will become a crucial consideration in reaching a judgement here.

7.4 If, after careful consideration, the response is that none of these options meets the public interest objective, then reviews should consider selective government intervention again, in the order of least disturbance to the market and least cost of provision, consistent with meeting the

need. Three broad categories of selective response can be recognised, each being more usually associated with some market failure or other public interest concerns than others. The categories, types of options in each, and relevant source of problems with the free market are as follows:

- persuasion and information disclosure - especially for information asymmetry and disequilibrium
- incentives such as taxes and subsidies – especially for externalities, redistribution/social welfare and regional development; and
- compulsory regulations/laws, using alternative, less restrictive designs – especially for monopoly, access and equity, investment.

7.5 In relation to **persuasion and information**:

- some of the larger companies which provide chemical engineering, mining engineering or construction engineering services voluntarily publish statistical information on occupational health and safety (including site safety) and environmental impact of their activities in their annual reports;
- the peak body for the migration advice industry, the Migration Institute of Australia, publishes the details of individuals who have been found in breach of the migration agents' code of conduct;
- Governments themselves can sponsor enhanced information strategies for consumers, including warnings on official forms, advertising campaigns, publication of pamphlets about specific professions/occupations, *eg*
 - the Victorian Department of Health and Community Services compiled and published morbidity rates for selected procedures performed in different hospitals.

7.6 It is quite common in some professional areas for registration rather than licensing to be required. While this still restricts competition when compulsory and further connected to reservation of title, it is less restrictive than licensing and may be seen to have a primary information objective for clients or consumers. A lesser requirement may simply be information disclosure *eg* information registers obliging service providers to register or disclose certain information.

7.7 Examples of **incentives based upon tax or subsidy provisions include**:

- Subsidies for professional update education programs, professional re-entry and migrant vocational language programs for professionals;
- Awards and prizes for professional excellence funded by government;

- Tax concessions for practice in unattractive areas *eg* health professionals in remote locations, military reservists;
- Public funding of access to professional services in addition to professional charitable or *pro bono* work *eg* legal aid and medical service bulk-billing, pensioner and school dental subsidies or services , animal welfare subsidies

7.8 Less restrictive regulatory options can encompass a range of possibilities, with the least restrictive being negative licensing, where intending practitioners are not screened before starting to practise, but only prohibited from practising if shortcomings in their operations are identified, such as a violation of general consumer protection legislation. Co-regulation, an arrangement which comprises elements of self-regulation along with some legislated restrictions, is a common feature of much current professional legislation. There is no single ‘model’ or ‘best practice’ available. Rather, co-regulation has the potential to be tailored to an individual professional area, combining a flexible balance between the minimum necessary legislative restrictions designed to achieve public interest objectives, together with voluntary restrictions administered by the professional association itself. Typically, governments administer those processes where it is considered that conflicts of interest may distort decisions made by the particular professional association. For example:

- in the insurance area, practitioners are licensed under legislation administered by the Superannuation Commission, while a code of ethics and complaints resolution scheme is administered by the industry association itself;
- similarly, under the South Australian occupational licensing legislation, the Office of Consumer Affairs administers the licensing, registration and disciplinary processes, while the individual associations are responsible for setting professional standards and running the complaints resolution processes;
- by contrast, in NSW the legal profession is responsible for setting entry standards, and administering disciplinary mechanisms, while a statutory authority (the NSW Legal Services Commission) undertakes complaints handling against lawyers.

7.9 In the context of co-regulation, components may be principle based, performance based or describe how the outcome will be achieved. Typically, rules are more costly than standards to create, whereas standards tend to be more costly for individuals to interpret, as it is simpler to check a provider’s qualifications than to check his or her outputs. Codes of conduct are useful alternatives to statutory regulation, and transfer the administrative costs from the public sector regulators to industry participants. It is important to ensure that the administration of such codes is transparent, that there be effective incentives for providers to participate, and that there is effective policing. Disputes between clients and providers can be handled through mechanisms such as industry specific tribunals, industry ombudsmen or mediation. There are a number of different models, and industry based schemes funded on a ‘user pays’ basis are becoming more prevalent. For consumers to maintain confidence in these arrangements, it is important that they be direct participants in the formulation and enforcement of these procedures. It is also proposed that any current co-regulatory arrangements be examined with a view to adopting the least restrictive combination of legislative and self-regulatory provisions.

7.10 One relatively minimalist form of regulation is that of title restriction. The use of a particular title is legally restricted to those meeting prescribed qualifications and conditions. But practice is otherwise unregulated and is open to contestation by other providers.

7.11 Where there are no strong public interest arguments for retaining legislative restrictions for a profession as a whole, but the analysis has shown that there are some specific areas of practice where there is an unacceptably high risk of market failure, then reviews could consider retaining regulation only for those specific areas within the profession. For example, in the predominantly unregulated profession of accountancy, there are some areas of accounting practice where it has been considered necessary in the public interest to maintain legislative restrictions on competition. These are insolvency practice (*ie* liquidators, receivers and administrators), company auditing and taxation advice. The main rationale for maintaining legislative restrictions on those areas was to overcome the problems associated with information asymmetry and externalities, which were considered to be greater in those areas than for the majority of accounting practice, as well as the need for a high degree of professional independence and integrity. In line with the rationale set out above, the aim should be to maintain the least legislative restriction on competition, consistent with protecting the public interest.

