# OECD REVIEWS OF REGULATORY REFORM

# MARKET OPENNESS IN AUSTRALIA

**ORGANISATION FOR ECONOMIC CO-OPERATION**

**AND DEVELOPMENT**

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

- To achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

- To contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and

- To contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

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## FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *Market Openness in Australia* analyses the institutional set-up and use of policy instruments in Australia. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Australia* published in 2010. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 23 member countries as part of its Regulatory Reform programme. The programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses, drawing on the 2005 *Guiding Principles for Regulatory Quality and Performance,* which brings the recommendations in the 1997 *OECD Report on Regulatory Reform* up to date, and also builds on the 1995 *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation.*

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness and on specific issues, such as multi-level regulatory governance and environmental policy for Australia. These are presented in the light of the domestic macro-economic context.

This report was prepared by Anthony Kleitz and Evdokia Moïse in the Trade and Agriculture Directorate. It has benefited from comments provided by Dale Andrew in TAD and other colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Australia. The report was peer reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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## ACRONYMS AND ABBREVIATIONS

| | |
|---|---|
| ACCC | Australian Competition and Consumer Commission |
| ACIS | Automotive Competitiveness and Investment Scheme |
| ACMA | Australian Communications and Media Authority |
| AEMC | Australian Energy Market Commission |
| ALGA | Australian Local Government Association |
| ALOP | Appropriate Level of Protection |
| AMSA | Australian Maritime Safety Authority |
| ANZCERTA | Australia New Zealand Closer Economic Relations Trade Agreement |
| APEC | Asia-Pacific Economic Cooperation |
| APVMA | Australian Pesticides and Veterinary Medicines Authority |
| AQIS | Australian Quarantine and Inspection Service |
| AQTF | Australian Quality Training Framework |
| BRCWG | Business Regulation and Competition Working Group |
| CAC | Commonwealth Authorities and Companies Legislation |
| CI&SC | Customs Information and Support Centre |
| COAG | Council of Australian Governments |
| CPGs | Commonwealth Procurement Guidelines |
| DAFF | Department of Agriculture, Fisheries and Forestry |
| DFAT | Department of Foreign Affairs and Trade |
| DIISR | Department of Innovation, Industry, Science and Research |
| EDI | Electronic Data Interchange |
| FDI | Foreign Direct Investment |
| FMA | Financial Management and Accountability Act |
| FOI Act | Freedom of Information Act |
| FRLI | Federal Register of Legislative Instruments |
| FSANZ | Food Standards Australia New Zealand |
| FTA | Free Trade Agreement |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| GDP | Gross Domestic Product |
| GPA | Agreement on Government Procurement |
| IAF | International Accreditation Forum |
| ICS | Integrated Cargo System |
| ICSID | International Council of Societies of Industrial Design |
| IEA | International Energy Agency |
| IEC | International Electrotechnical Commission |
| ILAC | International Laboratory Accreditation Co-operation |
| IPPC | International Plant Protection Convention |
| IRA | Import Risk Analysis |
| ISO | International Organisation for Standardisation |
| ITU | International Telecommunications Union |
| JAS-ANZ | Joint Accreditation System of Australia and New Zealand |

| | |
|---|---|
| LPI | Logistics Performance Index |
| MFN | Most-favoured nation |
| MRA | Mutual Recognition Agreement |
| MTAS | Mobile terminating access service |
| NAFTA | North American Free Trade Agreement |
| NARIC | National Recognition Information Centre for the United Kingdom |
| NATA | National Association of Testing Authorities |
| NCP | National Competition Policy |
| NGO | Nongovernmental organisation |
| NIA | National Interest Analysis |
| NMI | National Measurment Institute |
| NSO | National standardisation organisation |
| OBPR | Office of Best Practice Regulation |
| OCVO | Office of the Chief Veterinary Officer |
| PASC | Pacific Area Standards Congress |
| PATCRA | Papua New Guinea and Australia Trade and Commercial Relations Agreement |
| PMR | Product Market Regulation |
| RIA | Regulatory Impact Analysis |
| RIS | Regulation Impact Statement |
| SEC | US Securities and Exchange Commission |
| SME | Small and medium-sized enterprises |
| SPARTECA | South Pacific Region Trade and Economic Cooperation Agreement |
| SPS | (Agreement on the Application of) Sanitary and Phytosanitary Measures |
| TBT | (Agreement on) Technical Barriers to Trade |
| TCF | Textiles, clothing and footwear industry |
| TPA | Trade Practices Act 1974 |
| TRA | Trades Recognition Australia |
| TRS | Time Release Study |
| TTMRA | Trans-Tasman Mutual Recognition Agreement |
| UN/ECE | United Nations Economic Commission for Europe |
| VAT | Value Added Tax |
| WCO | World Customs Organisation |
| WEF | World Economic Forum |
| WTO | World Trade Organization |

## EXECUTIVE SUMMARY

As traditional barriers to trade have fallen, the impact of domestic regulations on international trade and investment has become more apparent than ever before. While regulations aim at improving the functioning of market economies in a range of fields, such as market competition, business conduct, the labour market, consumer protection, public health and safety or the environment, they may directly or indirectly distort international competition and prevent market participants from taking full advantage of competitive markets. Maintaining an open world trading system requires regulation that promotes global competition and economic integration, thereby avoiding trade disputes and improving trust and mutual confidence across borders. This chapter assesses how the Australian regulatory system performs from these perspectives and how regulatory reform may contribute to enhancing market openness and the benefits which consumers and producers can reap from open markets.

Australia's approach to regulatory policy and reform reflects recognition of the importance of maintaining and strengthening the openness of its markets to international competition. The remaining challenges of regulatory reform are strongly characterised by the federal system of government and by Australia's geographic size and physical isolation from other economies. At the same time, through effective political leadership and transparent involvement of stakeholders in the regulatory process, the challenges have virtually all been recognised and are being addressed on a variety of levels. Australia should be commended for its frequent assessment of the regulatory process and effects on the economy and its willingness to implement reforms suggested by this assessment. Across the board, the OECD principles of "efficient regulation" for a market-openness-friendly regulatory environment are well reflected in the Australian regulatory framework, even if there may be room for further improvement of implementation.

Australian mechanisms for making information available are well developed, offering multiple, easily-accessible and user-friendly information sources to all stakeholders. Consultation mechanisms allow interested parties to efficiently interact with the administration and their pro-active and widely inclusive character is particularly helpful for foreign stakeholders. Well established review mechanisms offer effective redress opportunities should a problem arise. Transparency mechanisms for government procurement and technical standards are also generally sound. However, in the area of technical regulations, the timeliness and user-friendliness of consultation processes could be further improved.

Economic policies are generally applied on a basis of non-discrimination. Industry assistance programs have aimed to promote participation of Australian-based production in global supply chains with little attention to national ownership patterns. Foreign investment policy is generally open, although foreign acquisitions are subject to a screening process that causes some investors to raise concerns about the transparency and predictability of the investment regime.

Australian regulatory impact assessment mechanisms and their explicit consideration of market openness impacts significantly contribute in avoiding unintended trade-restrictive effects. Market openness considerations are also high in the Commonwealth-State dialogue agenda and the achieved momentum should help promote reforms in areas where further improvements are needed, namely as regards the mutual recognition of goods and services. Border procedures are generally trade-friendly and their continuous monitoring is a good safeguard against duplication and inefficiencies and in favour of trade facilitation. However, positive results obtained by Customs are not equally matched by other border agencies, in particular as regards quarantine inspections, the sweeping nature of which has been strongly and consistently criticised by Australia's trading partners over the past years.

Use of internationally harmonised measures is encouraged by a number of regulatory mechanisms at the Commonwealth and State level. Although the stock of domestic standards aligned with international standards is relatively limited compared to other OECD countries, this does not seem to create major problems for foreign manufactures seeking to enter the Australian market. On the other hand, the limited reliance of sanitary and phytosanitary policies on international standards still generates important frictions with Australia's trading partners.

Recognition of equivalence of foreign regulatory measures and conformity assessment results works generally smoothly as regards manufactures. On the other hand, the mutual recognition of professional qualifications is still a challenge, in particular at the State level.

Finally, Australia has paid serious attention to advancing the implementation of an effective competition policy framework and does not seem to encounter significant problems with respect to the openness of the Australian market and enforcement of a strong competition policy.

# ENHANCING MARKET OPENNESS THROUGH REGULATORY REFORM

The globalisation of production and the resulting deeper integration of national markets have reinforced the link between domestic policies and trade liberalisation. As traditional barriers to trade have fallen, the impact of domestic regulations on international trade and investment has become more apparent than ever before. While regulations generally aim at improving the functioning of market economies in a range of fields, such as market competition, business conduct, the labour market, consumer protection, public health and safety or the environment, they may directly or indirectly distort international competition and affect resource allocation and productive efficiency. Thus regulations should be made in a way that is consistent with an open trading system and that supports strong international competition.

This chapter reviews experiences in Australia and looks in particular at whether and how Australian regulatory procedures and content affect market access and presence in the country. It is organised as follows: Part 1 presents an overview of the trade and economic environment in Australia and the analysis focuses in particular on the country‘s record as a trade and investment-friendly location. Part 2 reviews the regulatory process in Australia – its procedures and policy experiences – and studies how these conform to the six efficient regulation principles that are promoted by the OECD. Part 3 finally presents the conclusions and recommendations.

## 1. MARKET OPENNESS AND REGULATION: THE ECONOMIC AND POLICY ENVIRONMENT IN AUSTRALIA

### 1.1. The economic environment

Partly because of the extensive structural reforms and market opening measures initiated from the 1980s, Australia finds itself in a relatively favourable position compared to some other countries with respect to the global economic downturn that began to be felt in 2008. This means that Australia may resist the downturn relatively better than some countries; yet it does not reduce the need to pursue those and other reforms in order to further strengthen Australia’s ability to compete in the global market place.

Before the effects of the global economic crisis began to be felt during 2008, the Australian economy was enjoying a period of 17 years of uninterrupted growth. At an average of close to 4% a year, this was one of the highest levels of real GDP growth among OECD countries over this period and unemployment had reached a 33-year low. This overall impressive performance reflected in particular the extensive structural reforms that had been undertaken since the 1980s, which among other things involved the deregulation of key network industries, allowing in particular advantage to be taken of rapid advances in information and communications technology and, along with labour market reforms, contributing to important growth in labour productivity. The reforms also involved a significant liberalisation of foreign trade and investment. Australia’s position was further strengthened by its proximity to rapidly growing

Asian markets, its participation in global value chains and the gains in its terms of trade, which were up about 80% between 2003 and mid-2008 due to rising prices for raw materials and food products.

With the economic downturn, OECD has forecast that GDP growth in the Australian economy could decline from 2.5% in 2008 to 1.75% in 2009, before picking up to 2.75% in 2010. If these are accurate, the effects of the economic crisis may indeed be more modest for Australia than for some countries. Fiscal stimulus measures taken by the government as well as Australia's linkages to Asian economies should support this outcome. Nevertheless, weaknesses exist, in particular a notable slowdown in productivity growth in the past decade and the recent downward pressure on terms of trade, which have fallen about 10% since mid-2008 in response to the global recession. These clouds on the horizon should provide strong arguments for pursuing and reinvigorating the reform movement in Australia in order to return to a path of productivity growth and strengthening global competitiveness.

With a population of about 22 million, Australia's relatively small economy has in recent decades come to rely increasingly on trade. The role of trade in the economy can be seen from the fact that trade (exports plus imports) as a percentage of GDP has grown significantly in the past two decades to reach 48% - although this is still one of the lowest shares in OECD. In 2008 economic growth was accompanied by a significant increase in two-way trade in goods and services, although much more in value (an increase of 23%) than in volume (about 8%). While Australia's trade balance was in deficit at that time, in 2007 this represented only about 2% of GDP - relatively small compared to some OECD countries. With export values growing more rapidly than import values in 2008, the trade deficit was considerably smaller that year.

Slightly over half of Australia's trade (imports and exports) in 2008 was with OECD, dominated by the EU, Japan and the United States (see Table 1). However, the importance of East Asia (including OECD Members Japan and Korea) is very clear: it accounted for 56% of Australia's exports and 46% of imports. Japan is Australia's most important two-way trading partner, with 13.5% of total trade, followed by China (13.1%) and the US (9.7%).

With respect to the product composition of Australia's exports, coal and iron ore were by far the most important products in 2008. As a reflection of the global boom for mineral products, the value of these two categories of exports doubled in 2008 compared to the previous year, to account for over one-third of the value of merchandise exports. Agricultural exports accounted for only 14%, compared to nearly 28% a decade earlier (nevertheless, about two-thirds of Australia's agricultural production is exported). The major agricultural export products remain bulk commodities such as beef, grains, wine and dairy. The major category of industrial exports in 2008 was transportation equipment. With respect to imports, the major categories were machinery and transport equipment (which in turn contributes to Australian exports in this same field) and mineral fuels.

Services trade in 2008 represented about 20% of total Australian trade (very close to the OECD average). The most important export categories were education services, personal travel (excluding education), and professional, technical and other business services.

