Consumer Affairs Victoria

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Preface

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

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

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

Consumer Affairs Victoria would like to thank Deborah Cope from PIRAC Economics for her assistance in preparing this paper.

Consumer Affairs Victoria would welcome your comments on the paper. These may be directed to:

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“Using licensing as a consumer protection mechanism”

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

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

Contents

It recommended:

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

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

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

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

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

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

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

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

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

The Victorian Government has emphasised its commitment to regulatory reform:

> *The Victorian Government is committed to regulatory reform, the creation of a competitive business environment and the achievement of better social outcomes in the State.*
>
> *An improved regulatory framework will reduce the time and costs of doing business in Victoria—and the prices faced by Victorian consumers—by ensuring that government regulation does not unduly impact on business productivity and growth.* (DTF 2005, p. i)

This includes a commitment to protecting the interests of consumers, which is reflected in the principles of good regulatory governance (DTF 2005, p. 1.7). In addition, the calls for greater national consistency are increasing (VCEC 2005, p. 137).

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

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

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

[2] Appendix 2 outlines these reform processes.

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

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

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

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

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

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

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

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

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

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

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

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

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

Information constraints arise if:

- consumers do not have access to adequate information
- the cost of obtaining that information is prohibitive
- consumers do not have the skills to collect or interpret the information

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

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

- making it easier to identify activities that could cause problems—for example, improving the

The third stage of a licensing scheme involves ongoing standards that licensed operators must meet. Ongoing licence standards vary across industries and can be used to address many risks. Credit providers, for example, are required to disclose credit contract information to consumers and are prohibited from

Licensing also has costs. These include direct financial, administration and compliance costs for business, administration costs for government, and costs to consumers due to higher prices or less choice of suppliers or products and services. Industry and government bear the direct costs of managing and

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

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

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

> *Revenue raising? Notwithstanding the states' imperatives, this is not in itself a sound rationale for restricting ownership. Governments have generally rescinded the practice of selling monopoly privileges to on consumers through higher prices and restricted choice. Such effects also arise in the gambling industries. The likely overall outcomes are clouded, however, by regulatory controls on prices and availability, and the presence among consumers of problem gamblers.*
>
> *Reduce social costs? In practice, ownership restrictions have not served to reduce the accessibility of gambling, other than for casino table games. And monopoly rights are unlikely to facilitate harm minimisation strategies for problem gamblers.*
>
> *Facilitate probity checks? Economies are likely to be gained with fewer operators to monitor. But the costs of probity regulation should in any case be borne by venues and this would partly determine their appropriate size.*
>
> *Some efficiency benefits? Scale is important to lotteries, but with the ability to pool across lotteries, does not necessitate exclusivity. There is a case for government intervention to address potential market failures for wagering on horse racing, but monopoly TABs do not appear necessary for this.* (PC 1999, p. 35)

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

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

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

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

(a) to promote and encourage fair trading practices and a competitive and fair market;

(aa) to protect consumers;

(b) to regulate trade practices;

(ba) to provide for statutory conditions and warranties in consumer contracts;

(bb) to provide for unfair terms in consumer contracts to be void;

(c) to provide for the safety of goods or services supplied in trade or commerce and for the information which must be provided with goods or services supplied in trade or commerce;

(d) to regulate off-business-premises sales and lay-by sales;

(e) to provide for codes of practice;

(f) to provide for the powers and functions of the Director of Consumer Affairs Victoria including powers to conciliate disputes under this Act and powers to carry out investigations into alleged

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

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

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

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

Under negative licensing, businesses do not need to demonstrate they meet preconditions before entering the industry. If, however, a business breaches industry standards, it can be barred from continuing to operate. Negative licensing is used for Finance Brokers in Victoria (BLA 2005d) and mobile hawkers in the Australian Capital Territory, consistent with the recommendations of a review of the *Hawkers Act 1936*

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

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

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

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

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

> *Co-regulation typically refers to the situation where an industry or professional body develops the regulatory arrangements (e.g. a code of practice, accreditation or rating schemes) in consultation with a government. While the industry administers its own arrangements, the government provides legislative backing to enable the arrangements to be enforced. For example, the Victorian Code of Accepted Farming Practice for the Welfare of Poultry is underpinned by the Prevention of Cruelty to Animals Act 1986. Co-regulation is common in relation to professions such as lawyers and engineers.*
> (DTF 2005, p. 2.5)

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

Under self-regulation, the industry takes a lead role in developing codes of practice that specify the standards expected of those operating in the industry. Government may be involved in these negotiations, but the codes are not legally binding or enforced by a regulatory agency. Self-regulation can be highly

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

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

6.6 Accreditation schemes

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

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

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

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

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

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

7.1 Industry-specific versus general regulators

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

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

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

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

7.2 Separation of regulatory functions

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

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

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

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

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

This model could be seen to promote natural justice and avoid bias. It reduces conflicts of interest and the need to establish ‘Chinese .02bdS.rsChi5seetwto pfuncsdiscinvbliign.

Travel agents

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

The Western Australian Department of Consumer and Employment Protection, in liaison with the Council of Australian Governments (COAG) Committee on Regulatory Reform, coordinated the preparation of the review response to the working

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

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

- The Commonwealth Government could pass national legislation, although this approach is not possible for many licensing schemes because the Commonwealth does not have constitutional power to regulate.
- The states could refer matters to the Commonwealth Government under s51(37) of the Constitution. This has occurred, for example, in state corporations law matters.
- The states could enact mirror legislation so each state Act is the same. Governments agreed in 1995, for example, to adopt mirror legislation to extend the co66986694 v41eqBT/b IVpf in 199 under s51(37) of the

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

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Mutual recognition does not cover:

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

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

8.3 When is national uniformity important?

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

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

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

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

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

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

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

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

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

Reasons for regulation

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

The business registration scheme seeks to ensure businesses:

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

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

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

Cost–benefit analysis

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

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

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

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

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

Conclusion

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

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

Recommendation

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

A1.2 Licensing of cadastral surveyors

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Restriction 4: Applicants face unclear character requirements

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

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

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

All governments are scrutinising licensing schemes. In recent years, the Australian, state and territory governments have undertaken reforms that affect the

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

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

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

A2.2 Regulatory impact statements

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

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

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

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

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

Box A2.1: Victorian regulatory impact assessments

Regulatory impact statements

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

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

These statements must include:

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

The commission's concerns are consistent with views noted by the Scrutiny of Acts and Regulations Committee in its 2002 review of the *Subordinate Legislation Act 1994* (Vic.) (SARC 2002). At that time, the government did not accept the committee's

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

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

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