8. RECOMMEND ON RESTRICTIONS ON COMPETITION FOR PROFESSIONS

8.1 In summarising the results of the benefit-cost analysis, or its planning balance sheet analogue, an assessment might be along the following lines:

‘Although the benefit to the community as a whole of the (legislation) is not considered to be greater than the costs, it is considered that (these specified restrictions) should be retained because the service is predominantly and frequently used by a particularly vulnerable sector of the community who would not otherwise be able to inform themselves about the relative capabilities of practitioners, and are likely to suffer serious (financial) consequences if they used an unqualified provider.’

Or it might be:

“The overall cost of (the restriction) is judged to be marginally greater than the benefits, and the restrictions on competition should generally be removed; however, due to some remaining (specified) failures in the market, those regulations which restrict (specify broad category such as “business ownership”) should be should be maintained for a further period of three years, and reviewed again at that time.”

8.2 Where the net public benefit test indicates that deregulation is warranted, the review should:

- identify all those legislative restraints on competition which do not directly deal with the market problems originally identified as giving cause for concern, and
- make recommendations in relation to the provisions which could be repealed.

8.3 Where the net public benefit test indicated that market intervention is necessary to correct market failure, and government regulation should continue, it does not automatically follow that all the existing legislative provisions should be retained. An examination of the information provided in the cost/benefit analysis will assist in determining those provisions which should be retained unchanged, and those where there is scope for replacing them with less restrictive means of dealing with the identified market problems.

8.4 Each completed review should conclude with a series of recommendations for reform which achieve the economic and broader public interest objectives of the legislation with the least restriction on competition. These recommendations could be expressed as:

- repeal the entire Act and subordinate legislation;
- amend the legislation as follows:
 - repeal specified provisions (list the relevant clauses in the principal and subordinate legislation)
 - amend specific provisions (list the relevant clauses and indicate the nature of amendment proposed)
 - specify what clauses would be retained.
- adopt new alternatives to legislation; specify alternative measures required.

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GLOSSARY OF TERMS

OFFICIAL TERMS

Australian Competition and Consumer Commission (ACCC) – a Commonwealth Government statutory authority responsible for ensuring compliance with major parts of the Trade Practices Act (plus the Conduct Code and Prices Surveillance Act)

Australian Competition Tribunal (ACT) – a quasi-judicial appeal body constituted under the Trade Practices Act

Committee on Regulatory Reform (CRR) – a committee of senior state and territory officials which advises responsible ministers as to co-ordination of regulatory reform across states and territories

Competition Principles Agreement (CPA) – a component of National Competition Policy defining agreed principles for six areas of competition reform, including legislation review

Council of Australian Governments (COAG) – regular meetings of the heads of state, territory and Commonwealth governments in Australia, formed in 1995 for purposes of non-budget discussions of matters of mutual governmental interest

Legislation Review – the process under National Competition Policy by which existing and proposed legislation is reviewed for consistency with the principles agreed in the Competition Principles Agreement

Mutual Recognition Agreement (MRA) – an agreement amongst Australian state, territory and Commonwealth governments to, *inter alia*, provide that a person registered to practise an occupation in one Australian jurisdiction should be able to do so also in the other jurisdictions

National Competition Policy (NCP) – a package of three agreements to promote competition adopted by all state and territory governments and the Commonwealth in April 1995.

Public Benefit Test – the balancing of public benefits and public costs during Legislation Review in order to determine if a legislated restriction on competition is in the public interest

COMPETITION TERMS

Asymmetric information – a systematic difference in information behaviour between buyers

and sellers that is not easily remedied by market provision of information

Atomistic competition - a market of many rivalrous sellers and buyers with no significant capacity for obtaining returns above competitive levels

Benefit-cost analysis – a systematic documentation of relevant costs and benefits over time, summarised as a monetary ratio

Catastrophic risk – events with a known chance of occurrence with fatal or injurious consequences for others in addition to the decision-maker

Competition – process of rivalrous behaviour by suppliers and buyers in a market

Competitiveness – a capacity to enhance market share for a firm, industry or nation

Complementarity – the degree to which use of one product or service is seen jointly linked to that of another

Contingent valuation – a technique for eliciting market valuations for non-market activities using hypothetical propositions

Customisation – individualisation of a product to the distinct requirements of particular customers

Discount rate – interest rate by which future monetary amounts are rendered commensurate with present money

Disequilibrium – a situation in a market where supply does not equal demand

Entry barriers – elements of market structure and conduct which inhibit easy entry by new suppliers to a market

Experience goods – products and services where knowledge of the characteristics supplied increases significantly with consumption

Externalities – effects on others beyond parties engaged in a market activity ('spillover')

Market – the area of close actual or potential competition between buyers and sellers

Market conduct – the behaviour of participants (and potential participants) in a market

Market structure – the conditions of entry and organisation in a market

Merit good – an activity provided in a manner divergent from the preferences of consumers on the grounds of ignorance, irrationality or immorality

Monopolistic competition – a market with many sellers but still possessing a capacity for

obtaining returns above competitive levels

Monopoly – power to obtain market returns above competitive levels, particularly where there is a single seller in a market

Oligopoly – a highly concentrated market structure dominated by a few sellers

Planing balance sheet – a systematic documentation of relevant costs and benefits, expressed in a mix of monetary, natural quantitative or qualitative units

Public good – an activity from which others cannot easily be excluded and which is readily consumable by some, without diminishing its availability to others

Public interest – well-being of the community

Risk – probabilistic events with a known chance of occurrence

Substitutability – the degree to which alternative suppliers are seen as competitive by buyers

Tragic risk – events with a known chance of occurrence with fatal or injurious consequences

Uncertainty – probabilistic events with imperfectly known distribution of likelihood

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