**Table 1. Australia's trade in goods and services by top ten partners, 2008 [(a)]**

**(AUD million)**

| Australia's top 10 export markets | | | | | | |
|---|---|---|---|---|---|---|
| | | **Goods** | **Services** | **Total** | **%share** | **Rank** |
| Japan | | 50 755 | 2 418 | 53 173 | *19.1* | 1 |
| China | | 32 347 | 4 749 | 37 096 | *13.3* | 2 |
| Republic of Korea | | 18 391 | 1 843 | 20 234 | *7.3* | 3 |
| United States | | 12 130 | 6 137 | 18 267 | *6.6* | 4 |
| India | | 13 508 | 2 968 | 16 476 | *5.9* | 5 |
| United Kingdom | | 9 332 | 4 750 | 14 082 | *5.1* | 6 |
| New Zealand | | 9 345 | 3 416 | 12 761 | *4.6* | 7 |
| Singapore | | 6 126 | 3 928 | 10 054 | *3.6* | 8 |
| Taiwan | | 8 263 | 479 | 8 742 | *3.1* | 9 |
| Thailand | | 5 340 | 965 | 6 305 | *2.3* | 10 |
| **Total exports** | | **224 727** | **53 202** | **277 929** | ***100.0*** | |
| *of which:* | *APEC* | *162 415* | *30 705* | *193 120* | *69.5* | |
| | *ASEAN 10* | *22 924* | *8 519* | *31 443* | *11.3* | |
| | *European Union 27* | *23 533* | *8 990* | *32 523* | *11.7* | |
| | *OECD* | *117 730* | *24 503* | *142 233* | *51.2* | |
| **Australia's top 10 import sources** | | | | | | |
| | | **Goods** | **Services** | **Total** | **%share** | **Rank** |
| China | | 35 258 | 1 449 | 36 707 | *13.0* | 1 |
| United States | | 26 696 | 9 781 | 36 477 | *12.9* | 2 |
| Japan | | 20 238 | 2 601 | 22 839 | *8.1* | 3 |
| Singapore | | 16 187 | 4 772 | 20 959 | *7.4* | 4 |
| United Kingdom | | 9 955 | 4 411 | 14 366 | *5.1* | 5 |
| Germany | | 11 351 | 1 237 | 12 588 | *4.4* | 6 |
| Thailand | | 10 150 | 1 821 | 11 971 | *4.2* | 7 |
| New Zealand | | 7 603 | 2 573 | 10 176 | *3.6* | 8 |
| Malaysia | | 8 958 | 1 009 | 9 967 | *3.5* | 9 |
| Republic of Korea | | 6 428 | 559 | 6 987 | *2.5* | 10 |
| **Total imports** | | **229 114** | **53 783** | **282 897** | ***100.0*** | |
| *of which:* | *APEC* | *158 517* | *30 215* | *188 732* | *66.7* | |
| | *ASEAN 10* | *47 744* | *9 696* | *57 440* | *20.3* | |
| | *European Union 27* | *47 468* | *11 273* | *58 741* | *20.8* | |
| | *OECD* | *115 350* | *29 208* | *144 558* | *51.1* | |

| Australia's top 10 two-way trading partners | | | | | | |
|---|---|---|---|---|---|---|
| | | **Goods** | **Services** | **Total** | **%share** | **Rank** |
| Japan | | 70 993 | 5 019 | 76 012 | *13.6* | 1 |
| China | | 67 605 | 6 198 | 73 803 | *13.2* | 2 |
| United States | | 38 826 | 15 918 | 54 744 | *9.8* | 3 |
| Singapore | | 22 313 | 8 700 | 31 013 | *5.5* | 4 |
| United Kingdom | | 19 287 | 9 161 | 28 448 | *5.1* | 5 |
| Republic of Korea | | 24 819 | 2 402 | 27 221 | *4.9* | 6 |
| New Zealand | | 16 948 | 5 989 | 22 937 | *4.1* | 7 |
| India | | 15 339 | 3 587 | 18 926 | *3.4* | 8 |
| Thailand | | 15 490 | 2 786 | 18 276 | *3.3* | 9 |
| Germany | | 13 423 | 2 227 | 15 650 | *2.8* | 10 |
| **Total two-way trade** | | **453 841** | **106 985** | **560 826** | ***100.0*** | |
| *of which:* | *APEC* | *320 932* | *60 920* | *381 852* | *68.1* | |
| | *ASEAN 10* | *70 668* | *18 215* | *88 883* | *15.8* | |
| | *European Union 27* | *71 001* | *20 263* | *91 264* | *16.3* | |
| | *OECD* | *233 080* | *53 711* | *286 791* | *51.1* | |

(a) All data is on a BOP basis, except for Goods by country which are on on a recorded trade basis.
*Source*: DFAT STARS database & ABS catalogue 5368.0, April 2009 issue.

Inward international investment has remained relatively strong, reflecting the open investment policy followed by Australia as described briefly in Sections 1.2 and 2.2.2 below. The level of foreign investment in Australia increased by AUD 80.9 billion in 2008 and reached AUD 1.74 trillion by 31 December 2008. The stock of inward direct investment thus represents close to 33% of GDP. At that time, the major holders of investment in Australia were the United Kingdom (25%), the United States (24%), Japan (5%), Hong Kong (3%) and Singapore (3%). As of 2007, inward direct investment was heavily concentrated in mining (25%), manufacturing (18%), wholesale and retail trade (15%) and finance and insurance (14%). The level of Australian investment abroad reached AUD one trillion in 2008, an increase of AUD12 billion on the previous year.

## 1.2. Economic and trade policy

As explained by the Government, Australia’s trade policy is based on two pillars. This first is to open new markets through international trade negotiations; the second, which is the main subject of this chapter, concerns undertaking the necessary reforms to improve productivity and competitiveness behind the border.

With respect to opening new markets, Australia has attached very high priority to the successful conclusion of the Doha Round of Multilateral Trade negotiations taking place under the WTO. It has simultaneously pursued a policy of negotiating free trade agreements with important trading partners, as discussed below in Section 2.2. A particular focus in this regard has been trade with China and other Asian countries, drawing on Australia's geographic proximity to these countries and the complementary role Australia can play in providing raw materials and food for the burgeoning economies in that region. A major plank in Australia's trade policy in recent years has thus been the development of strong trade and investment links in the Asia-Pacific region, reflected in Australia's leadership role in APEC and in moving forward on FTA negotiations with particular Asian countries or groups of countries.

In addition, since the 1980s Australia has undertaken unilateral tariff reductions on an MFN basis, with the goal of strengthening competition and providing incentives for improved productivity in the domestic economy. Australia has also acted unilaterally to reduce barriers to trade in services and cross-border investment flows.

In parallel to the increased market opening achieved through its trade policy, Australia has sought to favour foreign investment, both inward and outward. The goal has been to strengthen Australian competitiveness and increase participation in the global economy. Australia's foreign investment regime is considered transparent and fairly open. Nevertheless, there are foreign equity restrictions in certain sectors and all inward direct investment above certain thresholds is subject to a screening process (see Section 2.2.2 below). It is worth noting that the OECD PMR indicators show Australia to maintain one of the most significant levels of policy-induced barriers to FDI in OECD.

The Australian Trade Commission (AusTrade) helps economic actors take advantage of opportunities provided by measures intended to enhance market openness. Its role is to provide information, advice and services to domestic and foreign enterprises, business groups and governments, with a view to facilitating Australian exports as well as productive investment into Australia. In helping to attract new investment into Australia it aims to fill technology gaps and help develop effective commercialisation of Australian technology while enhancing the participation of Australian producers in global value chains.

## 2. THE POLICY FRAMEWORK FOR MARKET OPENNESS: THE SIX "EFFICIENT REGULATION" PRINCIPLES

An important step in ensuring that regulatory regimes, processes and practices do not unnecessarily reduce market openness is to build "efficient regulation" principles into the domestic regulatory process. "Market openness" here refers to the ability of foreign suppliers to compete in a national market without encountering discriminatory, excessively burdensome or restrictive conditions. Efficient regulation principles, were first included in the 1997 OECD *Report on Regulatory Reform*, developed further in the Trade Committee and re-affirmed in the 2005 OECD Guiding Principles for Regulatory Quality and Performance. These principles are:

- Transparency and openness to affected and interested parties, including foreign parties;
- Effective equality of competitive opportunities between like goods and services irrespective of origin (non discrimination principle);
- Avoidance of trade-restrictive effects that go beyond what is necessary to ensure achievement of the desired regulatory objective;
- Use of internationally harmonised measures;
- Recognition of the equivalence of other countries' regulatory measures and of the procedures and results of conformity assessment; and
- Application of competition principles in an international perspective.

These principles have been identified by trade policy makers as key to market-oriented, trade and investment friendly regulation. They reflect the basic principles underpinning the multilateral trading system, concerning which many countries have undertaken certain obligations in the WTO and other contexts. The intention in the OECD country reviews of regulatory reform is not to judge the extent to which any country may have undertaken and lived up to international commitments relating directly or indirectly to these principles but rather to assess whether and how domestic instruments, procedures and practices give effect to the principles and successfully contribute to market openness.

## 2.1. Transparency, openness of decision making and of appeal procedures

In order to ensure international market openness, the process of creating, enforcing, reviewing or reforming regulations needs to be transparent and open to foreign firms and individuals seeking access to a market, or expanding activities in a given market. From an economic point of view, transparency is essential for market participants in several respects. Transparency in the sense of information availability offers market participants a clear picture of the rules on the basis of which the market operates, enabling them to base their production and investment decisions on an accurate assessment of potential costs, risks and market opportunities. It is also a safeguard in favour of equality of competitive opportunities for market participants and thus enhances the security and predictability of the market. Such transparency can be achieved through a variety of means, including systematic publication of proposed rules prior to entry into force and use of electronic means to share information, such as the Internet.

Transparency of decision making further refers to the dialogue with affected parties, which should offer well-timed opportunities for public comment, and rigorous mechanisms for ensuring that such comments are given due consideration prior to the adoption of a final regulation. Market participants wishing to voice concerns about the application of existing regulations should have appropriate access to appeal procedures. Such dialogue allows market forces to be built into the process and helps avoid trade frictions.

This sub-section discusses the extent to which such objectives are met in Australia and how. It also provides insights on two specific areas, technical regulations and government procurement, in which transparency is essential for ensuring international competition.

### *2.1.1. Information dissemination*

Information on Australian regulations is publicised through a variety of means : legislation is available in paper form and in electronic form on a central free-access website *www.comlaw.gov.au*; furthermore, information about government and compliance requirements can be found in the Australian Government's central portal *www.australia.gov.au* and in the central portal for business *www.business.gov.au*, which provides a registry of business formalities encompassing information from all three levels of government. Information on regulations affecting foreign parties is disseminated in the same way as other regulations.

Under the *Freedom of Information Act 1982* (FOI Act),[1] every person has a legally enforceable right of access to documents of most Australian Government agencies and to the official documents of Ministers. This right is not affected by the reason for seeking access, nor subject to any conditions of nationality or residence, other than to have an address for service or delivery in Australia. Exemptions and exclusions include, for example, documents relating to national security, defence, international relations, Commonwealth/States relations, Cabinet documents, Executive Council documents, personal information, business affairs and legal professional privilege. The FOI Act also contains a right to seek amendment and annotation of personal records where the information is claimed to be incomplete, incorrect, out of date or misleading. All sub-federal jurisdictions in Australia have equivalent freedom of information legislation.

An applicant refused access or an affected third party[2] may apply for internal review, which must be conducted by a person other than the original decision-maker and treated as if it were a fresh request for access. If dissatisfied by the internal review, a person may lodge an appeal to the Administrative Appeals Tribunal, an independent statutory body whose decisions are binding on the agency concerned. An applicant may also complain to the Commonwealth Ombudsman about any aspect of the handling of a request. Applicants may also appeal against AAT decisions to the Federal Court, on questions of law.

Australian transparency provisions aim to ensure timely and easy access to information for all interested stakeholders.[3] The ComLaw website is updated for developments each day and offers free notification services whereby interested parties can get information about developments relating to Bills, Acts and a large volume of secondary legislation. It also displays compilation or 'cut and paste' versions of amended legislation. Finally, the Business.gov.au website holds a consultative forum for business and government representatives twice a year to provide an update on its activities, and to encourage the use of information technology to reduce business compliance costs.

Arrangements for the timing between publication of legislation and its entry into force ensure predictability and offer stakeholders time to prepare for implementation. All Acts of Parliament have a provision specifying when the Act enters into force. Secondary legislation classified as a legislative instrument is not enforceable unless and until it is registered on the Federal Register of Legislative Instruments (part of the ComLaw website). Legislative Instruments are subject to sunsetting (periodic review and repeal) approximately 10 years after registration, so as to ensure their continuing relevance and appropriateness.

In parallel to the above information channels, Australian government agencies also maintain their own transparency and information dissemination mechanisms. Australian agencies operating in trade-related areas use extensively handbooks, websites and enquiry points, ensuring a high level of accessibility, timeliness and user friendliness of trade-related information. Agency specific mechanisms of particular relevance to foreign parties include Australia's Import Risk Analysis (IRA) Handbook 2007, the Australian Quarantine and Inspection Service (AQIS) enquiry point, the Food Standards Australia New Zealand (FSANZ) central enquiry point, the Australian Customs Information and Support Centre (CI&SC), and contact points called for by Australia's international commitments.

*Import Risk Analysis Handbook*

The IRA Handbook 2007, provides information about Australia's approach to import risk analysis, quarantine and biosecurity. An update of earlier editions (1998 and 2003), it is meant to be kept under review to reflect evolving conditions and processes and offers contact details should any party require further clarification or information. The most recent review was completed in July 2009. The IRA Handbook 2007 (update 2009) is available in electronic form.[4] These changes, and the IRA process as a whole, are regulated under the *Quarantine Regulations 2000* and its subsequent amendments. Furthermore, AQIS proposes a centralised email inquiry point (*www.daff.gov.au/aqis/import*), providing general information on Australia's quarantine import conditions and associated matters, as well as a detailed list of contact points for inquiries relating to specific product types.[5]

*FSANZ enquiry point*

The FSANZ central enquiry point provides telephone or email information and clarifications concerning the operation of the Australia New Zealand Food Standards Code. This allows domestic and foreign parties an easier and more user-friendly access to these regulations, which are adopted by reference into Australian state and territory food legislation and are enforced directly at that level of government. Imported food is also subject to the requirements of the *Food Standards Code* and enforced by AQIS.

*Australian Customs Information and Support Centre*

The Australian Customs and Border Protection CI&SC provides information about Customs and Border Protection processes to members of the public. The availability of such an enquiry point alongside the Australian Customs website *www.customs.gov.au* and the Customs and Border Protection International Branch and officers based in a number of Australia's partner countries, is meant to ensure that client queries, be they domestic or foreign, about Australian border processes are efficiently addressed. The CI&SC is committed to acknowledging client communication immediately and providing a full response to email and fax contacts within two working days, or notifying within one working day if it cannot fully answer the query on time. As far as phone contacts are concerned, the CI&SC seeks to achieve 80% of calls answered within five minutes, in accordance with its service level agreement. In addition, the CI&SC addresses systems support calls from the Integrated Cargo System (ICS, see below, Section 2.3.3), thus improving the consistency of border process enforcement and is committed to answering 80% of urgent Cargo Systems Support phone contacts within three minutes. Combined general public and systems support calls to the CI&SC total around 1500 each weekday.

Although surveyed stakeholders generally express satisfaction with Customs Information and Cargo Systems Support service ("good" or "excellent" ratings have been received by 54% of survey respondents for consistency of information; by 63% of respondents for Customs and Border Protection's ability to resolve issues for business; and by 40%of respondents for timeliness[6]), Australian Customs and Border Protection Service feels that the channelling of the most repetitive Customs information enquiries through a self-service facility would allow an increased first-call resolution rate and a reduction in average call time.

*Contact points for international enquiries*

Contact points established in conformity with Australia's international commitments include the SPS Contact Point, performing the roles of National Notification Authority (sending SPS notifications to the WTO) and National Enquiry Point (coordinating Australia's responses to enquiries regarding its SPS measures); the *Codex* Contact Point[7] providing information on Codex Alimentarius standards and related texts either during their development or after their adoption as full standards; and the International Plant Protection Convention (IPPC) Contact Point[8]; and the World Organisation for Animal Health (OIE) contact point.[9] All three contact points are located within the Department of Agriculture, Fisheries Forestry (DAFF).

### *2.1.2. Consultation mechanisms*

Prior consultation of parties with a stake in a draft text or a new policy is not only a powerful means of involving economic players and civil society in the process of developing government policies; it is also a very useful tool for enlisting the specific expertise of the private sector. Australia has a longstanding commitment to meaningful and comprehensive engagement with the civil society in general, including the business community both domestic and foreign.

Guidelines for consultation are laid down in the *Best Practice Regulation Handbook*,[10] which charts all aspects of developing regulation, from the policy proposals/ideas stage through to post-implementation reviews.[11] A *Guide for Ministerial Councils and National Standard Setting Bodies*, adopted by the Council of Australian Governments (COAG), calls for the same guidelines to be applied by COAG itself, Ministerial Councils, national standard-setting bodies or related bodies (see below, Section 2.3.2).

The Handbook specifies that "the nature of consultation should be commensurate with the magnitude of the problem and the size of the potential impact of the proposal", and calls for consultations that are widely based and organised in an accessible and targeted manner so as to capture the diversity of affected stakeholders. Major policy reviews, such as the Carbon Pollution Reduction Scheme (CPRS), undergo wide ranging consultations, inviting submissions and input from all interested stakeholders, including foreign ones.

Agency specific consultation channels, in particular consultation web-pages, are not limited to providing information and calling for comments on upcoming policy and regulation proposals, but generally take a clearly proactive stance, by sending registered stakeholders information on ongoing and upcoming work and on issues of particular interest to them. Australian Government public transparency and consultation requirements do not discriminate against foreign parties. For example, stakeholders registered with Biosecurity Australia[12] are individually informed of the publication on the internet[13] of Import Risk Analysis (IRA) and draft IRA reports. In addition, a special business consultation webpage within the Australian online business information gateway *www.business.gov.au* allows government agencies to further promote public consultations and widen their potential consultation audience. Stakeholders can register on the website to make sure they get an opportunity to express their views on government policy and regulation. Registration to consultation websites is open to everyone without any qualifying conditions and in particular no requirement of a domestic presence. There is, however, no mechanism for ensuring that relevant consultation opportunities and proposals are notified to stakeholders researching their existing compliance obligations on websites such as ComLaw.

The consultation process also engages State, territory and local governments and relevant Australian Government departments and agencies as appropriate. The Australian Government's regular consultations and collaboration with the states and territories on major economic and social reform contribute to avoiding unintended barriers to market openness at the sub-federal level. It is worth noting that consultations between federal and sub-federal entities also generally involve New Zealand counterparts, reflecting the strong political and economic ties between the two countries (see below).

Transparency is a key component of the Australian Government's consultation policy : in order to ensure a meaningful involvement of concerned stakeholders, consultations are required to start early in the policy development process, provide sufficient explanation about the objectives and the policy framework within which consultations will take place, and offer adequate time for considered reactions. Where the administration seeks to quantify business compliance costs, the Handbook suggests a consultations period of six weeks, going up to twelve weeks for highly significant proposals. Regulators are required to maintain constructive relationships with key stakeholders so as to obtain information on the potential impacts of implementation. Stakeholder comments inform and influence the policy making process but ultimate responsibility for deciding on the policy direction among competing views from the public lies with the administration. However, the requirement to provide feedback on how consulting authorities have taken consultation responses into consideration when formulating policy responses and to incorporate information about the outcomes of the consultation in the Regulation Impact Statement (RIS) reinforces the accountability and credibility of the whole consultation process.

The non-discriminatory character of consultation mechanisms concerns not only regulations by government departments but also decisions of independent bodies such as the Australian Competition and Consumer Commission (ACCC), the Australian Communications and Media Authority's (ACMA), the Australian Maritime Safety Authority (AMSA), or the Food standards Australia New Zealand (FSANZ) (see below, Sections 2.1.4 and 2.4.1). Failure to take account of affected parties' legitimate interests may allow the affected party to challenge those decisions under Commonwealth legislation enabling review of administrative decisions in federal courts.

The extensive participation of foreign businesses in consultations on issues of interest to them underscores the efficiency and accessibility of the system. In the area of telecommunications, the second, third and fourth largest telecommunications carriers operating in Australia, which are either foreign owned or have a foreign parent company, are full participants in regulatory processes and regularly make submissions, such as in the case of ACCC's *Mobile terminating access service (MTAS) 2007 pricing principles*, or ACMA's development of *Principles for Spectrum Management*. However, government departments and regulatory bodies observe that many foreign commercial parties often make submissions through their domestic subsidiary companies or through the industry representative body. In the area of radio communications, submissions from overseas entities are often sought directly because of their experience in other jurisdictions and their contribution in the development of effective regulatory outcomes.

**Box 4. The Quarantine and Biosecurity Review: a model consultation arrangement**

In February 2008, Australia launched a major review of its quarantine and biosecurity systems. An independent Panel of experts, appointed by the Minister for Agriculture, Fisheries and Forestry, was asked to review the appropriateness, effectiveness and efficiency of current arrangements, including public communication processes and governance and institutional arrangements, and to produce a report (*One biosecurity: A Working Partnership,* also known as the *Beale report*, from the name of the Panel's Chair), consulting in the process with relevant domestic and international stakeholders.

The Panel first prepared and released an Issues Paper in order to prompt discussion and attract submissions and comments from all interested stakeholders. It received around 220 written submissions from a wide range of interested parties, including overseas submissions, and organised over 170 meetings with domestic and international stakeholders, both individuals and representatives of organisations. The Panel also sought information from Australia's trading partners on their arrangements for managing biosecurity risks and held discussions with government officials and business representatives in New Zealand, North America, Europe, and representatives from other WTO Members.

A dedicated website (*www.quarantinebiosecurityreview.gov.au*) offered online support to the process: reference documents used during the review were made available on the site, alongside with copies of all the submissions received. At the completion of the consultation process, the Beale Report, submitted to the Australian Government, described the current situation, summarised comments received and presented specific recommendations. The Australian Government released its Preliminary Response to the report in December 2008, agreeing in principle with all 84 recommendations and outlining the actions the government intends to take in order to put the recommendations into practice. The Response is publicly available on the DAFF website along with updates of progress with reform.[14]

Changes to Australia's quarantine and biosecurity system based on the Beale Report have and will continue to be notified through the SPS notification system, whereby the normal comment and consideration process will occur.

In addition to participation to the domestic consultation process, foreign parties may also interact with Australian authorities through their representative government missions located in Australia, or through Australian missions in the host country. This is, for instance, the most used approach as regards shipping regulation, although AMSA does, in parallel, post draft Marine Orders and amendments on its website[15] for public comment : Shipping Australia Limited, representing foreign ship owners operating in Australian trades, the Minerals Council of Australia and the National Bulk Commodities Group, representing foreign owned interests in Australia's resources sector, the Australian Institute of Petroleum and the Australian Petroleum Production and Exploration Association, representing foreign owned interests in Australia's petroleum and offshore exploration industries, are among the government's most active interlocutors on issues regarding bulk carriers and bulk cargoes, ship safety and marine pollution prevention regulation for ships and ship pollution liability and compensation schemes, respectively.

The non-discriminatory character of public consultation practices also extends to advance notice commitments undertaken by Australia in the context of the multilateral trading system and of its free trade agreements: partner countries should be offered reasonable opportunity to become acquainted with laws, regulations, procedures and administrative rulings of general application and to comment on them. In

accordance with its WTO commitments, Australia notifies other WTO member countries of proposed SPS measures, or changes to existing SPS measures, that are not substantially the same as the content of an international standard and that may have a significant effect on trade of other WTO members. Australia has designated an official enquiry point for receiving comments on Australian SPS notifications. The SPS enquiry point, located within the Department of Agriculture, Fisheries and Forestry, passes comments directly to the relevant Australian regulatory authority.

More detailed provisions for a pro-active process have been included in the context of Australia's closer economic relations with New Zealand, meant to ensure a smooth and efficient functioning of the Trans-Tasman Mutual Recognition Arrangement (TTMRA).[16] In order to avoid unnecessary conflicts with other policy objectives in either country, the arrangement provides for early consultation with trans-Tasman and interstate counterparts, and processes for trans-Tasman coordination. In particular, New Zealand counterparts may be involved in decisions made by ministerial councils and national standard setting bodies both at the commonwealth and State level. Where a proposal involves a trans-Tasman issue, the New Zealand Regulatory Impact Analysis Unit comments on the consultation RIS before it is made public.

### *2.1.3. Appeal procedures*

The Australian administrative law framework provides for a range of administrative and judicial appeals.[17] In general, administrative appeals, including on issues related to trade, customs and industry assistance, can be lodged with the Administrative Appeals Tribunal, either directly, or once an internal review has been conducted where required. In the case of Tribunal proceedings relating to Customs and Border Protection, appellants have also to meet the requirements set out in Section 167 of the Customs Act 1901, *i.e.* payments under protest have to be made and action has to be commenced within six months of payment. There is a limited right to bring an appeal from a decision of the Tribunal to the Federal Court. In addition to any right to seek review of a decision in the Tribunal, applications for judicial review of decisions made under Commonwealth laws can be made directly to the Federal Magistrates Court or the Federal Court of Australia. The Administrative Appeals Tribunal and the Federal Courts are not required to make a decision within a specified time period, unless otherwise indicated by the applicable law. However, the Tribunal aims to make a decision within 60 days of the last day of a hearing. In general those appeals procedures are open to foreign parties without any qualifying conditions, other than to demonstrate that the decision to be reviewed directly affects their interests. Foreign parties follow the same procedures as domestic parties.

In the areas of trade-related decision making, there are in addition a number of specific appeals procedures, such as those concerning anti-dumping and countervailing investigations conducted by Australian Customs, or decisions of the Australian Competition and Consumer Commission (ACCC). Decisions of the ACCC, including determinations to grant or revoke authorisations and applications for authorisation of company mergers and acquisitions which would otherwise be prohibited under the *Trade Practices Act 1974* (TPA), may be appealed to the Australian Competition Tribunal. The Tribunal, composed of Federal Court Judges and experts on industry, commerce, economics, law or public administration matters, follow transparent procedures and practices,[18] applied in a non-discriminatory way to domestic and foreign parties.

Parties "*interested*" by the decisions taken by Australian Customs and Border Protection Service in the context of anti-dumping and countervailing investigations[19] can apply for an independent administrative review by the Trade Measures Review Officer. The Review Officer, a statutory appointment made by the Minister responsible for Customs and Border Protection will review decisions made by the Minister or by the Chief Executive Officer of Australian Customs (the CEO) and make recommendations, but cannot revoke the Minister's decision or substitute another decision (although he has that power for certain CEO decisions).

Eligibility criteria (described above) and applicable procedures are the same for all applicants, domestic and foreign. Applications for review must be made within 30 days of the publication or direct notification of the reviewable decision. In case of decisions by the Minister, a public notification of review allows interested parties to make submissions within a period of 30 days. The Review Officer is required to make a decision within 60 days of that public notification or the receipt of the application. Previous review decisions and information about applicants is available online on the Attorney-General's webpage.[20] Any aggrieved party may also seek judicial review of decisions of the CEO, Review Officer or Minister.

### *2.1.4. Transparency in the field of technical regulations and standards*[21]

Transparency in the field of technical regulations and standards is essential to firms facing diverging national product regulations, as transparency reduces uncertainties over applicable requirements and thereby facilitates access to domestic markets. Consistent with the requirements of the WTO TBT Agreement, Australia provides to its trading partners information on technical regulations and standards through a single point of enquiry and gives them the opportunity to comment. This is particularly important as a variety of bodies are responsible for regulation in various markets in Australia: legislative, executive, and judicial powers relating to regulations and standards are shared between the Commonwealth and state and territory governments. For example, mandatory consumer product safety and information standards at the Commonwealth level are enforced by the ACCC, while at the state and territory level, they are enforced by government departments or agencies for the relevant jurisdictions with portfolio responsibility for consumer affairs and fair trading. Australia's WTO enquiry point, located in the Department of Foreign Affairs and Trade (DFAT) Office of Trade Negotiations, channels enquiries and comments from interested parties to relevant regulatory bodies.

Standards Australia, the main national standard setting body, is a signatory to the Code of Good Practice for the Preparation, Adoption and Application of Standards (Annex 3 to the WTO TBT Agreement), and is committed to the transparency and prior comments provisions contained therein. In addition, Australia's national standard setting bodies, both at the Commonwealth and State/Territory levels, are subject to the principles of COAG's Best Practice Regulation Guide (see above, Section 2.1.2) and in particular the requirement of "*providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear"* and of "*consulting effectively with affected key stakeholders at all stages of the regulatory cycle*". Based on these requirements, prior consultation of interested parties is component of the procedures for preparing technical standards and regulations that affect international market openness.

Reviewing these procedures in 2006, the Productivity Commission acknowledged the general soundness of transparency mechanisms in Australia's standard setting processes, but highlighted concerns about the timeliness and user-friendliness of online information mechanisms and consultation processes. In particular, the Commission recommended improving the internet accessibility of base documents, providing better opportunities for public comment and guaranteeing minimum time periods for consultation.[22] In response to these concerns, Standards Australia is currently elaborating interactive web-based consultation mechanisms aiming to cut down standards production time by focussing on the points of disagreement between participants. The System has been tested in the context of APEC consultations.

Provisions calling for comments via public notice when considering an application or preparing a draft standard are also contained in the *Food Standards Australia New Zealand Act 1991*. Draft regulations in the form of food standards are available for public access on the FSANZ website and can be accessed by anyone without any qualifying conditions. Consultations undertaken by FSANZ are open to foreign parties, who make ample use of this opportunity. Furthermore, FSANZ has a number of strong relationships with international bodies via Memorandums of Understanding providing for exchange of information and discussion of topical or upcoming matters.

### *2.1.5. Transparency in government procurement*

Given the significant role typically played by governments in the economy, purchases by public entities represent significant opportunities for local, national or foreign suppliers to the markets in question. Transparency in government procurement is essential for ensuring that the market for public works, supplies and services is effectively open to national and international competition.

International disciplines for government procurement exist in the WTO, particularly in the plurilateral Agreement on Government Procurement (GPA), and in various regional and bilateral agreements. Contrary to most OECD countries, Australia is not a signatory of the GPA; however it is an observer in the WTO Committee on Government Procurement and participates in the work of the Working Party on Transparency in Government Procurement. It feels that the procedures it follows are on a par with international best practice.

Transparency in Australia's public purchases does seem to be generally well established through the mechanism used to achieve "*value for money"*, which is the guiding principle of Australia's procurement policy framework. As in other OECD countries applying a "*value for money*" procurement principle, this implies maintaining a procurement system that is aligned as much as possible to general commercial practice, including considerations that are not limited to price, and that is administratively efficient for both government and suppliers. This general principle is buttressed by provisions of transparency and accountability to ensure that all potential suppliers have access to the process and are treated equitably, that conditions for participation and evaluation criteria are clearly articulated and that procurement related actions are documented, defensible and substantiated. Commonwealth procurement entities are subject to a coordinated procurement contracting framework, defined by the Commonwealth Procurement Guidelines (CPGs), issued by the Finance Minister, and are accountable under the *Financial Management and Accountability Act 1997* (FMA Act). The other two levels of government (state and territory, and local) have their own procurement frameworks and policies.

Australia's procurement policy framework, including the CPGs, Finance Circulars, advising of key changes and developments, and the range of web-based and printed guidance documents to assist with implementation, are all available free of charge on the Department of Finance and Deregulation website.[23] Finance also holds quarterly 'Procurement Discussion Fora' to inform Australian Government officials of any recent procurement policy developments and to allow agencies to discuss matters of mutual interest. Finance further maintains a publication *Selling to the Australian Government – a guide for business* which is a practical guide aimed at aiding potential suppliers to identify opportunities and compete for Australian Government business. However, perhaps the most significant transparency safeguard of the system is the publication of Australian Government business opportunities, annual procurement plans, multi-use lists and contracts awarded through the AusTender website.[24] Australian Government contract statistics are available online.[25] For 2006/07 they covered 82 532 contracts above the AUD 10 000 value threshold triggering the AusTender publication requirement, for a total value of AUD 28 978.5 million. For 2007/08 they covered 69 493 contracts for a total value of AUD 26 361.8 million.

The analysis of costs and benefits of each procurement proposal is judged throughout the whole procurement cycle (whole-of-life costing) and is based not only on the consideration of costs, but also on the performance history of prospective suppliers, the relative risk of each proposal, the fitness of the proposal for the purpose of the procurement project, or the flexibility to adapt to possible changes over the lifecycle of the project. Further guidance contained in the CPGs is largely inspired by international best practice in the area of government procurement and in particular the 1999 APEC Non-Binding Principles on Government Procurement.

More specifically, the Guidelines require procuring entities not to use specifications or prescribe conformity assessment procedures in order to create an unnecessary obstacle to trade. Specifications should, where possible, be set out in terms of performance and functional requirements and be based on international standards, where they exist, except where the use of international standards would fail to meet the agency's requirements or would impose greater burdens than the use of recognised Australian standards. In order to avoid capture or discriminatory treatment, specifications must not require or refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer, or supplier, unless there is no other sufficiently precise or intelligible way of describing the requirement. In exceptional circumstances where this type of specification is absolutely necessary words such as 'or equivalent' must be included in the specification.

Although the CPGs allow government agencies considerable flexibility to adapt to particular procurement situations, all agencies are required to follow mandatory procurement procedures for procurement above certain thresholds,[26] based on the maximum anticipated value of the contract including extensions and renewals and incorporating all component parts in case of multiple contracts. Mandatory procedures provide for open tendering, select tendering, and direct sourcing. *Open tendering* involves publishing a request for tender and accepting submissions from any potential suppliers who satisfy conditions for participation.[27] Under the *select tender* process an invitation to tender is issued to potential selected suppliers.[28] *Direct sourcing* from a potential supplier of the concerned agency's choice is conducted when no submission was received, or no submission or potential supplier satisfies conditions of the tender. It may also be conducted in situations of extreme urgency, or where the goods or services can only be supplied by a particular business.[29]

There are no special appeal procedures applying solely to Australian government procurement. A general principle underlying government procurement in Australia is that suppliers should enjoy the same rights and obligations when dealing with government that they have when dealing with other private sector entities. Procurement decisions by Australian (Commonwealth) Government departments and agencies are subject to administrative or judicial review: *Administrative* mechanisms comprise of two main avenues. Firstly, agencies are required by the *Commonwealth Procurement Guidelines* to have fair, equitable and non-discriminatory processes for review of supplier complaints. Secondly, the Commonwealth Ombudsman is empowered to investigate procurement decisions and processes. In relation to *judicial* mechanisms, agencies are generally subject to the same kinds of legal accountabilities and recourse that apply to business in Australia. These mechanisms include avenues such as the ability to initiate legal proceedings on the basis of breach of contract.

### *2.1.6. Assessment*

Mechanisms for disseminating information on the regulatory process, its outcomes and how they affect market operation are well developed in Australia. Information is available through various channels and presented in an accessible and user-friendly way, including for overseas stakeholders. The established consultation mechanisms provide interested parties ample opportunities to react and interact with concerned administrations and their proactive and widely inclusive character are a particularly commendable characteristic, in particular for foreign parties. Well established review mechanisms allow all stakeholders to seek effective redress should a problem arise.

Transparency mechanisms in the area of government procurement and technical standards are also generally sound, although the user-friendliness of the latter has caused some concerns, highlighted in the 2006 Productivity Commission report and which the Australian national standard-setting body is now seeking to address.

## 2.2. Measures to ensure non-discrimination

The application of non-discrimination principles in making and implementing regulations aims at providing effective equality of competitive opportunities between like goods and services irrespective of country of origin. The Most Favoured Nation (MFN) and National Treatment (NT) principles are the two principal codes of conduct employed to ensure non-discrimination. The application of the MFN principle means that all foreign producers and service providers seeking entry to the national market are given equal opportunities while NT implies that foreign producers and service providers are treated no less favourably than domestic producers and service providers. The extent to which these two core principles of the multilateral trading system are actively promoted when developing and applying regulations is a helpful gauge of a countries' overall efforts to promote a trade and investment-friendly regulatory system.

Australia recognises non-discrimination, particularly with respect to foreign suppliers and products, as an essential component to ensuring strong competition. Like many other countries, Australia does not have a general legislative requirement to avoid discrimination against or among foreign stakeholders in the drawing up and application of regulations. However, this goal is largely achieved through Australia's international commitments, in particular under the WTO. An extensive system exists across government agencies for examining the consistency of regulations and their application with Australia's international commitments. In the case of trade-related issues, consistency is examined primarily by the Department of Foreign Affairs and Trade (DFAT) and the Attorney-General's Department (AGD). Other agencies that monitor regulations with trade implications include the Department of Agriculture, Fisheries and Forestry; Australian Customs; and the Department of Innovation, Industry, Science and Research. When regulatory changes are being considered that may have trade implications and a RIA is conducted, foreigners are able to submit comments and have their views considered.

Despite the broad scope of WTO Members' obligations with respect to non-discrimination in their trading relations, some areas exist where discrimination is possible, as discussed in the following sub-sections. In addition, specific policies consistent with Australia's WTO obligations exist in Australia to assist small and medium enterprises (SMEs) and, in limited circumstances, indigenous Australians.

### *2.2.1. Preferential trade agreements*

As is common practice today, Australia provides special treatment to many of its trading partners under agreements and arrangements that are WTO-consistent. Unilateral preferences are provided under the Australian System of Tariff Preferences for least developed countries, under PATCRA for Papua New Guinea, and under SPARTECA benefiting the Forum Island countries. These preferences concern only customs tariffs and in some cases import quotas.

A broader range of provisions is included in Australia's bilateral and regional free trade areas (FTAs), which cover goods and services and extend in varying ways to trade-related regulations and procedures, as specified in the relevant agreements or developed under them.

In recent years, Australia has been increasingly active in developing FTAs. Australia currently has in force five FTAs, respectively with New Zealand (1983), Singapore (2003), Thailand (2005), the United States (2005) and Chile (2009). A number of other agreements have not yet been put into effect (*e.g.* the FTA with ASEAN, negotiated and signed jointly with New Zealand and which is expected to become effective in December 2009) or have not yet been finalised. The latter include ongoing negotiations with Korea, Japan, China, Malaysia, the Gulf Cooperation Council and the Trans-Pacific Partnership Agreement – which will build on the Trans-Pacific Strategic Economic Partnership Agreement that entered into force in 2006 between Brunei Darussalam, Chile, New Zealand and Singapore; Peru, the United States and Vietnam will also participate in these negotiations. Additional FTAs (*e.g.* with Indonesia and India) are under consideration.

Superficially this would suggest a complex "spaghetti bowl" of preferential treatment that could discriminate in various ways, particularly against countries that are not parties to any of these agreements. In practice, however, the level of regulatory discrimination is probably not significant. This judgement reflects, first, the fact there is high level of transparency concerning Australia's FTAs. This transparency begins with the negotiating process, which typically starts with a feasibility study (sometimes jointly conducted) and which involves consultations with a wide range of industry, State and non-governmental stakeholder groups. Once agreements are reached and put into effect, detailed information on them is made available on the DFAT website.[30] In addition, Australia participates in the transparency processes of the WTO, including discussions in the Committee on Regional Trading Agreements (CRTA). Similarly a range of other agreements not directly established as FTAs but involving issues such as investment protection and mutual recognition (as between US SEC and ASIC, providing a basis for stock exchanges and broker-dealers to operate in both countries) are publicly available on the internet. Second, certain benefits of Australia's FTAs are extended to all trading partners as a matter of course. For example, extension of the term of copyright protection under Australian law to the life of author plus 70 years, a feature of the AUSFTA, now applies to all copyright holders.

### *2.2.2. Investment policy*

Australia's foreign investment policy is generally open and transparent. Nevertheless, some foreign equity restrictions continue to exist in sectors considered sensitive. In particular, 49% equity ceilings currently exist in three sectors: international aviation, federally-leased airports and domestic shipping. While restrictions were removed on media in 2007, that sector is considered to remain sensitive and investments are subject to prior approval, irrespective of size, as described in the following paragraph. Recently, attention has been attracted to investments by foreign state-owned enterprises and sovereign wealth funds. A focal area in this regard has been potential investment in the raw materials sector.

A comprehensive screening process is applied under the Treasury to inward international investment to ensure that such investment is not contrary to the "national interest". A Foreign Investment Review Board (FIRB) examines foreign investment proposals against the background of the Government's foreign investment policy and makes recommendations to the Government, which has sole responsibility for approving or rejecting them. Under liberalised provisions effective 22 September 2009, foreign investors can establish new businesses in Australia without government review. Foreign acquisitions of interest in an Australian business must be notified for approval when above a certain threshold value (now AUD 219 million). In certain cases approval is required irrespective of the value, as for investment in the media or investment proposals by a foreign government or its agencies. Today the screening process seems to cause few problems in practice: business proposals are only very rarely rejected (the last one being in 2001), while the main sector negatively affected by screening is residential real estate. It should be noted that Australia's process for real estate applications was streamlined in December 2008, with the goal of making it simpler for foreign investors.

However, concerns are often expressed about the persistent lack of transparency in the general screening process and in particular the absence of detailed public reasoning for decisions to reject investment proposal as contrary to the national interest. Furthermore, the time taken for considering applications (up to 30 days to examine and up to a further 10 days to advise the parties of the decision; that time period may be extended by a further 90 days if necessary) may affect concerned businesses in a negative manner, because of the uncertainty it creates. It should be noted however that to date extensions are rare – less than one percent of investment applications. In February 2008 the Australian government issued a set of principles for improving the transparency of the screening regime with respect to investment by foreign governments, conscious of the sensitivity that is sometimes aroused by those investments. Whether these principles will improve the overall transparency of the process remains to be seen.

Investment provisions exist in Australia's FTAs with Singapore, Thailand, Chile and the United States; particularly in the latter case preferential treatment is foreseen, where among other things higher threshold values are specified for notification and prior approval. However, this more favourable treatment does not appear to have increased investment from the relevant partner countries. In August 2009, the Treasury announced a further easing of investment screening thresholds for non-US private investments in existing businesses, from AUSD 100 million to AUSD 219 million. It is expected that, based on the new thresholds, 20% of all business applications will no longer need to be screened by the FIRB.

As explained in document DAF/COMP(2009)3 ("Regulatory Reform: In Depth Review of Australia"), mergers and acquisitions are also subject to scrutiny by the ACCC under the 1974 TPA, to ensure that there is no "substantial lessening of competition". Among other factors, consideration is given to the level of import competition. In practice, this scrutiny is carried out through an informal clearance procedure and the great majority of mergers have been cleared.

### *2.2.3. Services liberalisation*

In the case of domestic regulation relating to services, the GATS allows exemptions to MFN treatment as long as they are listed. For Australia, this is limited to two cases in relation to audiovisual services (where national treatment is provided to film and television co-productions with certain countries).

Australia's FTAs all include a services chapter, in most cases following a "negative" rather than a "positive list" approach. Since they exclude fewer sectors than under Australia's GATS commitments, and since those exclusions are subject to a "ratchet" effect prohibiting new restrictions, these FTAs generally provide greater benefits to FTA partners than are available under GATS.

### *2.2.4. Government procurement*

In many countries, trade-related discriminatory practices also arise sometimes in the field of government procurement. As mentioned earlier, Australia is not a signatory of the GPA; however, Australia considers that its procurement regime is more open that what is prescribed in the GPA. The Government operates a "single procurement policy framework" that makes no distinction between foreign and domestic providers of goods or services, nor does it distinguish among foreign providers. Under these circumstances, Australia applies to all foreign suppliers the provisions that are stipulated under the Government Procurement chapters of Australia's FTAs with Singapore, the United States and Chile. Among other things, information relating to all Australian business opportunities, procurement plans and contracts awarded is available to potential domestic and foreign suppliers through AusTender (the Australian Government's procurement centralised information system).

As described above in Section 2.1.5, the "value for money" principle underpins the Australian procurement regime. Although this system aims to support open competition, non-discrimination, efficiency and an ethical use of resources, foreign suppliers still appear to be disadvantaged. While Australia's record on transparency for government procurement is very good, foreign suppliers still appear to be disadvantaged in several respects. While appreciating the opportunities that are available, foreign businesses have complained about the complexity and cost of the tender process, exacerbated by differences between Commonwealth and State procurement. In some cases, bidders need to demonstrate previous relevant experience. When it exists, this requirement provides an advantage for "first suppliers" in contrast to potential new suppliers, be they foreign or domestic. One of the goals of Infrastructure Australia (established in January 2008) is the standardisation between Commonwealth and State jurisdictions of tender processes and contract documentation for infrastructure projects. This is important in the context of the stimulus package which includes significant additional funding for new infrastructure projects.

Foreign suppliers are excluded from one sector of government procurement. Under government fleet arrangements, motor vehicles leased must either be made by manufacturers engaged in vehicle assembly or component production in Australia, or be imported and marketed in Australia by an Australian-based manufacturer. About 42% of fleet vehicles are Australian made, the rest being sourced from 44 manufacturers in total. Fleet vehicle purchases correspond to less than 1% of annual new vehicle sales.

### *2.2.5. Industry assistance programs*

In recent years, and particularly during the economic downturn, attention is drawn to government assistance programs for structural adjustment in certain industries. The principal sectors benefiting from such programs have been textiles, clothing and footwear (TCF); automobiles; and pharmaceuticals. On the whole, the programs have been progressively reduced and have not discriminated against foreign-owned producers in Australia, as they have aimed to promote participation of Australian-based production in global supply chains.

**Box 5. Assistance to the Australian automobile industry: aiming at domestic objectives with foreign participation**

The major example today of Australian government assistance to an economic sector is found in the Australian automobile industry. For many years this industry has benefited from a range of general as well as industry-specific policies, with supporting funds coming from both Commonwealth and State governments. The industry is important for the Australian economy, particularly in terms of both employment and trade. Recently, exports account for over 40% of Australian production of motor vehicle production, with foreign markets enabling improved productivity through scale economies and incentives for innovation.

Over time there has been a shift of emphasis from industry-specific to more general measures, supporting particular activities rather than particular industries. The automobile industry has seen its effective rate of assistance fall from about 140% in 1984-5 to about 12% today. Nevertheless, the industry remains one of the most highly assisted in the Australian economy. Given the predominant role that foreign-owned firms play in this sector (all three vehicle manufacturers are subsidiaries of MNEs, as are many of Australia's producers of auto components), it is not surprising that they participate in the relevant industry assistance programs. There appear to have been no efforts to discourage this.

The Automotive Competitiveness and Investment Scheme (ACIS), scheduled to run until 2015, aims to promote the competitiveness of production in Australia. It provides among other things for import duty credits as well as investment and R&D incentives. With respect to R&D incentives, it is of interest that the New Car Plan for a Greener Future, announced at the end of 2008 :

- is being developed through consultation with the Automotive Industry Innovation Council, in which foreign owned firms participate;
- includes an AUD 1.3 billion Green Car Innovation Fund, for which guidelines have been developed in early 2009 through public consultations with stakeholder feedback;
- includes structural adjustment support offered from the beginning of 2009 through the Automotive Industry Structural Adjustment Program, aiming in particular at strengthening the components sector through better supply chain integration and encouraging mergers and acquisitions.

Foreign-owned firms operating in Australia may participate in these programs. This policy is quite rare among countries, particularly in the context of measures taken in relation to the recent economic and financial crisis, as noted by the joint WTO-OECD-UNCTAD report to the G-20 (14 September 2009). In fact, the Australian market is broadly open to foreign-manufactured automotive products (about three-quarters of vehicles sold in Australia are imported). Nevertheless some tariff and tax policies have given rise to complaints by foreign firms. Used vehicles are subject to a very high compound rate, while the luxury tax on cars over a certain price effectively is seen to discriminate against foreign production, which provides 97% of the revenue from this tax.

As in other OECD countries, the TCF industry has faced serious adjustment pressures in recent decades. Government protection has been significantly reduced as tariff rates have fallen (although they remain high relative to other manufacturing sectors). Partly following recommendations from the Productivity Commission, a post-2005 assistance package was put in place that provides various types of adjustment assistance including for R&D and product development and diversification. One aim is to promote high value-added production in Australia and to encourage more labour-intensive production to move abroad. The observed continued decline in the TCF workforce is consistent with Australia's policy objectives to focus on adding value and moving labour intensive production offshore.

#### *2.2.6. Assessment*

As a relatively small economy dependent for prosperity on international exchanges, Australia has generally ensured that its economic policies are applied on a basis of non-discrimination, in terms of both national treatment and MFN. The automobile industry provides a striking example of a sector where specific government benefits are provided with little attention to national ownership patterns. Nevertheless, some concerns continue to be raised with government procurement, particularly at the non-Commonwealth level; the transparency and predictability of the investment screening process; and whether the increasing number of FTAs may noticeably distort market conditions, *e.g.* for services providers or inward investors.

### 2.3. Measures to avoid unnecessary trade restrictiveness

To attain a particular regulatory objective, policy makers should favour regulations that are not more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Examples of this approach would be to use performance-based rather than design standards as the basis of a technical regulation, or to consider taxes or tradable permits in lieu of regulations to achieve the same legitimate policy goal. At the procedural level, effective adherence to this principle entails consideration of the extent to which specific provisions require or encourage regulators to avoid unnecessary trade restrictiveness and the rationale for any exceptions; how the impact of new regulations on international trade and investment is assessed; the extent to which trade policy bodies as well as foreign traders and investors are consulted in the regulatory process; and means for ensuring access by foreign parties to dispute settlement.

#### *2.3.1. Assessing the impact of regulations on trade*

The Australian Government is committed to the goal of open markets and has implemented a range of measures aimed at liberalising the economy over many decades. In the framework of Australia's best practice regulation policy referred to above, a number of specific provisions are aimed at ensuring that government entities prepare and apply regulations and administrative practices that do not hamper the free flow of goods, services and investment. Australia explicitly lists the "*impact on Australia's international capital flows or trade*" among the areas that need to be investigated when elaborating regulatory proposals.[31] The Australian Government also funds an independent body, the Productivity Commission, which provides advice on the elimination of barriers to economic efficiency, including trade. From time to time, ad hoc government inquiries are formed to review trade and industry development measures.

The potential impact of prospective regulations on trade and investment is assessed in the framework of Australia's Regulatory Impact Analysis (RIA).[32] RIA is required to consider significant impacts on business and individuals or the economy from proposed regulation, including trade and investment impacts. In order to target impact analysis to significant impacts only, Australia's RIA process provides for a multi-step system of assessing regulation.[33] A preliminary self-assessment allows distinguishing between proposals that will have no or low impacts, for which no further analysis is undertaken; proposals that will entail medium business compliance costs, for which a cost quantification is required; and proposals that

will have a significant impact on business and individuals or the economy, for which in-depth analysis is undertaken, documented in a Regulation Impact Statement (RIS). As indicated above, factors assessed during the preliminary assessment include any impact on Australia's international capital flows or trade.

Where a proposed regulation might have a direct bearing on *international trade* or export performance, a Trade Impact Assessment should be incorporated into the RIS. The Trade Impact Assessment summarises the impact of regulatory options and proposals on exporters, and assesses the overall impact on Australia's international trade. Training to government officials expected to undertake regulatory impact analysis is provided by the Office of Best Practice Regulation (OBPR). However, in order to make sure that the RIS analysis meets the information requirements of a Trade Impact Assessment, officials are required to consult with the Trade, Competitiveness and Advocacy Branch of the Department of Foreign Affairs and Trade (DFAT), entrusted with an oversight role on regulation that may impact on international trade. In addition DFAT, in concert with the Attorney General's Department (AGD), monitors the consistency of all trade related measures with Australia's WTO and Free Trade Agreement (FTA) obligations.

In order to address issues of potential trade restrictiveness prior to regulation being adopted, federal regulatory changes that potentially impact on trade are forwarded by domestic agencies to DFAT and/or AGD for review prior to being introduced to Parliament. DFAT and AGD have specialist trade law units that are consulted during the elaboration of any regulation potentially affecting trade. The Office of International Law in AGD regularly offers advice to Australian Government agencies in regard to new proposals, laws, regulations and administrative decisions; it is also required to approve all National Interest Analysis (NIA, see below). In addition to their involvement during the regulatory elaboration stage, officials from DFAT and AGD are in regular contact with officials from all government agencies whose work may impact on trade, so as to provide continuous guidance on Australia's international trade obligations and make sure that no unintended inconsistencies find their way into domestic regulation. Australian Government departments regularly monitor the implementation of measures which may affect trade to ensure the consistency of any such measures with Australia's WTO and FTA obligations. Furthermore, DFAT runs a trade policy course several times per year which is open to officials from federal, state and territory government agencies, so as to promote a better awareness of market openness stakes.

A regulatory impact assessment process is also applied with respect to Australia's international commitments linked to international negotiations or agreements, when these are expected to have a significant impact on business and the economy. Assessments occur both prior to the formal commencement of negotiations and at the stage when endorsement is sought to sign the final text of a treaty. Before engaging in negotiations, concerned administrations need to accompany the Cabinet submission or letter to the Prime Minister, the Minister for Foreign Affairs or other relevant ministers with a RIS focussing on the nature of the problem being addressed, the objectives of the proposed treaty and a preliminary discussion of options and their respective costs, benefits and, where appropriate, levels of risk. Prior to the signature, a more elaborate RIS is required, including detailed cost-benefit analysis that assesses the likely impacts on different groups within the Australian community. It may also include a quantitative assessment of compliance costs if this is deemed necessary by the OBPR.

All treaties signed by the Australian executive (except those the Government decided are urgent or sensitive) are tabled in both Houses of Parliament for at least 15 sitting days before any treaty action is taken which would bind Australia under international law. They are accompanied by a National Interest analysis (NIA), noting the reasons why Australia should be a party, and set out the legislative action required to implement the treaty's obligations. Where relevant, this includes a discussion of the foreseeable economic, environmental, social and cultural effects of the treaty action; the obligations imposed by the treaty; its direct financial costs to Australia; how the treaty will be implemented domestically; and what

consultation has occurred in relation to the treaty action. Line departments and agencies are required to consult State and Territory governments at an early stage in the preparation of NIAs.[34] As part of the transparency requirement, the RIS and/or compliance cost report for the treaty and the NIA are tabled or made public with the final text of the treaty. NIAs are also made available on DFAT's website.[35]

### *2.3.2. Avoiding unnecessary trade restrictiveness at the sub-federal level*

Powers and responsibilities in relation to trade and commerce with other countries or foreign corporations, including those relating to the collection and control of customs, excises and bounties lie with the Federal Government.[36] However, regulations potentially impacting on international trade and affecting the openness of the Australian market are not the sole responsibility of the Commonwealth Government, but may also be produced at the state or territory level. Regulatory barriers to trade and investment may also arise from divergent and duplicative requirements among States; in this light the 2005 OECD Guiding Principles for Regulatory Quality and Performance invite countries to reduce those as a priority matter. As an ongoing process, Australian Commonwealth and State governments are seeking to improve regulatory consistency between jurisdictions.[37] Furthermore, annual meetings of Commonwealth, State and Territory regulatory reform units (the OBPR and its State and Territory counterparts) are held with the aim of promoting the "efficient regulation" principles contained in the COAG 2007 *Best Practice Regulation* Guide (see below) and sharing best practices among the jurisdictions. The Australian Government's regular consultations and collaboration with the states and territories on major economic and social reform appears to contribute considerably in avoiding unintended barriers to market openness.

The main forum for initiating, developing and monitoring the implementation of policy reforms that are of national significance and which require cooperative action by Australian State and Territory governments is the Council of Australian Governments (COAG).[38] COAG is chaired by the Prime Minister and comprises State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association (ALGA). Among the issues considered by COAG are major initiatives of one government (particularly the Australian Government) which impact on other governments or require the cooperation of other governments. Where formal agreements are reached, these may be embodied in Intergovernmental Agreements.[39]

Co-ordination of the activities of the Federal and state governments in specific policy areas take place in over 30 COAG Ministerial Councils. The Councils initiate, develop and monitor policy reform jointly in these areas, including developing harmonised regulatory policy responses and reducing existing regulatory inconsistencies. New Zealand ministers have full membership in councils when matters affecting New Zealand are being considered, in relation to trans-Tasman mutual recognition. COAG and the Ministerial Councils are subject to the efficient regulation principles and practices contained in COAG's Best Practice Regulation Guide. The COAG Guide follows closely the Best Practice Regulation Handbook published by the Australian Office of Best Practice Regulation (OBPR) and its enforcement is monitored by the OBPR. The Guide's principles apply both to consultation and impact assessment requirements. Where regulatory decisions by Ministerial Councils or other inter-jurisdictional national standard setting bodies are likely to have significant impacts on business, COAG requires the preparation of a RIS. These principles and their associated guidance contribute to ensuring that the level of regulatory assessment is commensurate with the impact of proposed regulatory measures.

However, regulatory heterogeneity across Australian States is still a concern for Australian businesses that seek to establish activities in more than one State and for foreign businesses. This is also a priority area for the government which seeks to build a "Seamless National Economy". These concerns were highlighted in particular in two Productivity Commission reviews of the mutual recognition schemes operating between Australian jurisdictions (Productivity Commission 2003, Productivity Commission 2009). The 2009 report highlights the importance of keeping up momentum in favor of mutual recognition,

so as to expand gradually the coverage of mutual recognition schemes where regulatory approaches have converged.[40] The report also underlines that mutual recognitions schemes operate less effectively on the services side than on the goods side. Occupational standards in particular seem quite challenging because of the difficulty to achieve regulatory confidence among jurisdictions as to the potential risks of lower standards. The Productivity Commission recommends applying to mutual recognition registrants the same ongoing requirements for further training and professional development as applied to local registrants, so as to improve local customers' confidence on their qualifications, skills and experience. COAG has commenced initiatives to decrease redundancy and improve regulatory consistency and harmonisation between jurisdictions through the COAG reform agenda, especially the National Partnership Agreement to Deliver a Seamless National Economy.

In December 2007, COAG set up the Business Regulation and Competition Working Group the Group's aim is to reduce the regulatory burden on business; accelerate and deliver the agreed regulatory hot spots agenda (priority areas where regulatory reform would provide benefits to business and the community, such as productivity, including education, skills, and training; infrastructure; and business regulation and competition) further improve regulation making and review processes, including a national approach to processes to ensure no net increase in the regulatory burden; and deliver significant improvements in Australia's competition, productivity and international competitiveness.

### *2.3.3. The example of customs procedures*

As tariff levels have declined over the years through GATT/WTO rounds, the costs imposed by customs procedures have attracted growing attention from businesses. Customs procedures encompass formalities and procedures in collecting, presenting, communicating and processing data requested by customs for and related to the movement of goods in international trade. Costs are generated by compliance with documentary requirements (acquiring and completing the documents and paying for their processing) and by delays of cargo processing at borders. The aims of customs procedures (to collect revenue, to compile statistics, to ensure that trade occurs in accordance with applicable regulations, such as those aiming at protection of human safety and health, protection of animal and plant life, environmental protection, prevention of deceptive practices, etc.) should be pursued so as to ensure that the procedures do not create unnecessary obstacles to international trade. In other words, the lowering of trade barriers may not achieve the full efficiency of liberalisation without harmonised, simplified, fast and secured customs procedures.

Australian Customs and Border Protection is generally committed to streamlining and harmonising customs procedures. It has thus been quite active in monitoring and benchmarking the efficiency of its customs and border processes. In 2007, the Australian Customs and Border Protection Service conducted a Time Release Study (TRS) in order to assess its performance, and intends to repeat the study at least annually as an aid to strategic planning. The results of Australia's first TRS were released in February 2009. They identified 0.3 days of interval between arrival and release for air cargo and 1.3 days for sea cargo. The TRS has covered all border-related procedures, *i.e.* quarantine and health matters managed by AQIS, as well as border controls on trade administered by Customs and Border Protection on its behalf and on behalf of 41 other concerned government agencies.

**Box 6. Time Release Study: a trade facilitation benchmarking tool**

A TRS is a standardised method to assess the trade facilitation performance of Customs administrations and other agencies and private entities operating at the border. It was elaborated following similar initiatives undertaken by the Customs Administrations of Japan and the United States and endorsed by the WCO in 1994, then shaped into a methodological Guide in 2002. TRSs serve the principles of the WCO Kyoto Convention to simplify and harmonise customs procedures internationally and the aims of APEC's Trade Facilitation Action Plan II, to further reduce trade transaction costs.

A TRS seeks to measure the average time taken between the arrival of the goods and their release and to identify problem areas and potential corrective actions to increase efficiency. The objectives of TRS are to baseline current performance by Customs, other national authorities such as the port, health, veterinary, agriculture and other agencies, as well as the trading community which includes brokers, forwarding and shipping agents, carriers, banks and other intermediaries; and identify opportunities for improvement or reform. Undertaken over a series of years, such as in the case of Japan, which conducted 9 TRS since 1991, it allows monitoring the evolution of the border process and assessing the efficiency of reform measures: Japan's successive TRS exercises sustained reforms that reduced sea cargo intervals from 7 days in 1991 to 2.7 days in 2006 and air cargo intervals from 2.2 days to 0.6 days over the same period. In addition to Australia, the USA and Japan, other OECD countries that have undertaken a TRS include Korea and Mexico.

The 2007 TRS results were validated with industry and confirm that Australian Customs and Border Protection processing performance is not a significant impediment to trade. Among the factors identified as enabling Australia's good performance were the large degree of electronic reporting from users to Customs and Border Protection, with more than 98% of all reports and declarations submitted electronically via electronic data interchange (EDI); and the availability of an Integrated Cargo System (ICS), which enables a common declaration to Customs and Border Protection and AQIS and is accessible to industry 24 hours per day, seven days per week for the receipt of reports and declarations. Furthermore, these results match well with Australia's good performance as recorded in international benchmarking indicators: the Logistics Performance Index (LPI) indicates an average of 1.71 day for Customs clearance, and 3.44 days of lead time[41] for imports. Australian Customs and Border Protection Service continues to refine examination and inspection rates as part of an intelligence led and risk based approach to cargo intervention.

On the other hand, quarantine inspection rates still raise significant concerns from Australia's trading partners. Since 2001 Australia has applied mandated border inspection targets of 100% for all international air and sea vessels, mail and sea passengers and 81% for air passengers, following the sense of crisis engendered by the UK foot and mouth disease outbreak. These targets were motivated by that specific outbreak risk only and remained unchanged subsequently. The recent Beale review (see above) recommended moving away from mandated inspection targets in favour of a comprehensive risk-return approach to allocating inspection resources. The move to a risk-return approach has been given in principle support by the Government. In response to these developments, and supported by analysis of historical data, AQIS is trialling a number of new methods in order to move towards this risk-return approach. These trials will be closely monitored and validated before being fully implemented. AQIS will continue to collect surveillance data for international vessels, passengers, mail and air freight to identify high-risk pathways and emerging risks. AQIS will also be increasing both targeted and random surveillance programs on import pathways. In September 2009, the government announced a series of institutional and operational reforms, supported by 14.7M AUSD to progress reforms arising from the Beale review. This includes funding scoping work for investment in information and communications technology, scoping work for future arrangements for post-entry quarantine facilities, support for interim institutional arrangements, the development of new biosecurity legislation and extending current approaches to risk analysis at the border.

In addition to confirming the satisfactory performance of customs services, the 2007 TRS identified a number of target areas showing potential for improvement. In particular, it was highlighted that around 20% of sea cargo consignments are not fully reported and declared at arrival, with some 15% still not fully reported when the goods are physically available for delivery,[42] a proportion that is higher than the actual percentage of goods impeded by the border agencies.[43] A higher proportion of declarations lodged early could further reduce the average time from arrival to release, pointing to the need of further mobilising and raising awareness among the logistics industry involved in Australian goods trade.

Non-automatic import or export permits may be issued by a number of Australian agencies, including the Australian Customs and Border Protection, AQIS, the Departments of Health, the Environment, DAFF, DFAT and others. Although a large part of customs and quarantine requirements are incorporated in the ICS and further streamlining of the quarantine requirements is sought upstream through AQIS's electronic import permit system (ICON ePermits),[44] several other permit requirements are not integrated and are still managed through very diverse processes depending on the agency in charge.

Australian Customs and Border Protection is currently working to improve stakeholder engagement and working relationships with a wide range of policy agencies through the establishment of a Permit Issuing Agency and Stakeholder Forum. The Forum is expected to provide an ongoing mechanism to actively discuss whole of government policy and implement appropriate strategies designed to facilitate legitimate trade through the streamlining of handling procedures for restricted or prohibited goods. Australian Customs and Border Protection is seeking to reduce the administrative logistics costs for importers and minimise the duplication by policy agencies of the existing border measures. Furthermore, Australian Customs and Border Protection continues work with industry and other stakeholders to explore opportunities to improve electronic data uptake and transfer for border management purposes.

### *2.3.4. Assessment*

Australia's regulatory policy making is very clearly geared towards supporting market-openness. The market openness advocacy function imbedded in the country's regulatory impact assessment mechanisms and promoted by OBPR, DFAT and AGD result in a regulatory environment relatively free from unintended trade irritants. Unsurprisingly, Australia ranks 15th among 118 countries in the "*openness to multilateral trade rules"* indicator of the 2008 WEF Global Enabling Trade Report. Co-ordination between the federal and the sub-federal level is also well developed, and market openness for goods and services is high on the Commonwealth-State dialogue agenda. Although there are still areas where further improvements could be envisaged, namely as regards the mutual recognition of goods and services, the momentum achieved by COAG should help progress with the necessary reforms.

Australian customs procedures are also generally trade-friendly and the attention paid by the Customs administration to continuously monitoring progress through TRS and other surveys provides fertile ground for promoting trade facilitation. These positive results should be expanded to encompass other border agencies. In particular, quarantine inspection based on risk-assessment would considerably reduce the burden of border controls for importing businesses, while improving the controls' efficiency.

## 2.4. Encouraging the use of internationally harmonised measures

The application of different standards and regulations[45] for like products in different countries often explained by natural and historical reasons relating to climate, geography, natural resources or production traditions - presents firms wishing to engage in international trade with significant and sometimes prohibitive costs. There have been strong and persistent calls from the international business community for reform to reduce the costs created by regulatory divergence. One way to achieve this is to rely on internationally harmonised measures, such as international standards, as the basis of domestic regulations,

when they offer an appropriate answer to public concerns at the national level. The use of internationally harmonised standards has gained prominence in the world trading system with the entry into force of the WTO TBT Agreement, which encourages countries to base their technical requirements on international standards and to avoid conformity assessment procedures that are stricter than necessary to create market confidence.

### *2.4.1. The use of standards in the domestic context*

The basic rule that shapes the country's current approach to technical regulation is Australia's generic requirement for officials to promote regulation that is demonstrably the most effective means for achieving the relevant policy objective. This applies to all standards developed by Australian standard-setting bodies that are subsequently incorporated into regulations or are used as regulatory standards. The Best Practice Regulation Handbook in particular requests that standards used for regulatory purposes should be subject to a RIS demonstrating their policy effectiveness. Regulators are required to examine the costs associated with particular standards, especially where they use standards that were not specifically designed for the problem at hand. Overly complicated standards or standards imposing unnecessarily high compliance costs do not meet the policy effectiveness test and should thus be rejected. In addition, regulators should avoid modifying voluntary standards they incorporate into regulation, unless they can show clearly that modification is necessary to address the identified problem.

Australian regulatory policy reflects a clear and explicit commitment to international harmonisation. As legislative, executive, and judicial powers relating to technical regulations are shared between the Commonwealth and state and territory governments, provisions encouraging the use internationally harmonised measures are included in both the Handbook and the COAG Best Practice Regulation Guide (see above, Section 2.3.2).The Guide prescribes that, wherever possible, regulatory measures or standards should be compatible with relevant international or internationally-accepted standards or practices in order to minimise the impediments to trade, although it is indicated that "compatibility" does not necessarily mean uniformity. The Guide also sets out that national regulations or mandatory standards should be consistent with Australia's international obligations, including obligations under the WTO TBT and SPS Agreements and invites regulators to refer to the WTO Code of Good Practice for the Preparation, Adoption and Application of Standards. The Handbook calls for existing international standards to be taken into account when considering regulatory options. Where regulators decide to deviate from such international standards, they must specifically address the implications of this divergence in the RIS, explaining why it may not be appropriate to adopt those standards unchanged. The RIS must in particular demonstrate that the benefits outweigh the costs of divergence to stakeholders and that the deviation is not violating Australia's international commitments.

Enforcement of the government's RIA requirements in relation to standards is overseen by the Office of Best Practice Regulation (OBPR). The OBPR does not directly receive submissions. Comments from foreign parties can be presented to the department or agency preparing a regulation and associated RIS through any consultation mechanisms that they offer. Any concerns raised through the consultation process should be identified in the RIS, along with how the concerns have been addressed in the final regulatory proposal.

### *2.4.2. Standardisation activities*

Australia's main national standardisation body is Standards Australia, a not for profit non-government standards body responsible for the development, formulation and approval of standards. Australian standards and guidance material are available through Standards Australia's publisher, SAI Global. As an adjunct or alternative to developing their own standards, regulators across all tiers of government in Australia mandate into law a significant percentage of the standards developed by Standards Australia, and

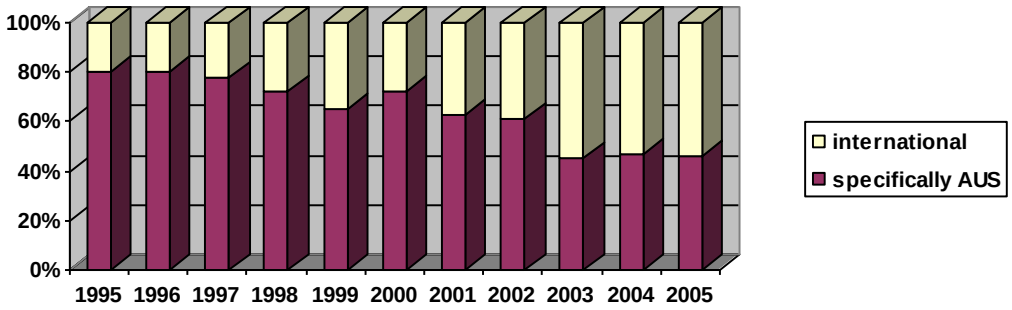
representatives of regulatory agencies often participate in the development of those standards. Of more than 6 500 standards published by Standards Australia, approximately 2 400 are referenced in Australian legislation/regulations.

A Memorandum of Understanding (MOU)[46] between Standards Australia and the Commonwealth Government ascribes to Standards Australia a number of functions beyond its standard-setting role, including the co-ordination of national and international standardisation initiatives and the accreditation of other standard-setting bodies in Australia (see below, Section 2.5). The MOU introduces a number of principles that should direct these functions: in particular, the development of standards should primarily aim at the net benefit of the Australian community as a whole, preserve competition and favour performance based rather than prescriptive requirements. No new Australian standard should be developed where an acceptable international standard already exists.

Standards Australia is a signatory to the WTO Code of Good Practice for the Preparation, Adoption and Application of Standards and abides by the Code's principles. It is also Australia's representative in international and regional fora such as the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC), the International Council of Societies of Industrial Design (ICSID) and the Pacific Area Standards Congress (PASC).

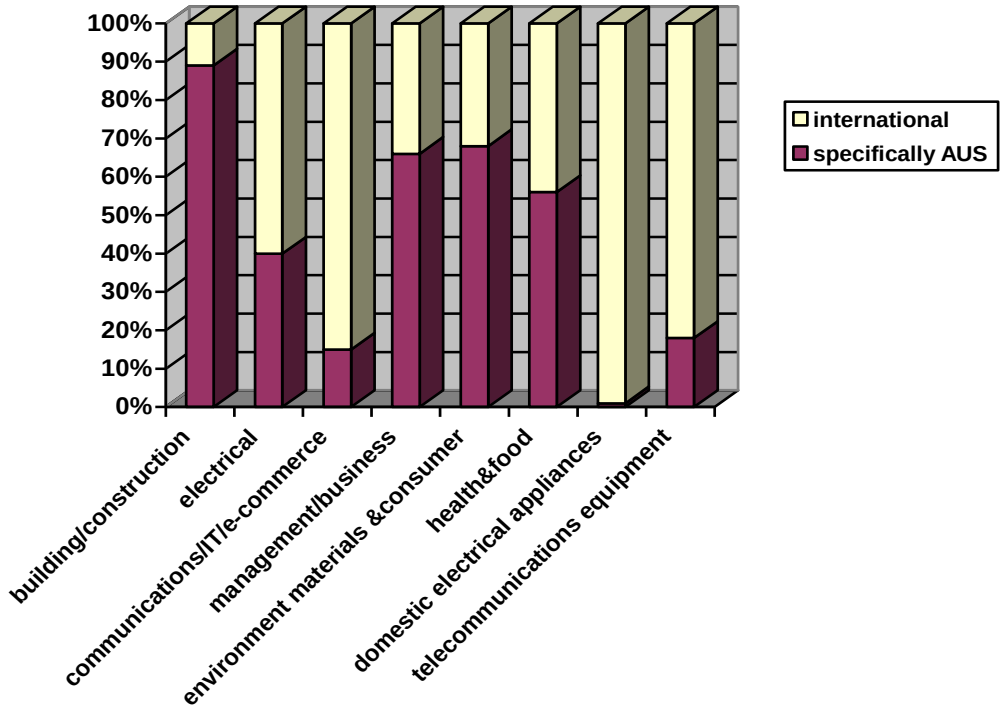
The national output of standards is increasingly aligned with international standards (according to Standards Australia this is the case with 33% of the current stock). The trend in the level of international adoptions as percentage of standards published each year appears in Figure 1. This is broken down by sector for year 2007 in Figure 2. The most internationally oriented sectors are domestic (household) electrical appliances and telecommunications equipment, where internationally aligned standards are close to 100% and in excess of 80% respectively. Areas of industry where standard-setting is predominantly domestic include building, construction and occupational health and safety, where Australia considers that no significant international standards exist. Australia deems that around one third of its standards do not have an international equivalent.

**Figure 1. International standards as a percent of yearly publications**




Drawing on Standards Australia data.

**Figure 2. 2007 International adoptions by Sector**




Drawing on Standards Australia data.

Standards Australia has issued a Guide for standards committees to assist committees in their consideration of the international alignment of standards under development. The Guide sets out that the policy of Standards Australia is to base Australian Standards on International Standards to the maximum extent feasible and to apply the requirements of the WTO TBT Agreement as a benchmark. The stated objective of this policy is to ensure that if any such Standard were adopted by a government agency as a technical regulation, this would not violate Australia's obligations under WTO TBT Agreement. All proposals to develop new or revised Australian Standards must list, *inter alia*, any relevant International Standards and all Australian Standards should be adoptions of International Standards, unless there are good reasons to the contrary. Such reasons must be set out in the introduction to any published standard which is not an adoption of an international standard.

In addition, a number of Australia's regulatory bodies are involved in standards development, in particular in the area of food and sanitary standards. These bodies, including the Department of Agriculture, Fisheries and Forestry (DAFF), Food Standards Australia New Zealand (FSANZ) and the Australian Pesticides and Veterinary Medicines Authority (APVMA) follow the same principle of favouring international standards when setting domestic food, veterinary and phytosanitary regulation. All of them are actively involved in international standard-setting activities, including towards the development of Codex standards and World Organisation for Animal Health (OIE) guidelines.

Australia's Import Risk Analysis process (IRA) is also expected to rely on international standards. The IRA assesses whether a proposed agro-food import can be brought into the country in a way that meets the country's *Appropriate Level of Protection – ALOP –* and under what conditions consistent with Australia's obligations under the SPS Agreement. However, consistent with the WTO SPS Agreement, the IRA does not need to rely on international standards if those are *considered as not providing sufficient protection to meet Australia's ALOP*. Although Australia's definition of ALOP as a risk estimation matrix reflecting the probability of a pest or disease incursion combined with the anticipated consequence of such

an event is among the most explicit available internationally, its actual expression in the IRA has attracted criticism from Australia's trading partners. In particular, the IRA process has in the past been criticised domestically and internationally for insufficient scientific scrutiny, lack of transparency and early stakeholder involvement, and significant delays (a number of these criticisms are registered in the Beale report). Although draft IRA reports are released for public comment, some IRAs have been in progress for the last eight years or more.

In September 2007 Australia implemented significant changes to the IRA process. Changes included the reinforcement of a pre-existing Eminent Scientists Group and the introduction of tighter timelines, 24 months for a standard IRA and 30 months for an expanded IRA. It is still early to judge the efficiency of those reforms. However, the Beale Report, which has reviewed applicable quarantine and biosecurity arrangements in 2008, made a number of recommendations to further improve Australia's IRA process through an increase of resources and enhancing the independence, transparency and accountability of the process. In September 2009, the government announced a series of measures to strengthen Australia's biosecurity operations, including by consolidating the Department of Agriculture, Fisheries and Forestry's bioscurity functions into a new one-stop-shop, integrating AQIS, Biosecurity Australia and other areas in a Biosecurity Services Group; and appointing an economist to the Emminent Scientists Group which is responsible for reviewing the risk analyses conducted by Biosecurity Australia.

### *2.4.3 Harmonisation at the sub-federal level*

Intensive and ongoing efforts are being made particularly within COAG to achieve regulatory harmonisation where possible in order to overcome the duplicative and burdensome regulatory processes sometimes faced by businesses. A major focus recently has been on product safety, where COAG has been supporting the harmonisation of consumer law, involving the transfer of certain responsibilities to the federal level (see the discussion in Section 2.6).[47] Australian States would retain the power to impose temporary orders on product safety grounds in order to address risk alerts, but those orders would be subject to confirmation at the federal level or would otherwise lapse. Regulatory harmonisation achievements in this area were formalised by the signing of an Intergovernmental Agreement on 2nd July 2009. The adoption of complementary legislation is expected by the end of 2010.

### *2.4.4. Assessment*

Australian regulatory mechanisms to encourage the use of internationally accepted standards or practices appear quite effective in addressing market openness problems resulting from regulatory divergence. Australian standard setting bodies are also quite active in the international standard setting arena. Although the stock of domestic standards aligned with international standards is relatively limited compared to other OECD countries (33%, against 62% in France, 78% in Canada, or 90% in Sweden) this does not seem to create major problems for foreign manufactures seeking to enter the Australian market. On the other hand, sanitary and phytosanitary policies and practices have attracted criticism from Australia's trading partners. While establishing the appropriate level of protection is clearly a domestic prerogative, there have been suggestions that the ALOP could be implemented in a less trade-restrictive manner. Recent reforms to address this issue still need to demonstrate their efficiency.

## 2.5. Recognising the equivalence of other countries' regulatory measures

In cases where the harmonisation of regulatory measures is not considered feasible or necessary, the recognition of equivalence of other countries' regulatory measures in attaining the same regulatory objective may be the most appropriate avenue for reducing technical barriers related to regulatory divergence. Despite the development of global standards, there are still many areas where specific national regulations prevail, preventing manufacturers from selling their products in different countries and from

enjoying full economies of scale. Additional costs are also raised by the need to demonstrate the compliance of imported products with applicable regulations in the import country through testing and certification accepted in that country. Recognising the equivalence of differing standards applicable in other markets or of the results of conformity assessment performed elsewhere can greatly contribute in reducing these costs. The success of international endeavours to achieve mutual recognition is naturally reliant on the quality of testing, certification and accreditation. In order to ensure the adequacy of these activities to the needs of evolving markets, governments increasingly leave them in the hands of private entities.

### *2.5.1. Intergovernmental initiatives*

The Australian Government seeks to promote international arrangements for the mutual recognition of conformity assessment in both regulated and voluntary sectors. Australia's Free Trade Agreements (FTAs) with New Zealand, Singapore, Thailand, the United States, Chile and ASEAN/New Zealand all include provisions which encourage regulatory authorities to recognise the equivalence of regulatory measures of the FTA partner countries. With respect to trade in goods, the FTAs typically confirm and strengthen[48] WTO provisions which promote mutual recognition, equivalence and harmonisation in relation to technical regulations. On trade in services, FTAs generally reiterate GATS Article VI and VII language, while some also include provisions requiring the Parties to encourage relevant bodies to develop mutually acceptable criteria for licensing and certification of professional service suppliers.

In the area of goods Australia has also developed a series of Government to Government Mutual Recognition Agreements (MRAs) with New Zealand, the European Community, EFTA and Singapore. The Trans-Tasman Mutual Recognition Arrangement is the most far-reaching, as it provides that a good that may legally be sold in one of the two partners may also be sold in the other, regardless of differences in standards or other sale-related regulatory requirements between Australia and New Zealand. This provision only suffers very few exceptions. Likewise, a person registered to practice an occupation in one of the countries is entitled to practice an equivalent occupation in the other without the need for further testing or examination.

The other three MRAs are limited to the recognition by one Party of conformity assessment (testing, inspection and certification) undertaken in the other Party. They do not involve recognition of the standards that apply in each Party, since products and manufacturers are assessed by conformity assessment bodies in the exporting country as conforming to the standards of the importing country. The Australia-Singapore MRA covers electrical and electronic equipment, telecommunications equipment and manufacturing processes for medicinal products. The EC-Australia MRA covers automotive products, electromagnetic compatibility, low voltage electrical equipment, telecommunications terminal equipment, machinery, medical devices, manufacturing processes for pharmaceuticals and pressure equipment. Australia is also a signatory to the APEC Mutual Recognition Arrangements on Conformity Assessment of Electrical and Electronic Equipment and of Telecommunications Equipment. Furthermore, in the area of legal metrology, Australia has bilateral MRAs of type approval test reports with equivalent bodies in the Netherlands, New Zealand, and the United Kingdom.

Australia has also concluded services-related MRAs, including a mutual recognition arrangement with the US Securities and Exchange Commission (SEC) on US and Australian securities regulation.[49] Professional qualifications recognition arrangements are essentially driven and supported by the relevant professional bodies, as professions are regulated at state and territory government level and not at the commonwealth level. For instance, an MRA was concluded in September 2008 between Australian and US professional bodies on engineering services. Many of the peak professional bodies in Australia set national standards for their profession, including through the assessment of overseas-trained professionals and the accreditation of university courses, and are also assessing authorities for skilled migrants seeking entry to

Australia. The accreditation may also be carried out by independent bodies with membership from the relevant professional bodies' professional associations, consumer bodies and registration boards. For example, the Australian Medical Council accredits both Australian and New Zealand medical schools and New Zealand medical qualifications are automatically recognised. The Royal Australian College of General Practitioners recognises general practice qualifications from the United Kingdom, Canada, Ireland New Zealand, United States of America, South Africa, Singapore, Belgium, Netherlands, Denmark, Norway, and Sweden as fully or partially comparable to Australian qualifications. However, the delegation of foreign qualifications' recognition to professional bodies that may have a stake in the issue seems to have generated burdens for foreign service providers.

More generally, the Australian Government supports international mobility through a range of multilateral, bilateral and regional activities, including conventions and memoranda of understanding on education and training cooperation and qualifications recognition; bilateral initiatives, including the Australian Government's free trade agenda; and multilateral fora, including the Asia Pacific Economic Cooperation. For instance, in the case of skills assessment for tradespersons, the assessing authority Trades Recognition Australia (TRA) uses missions to various countries to study the training and employment of different trades and requires any formal vocational training not delivered in accordance with the Australian Quality Training Framework (AQTF) to be of comparable international standard, including as described in the Qualification comparison databases published by the National Recognition Information Centre for the United Kingdom (NARIC).[50]

Finally, there are numerous examples of domestic regulations which require regulators and policy officers to pay due regard to international arrangements on goods and services requirements: for instance, regulators are encouraged to accept test reports from laboratories accredited by the National Association of Testing Authorities (NATA) and NATA's MRA partners; and conformity assessments under the International Accreditation Forum's (IAF) multilateral MRAs (see below).

### *2.5.2. Recognition of equivalence at the sub-federal level*

Australia is also engaged in significant efforts to improve mutual recognition at the sub-federal level. The COAG agenda has focussed in particular on product standards, product safety and mutual recognition of professional qualifications and a national trade licensing system. In the recent past a number of areas have been considered for mutual recognition, including the legal profession and the health profession. The most significant challenge has been to address inter-jurisdictional differences on educational requirements, probity standards and training requirements, as States prescribing a higher standard of qualifications express concerns about seeing their policy objectives undermined. For instance, although COAG is committed to the objective of uniform laws for the regulation of the legal profession in Australia, admission to the legal profession on the basis of overseas qualifications is still problematic : Recognition of such qualifications seems to lack uniformity and predictability among States, especially to the extent that it is in the hands of professional bodies that may have a stake in the issue, thereby generating considerable burdens for foreign service providers. In April 2009, COAG signed an Intergovernmental Agreement on a National Licensing System for Specified Occupations, establishing governance processes and underlying principles for the development of a national licensing system. At the same time, COAG agreed to set up a taskforce on reform of regulation of the legal profession, with the objective of developing uniform laws across jurisdictions.

### *2.5.3. Accreditation mechanisms*

Accreditation is a procedure whereby an authoritative body gives formal recognition that a body or person is competent to carry out specific tasks.[51] Accreditation mechanisms are used to assess and to audit at regular intervals laboratories, certification and inspection bodies by a third party as to their technical competence against published criteria. They provide confidence on the competence of conformity assessment bodies, which is essential for the success of mutual recognition. In that sense, international co-operation on accreditation is seen as an important supporting measure to promote recognition of equivalence in regulatory systems.

In Australia accreditation services are provided by NATA, responsible for laboratory accreditation, and the Joint Accreditation System of Australia and New Zealand (JAS-ANZ), responsible for certification of management systems, products and personnel. NATA is a private-sector organisation endorsed by the government and has mutual recognition agreements with many other accreditation bodies around the world. It represents Australia to the International Laboratory Accreditation Cooperation (ILAC) and the Asia Pacific Laboratory Accreditation Cooperation (APLAC) and is an active participant to voluntary sectoral MRAs established by these bodies. JAS-ANZ was established in 1991 by the Australian and New Zealand Governments and represents the two governments to the International Accreditation Forum (IAF) and the Pacific Accreditation Cooperation (PAC) and is an active participant to voluntary sectoral MRAs established by these bodies. JAS-ANZ usually accredits certification bodies to certify in line with international standards, such as the ISO 9000, ISO 14000, and HACCP (Hazard Assessment Critical Control Point) food safety standards, unless no such international standards are available.

### *2.5.4. Assessment*

Australia is party to several mutual recognition agreements with third countries and recognises the equivalence of foreign regulatory measures and conformity assessment to the extent it has agreed to do so. The operation of these agreements is generally smooth. However, the impact on trade is probably limited since the technical requirements still differ and industry normally has to produce different versions of the products. A bigger challenge is the application of the principle of mutual recognition for professional qualifications. Inter-jurisdictional differences on educational standards and training still generate regulatory costs for professions seeking mobility around Australia.

## 2.6. Application of competition principles from an international perspective

The benefits of market openness for business and consumers may be reduced by regulatory procedures or measures that do not take account of the possibility of anti-competitive conduct. Recognition of this risk lies behind the decision to include in each of Australia's free trade agreements (described in Section 2. 2.1 above) a competition chapter, elaborated with the participation of the Australian Competition and Consumer Commission.

In this same perspective, it is therefore important that all regulatory institutions in a country – not just the competition authority – make it possible for both domestic and foreign companies affected by anti-competitive practices to present their position effectively. The existence of procedures for hearing and deciding complaints about regulatory or private actions that impair market access and effective competition by foreign companies, the nature of the institutions that hear such complaints, and the transparency and accessibility of procedures are thus key issues from an international market openness perspective. These specific issues are the main focus of this section, while a general review of the role of Australian competition policy in regulatory reform is presented in "Regulatory Reform: in Depth Review of Australia" [DAF/COMP(2009)3].

Australia's competition policy and enforcement framework aims to be transparent, non-discriminatory and effective. It follows that foreign firms are subject to the same laws and procedures for hearing and deciding complaints as domestic firms. Institutions of relevance in this regard are:

- Australian Competition and Consumer Commission, which among other things is involved in informal or formal merger clearance.

- Australian Competition Tribunal, which hears review applications or can pronounce on certain issues that may be of concern to foreign enterprises, *e.g*. conduct or arrangements considered anti-competitive under the 1974 Trade Practices Act; access to services of essential facilities such as electricity grids or gas pipelines; certain practices by ocean cargo carriers; and mergers.

- Federal Court of Australia and the Federal Magistrates Court, which have jurisdiction over certain matters relating to trade practices such as mergers, misuse of market power, anti-competitive arrangements and exclusive dealing. In some cases jurisdiction may be cross-vested between the Federal Court and the Supreme Courts of States and Territories.

The Australian Government's best practice regulation-making guidelines came into effect in 2006 and are subject to annual reports by the Office of Best Practice Regulation (OBPR). They include a competition assessment that examines whether regulatory proposals discriminate between foreign and domestic goods or services, including on restrictions on trade or investment.

Arrangements that substantially reduce competition are prohibited in Australia under the 1974 Trade Practices Act (TPA). In principle this Act applies to all goods or services supplied by domestic or foreign firms that operate in the Australian market. However, exemptions still exist for liner cargo shipping and export contracts. With regard to the latter, restrictions on cartels originating outside Australia are stricter than those on Australian exporters.

Since its initiation in 1995, the National Competition Policy has extended competition to all business activities, including government enterprises. It also provides a legislative framework for extending third party access to essential infrastructure services, such as electricity networks, rail tracks and natural gas pipelines. A 2005 review of the NCP by the Productivity Commission recommended that priority be given to improving practices in certain areas of anti-competitive activity, including anti-dumping, cabotage restrictions and pharmaceuticals. More recently the NCP has been reinforced by the National Reform Agenda, endorsed by COAG in 2006, aiming among other things to reduce regulatory burden and facilitate investment in export-oriented infrastructure. Foreign firms also benefit from these reforms.

Following a Productivity Commission review of Australia's policy framework for consumer protection, COAG reached agreement in July 2009 on an Intergovernmental Agreement for the Australian Consumer Law, which foresees a single national consumer law and streamlined enforcement arrangements, contributing to the goal of a "seamless national economy". The new law is to be based on the current consumer provisions in the Trade Practices Act of 1974, with some additions. It will provide for the implementation of a new national product safety regulatory and enforcement framework and the development of enhanced enforcement cooperation among national and state regulatory agencies. It can be hoped that the new policy framework will simplify and clarify the requirements that foreign suppliers need to meet when participating in the Australian market.

### *2.6.2. Assessment*

Consistent with the evolution described in document DAF/COMP(2009)3, the Commonwealth government has paid serious attention to advancing the implementation of an effective national competition policy framework. This is reflected *e.g.* in its response to recommendations by the Productivity Commission. While institutional processes remain complex and must bridge federal-state issues, there do not appear to be significant problems that have arisen in recent years with respect to the openness of the Australian market and its enforcement of a strong competition policy.

## 3. CONCLUSIONS AND OPTIONS FOR POLICY REFORM

### 3.1. General assessment of current strengths and weaknesses

From the above review and analysis, it is clear that Australia's approach to regulatory policy and reform reflects recognition of the importance of maintaining and strengthening the openness of its markets to international competition. The ability to pursue this policy orientation has no doubt been enhanced by Australia's strong economic performance in recent years and its relative resistance (compared to some other countries) to the global economic downturn that began in 2008.

At the time of its accession to OECD in 1972, Australia's market was relatively protected compared to other OECD countries. Since then, however, Australia has engaged seriously in reforms, in its trade policy as well in other structural and regulatory policies. In terms of adopting and applying the six principles of trade-friendly regulatory reform identified in the past by the Trade Committee and which serve as the basis for the OECD country reviews of regulatory reform, Australia has achieved a very high standard. In the course of those country reviews, which have been undertaken since 1998, considerable knowledge has been accumulated concerning the approaches pursued by twenty-three Member countries as well as a few non-Members. While there is little disagreement among OECD countries about the objectives sought, the approaches implemented have varied in keeping with such factors as national cultural background and social choices – factors that determine the particular challenges that must be addressed and the modalities for success in different country situations. In this light, the challenges of regulatory reform in Australia are strongly characterised by the federal system of government and by Australia's geographic size. At the same time, through effective political leadership and transparent involvement of stakeholders in the regulatory process, the challenges are generally well recognised and are being addressed on a variety of levels. Australia should be commended for its frequent re-evaluation of the regulatory process and effects on the economy and its willingness to implement reforms suggested by this re-evaluation.

Across the board, the OECD principles of "efficient regulation" for a market-openness friendly regulatory environment are extensively reflected in the Australian regulatory framework, even if there may be room for further improvement of implementation. A case in point appears in the relationship between the federal and sub-federal governments in Australia. Considerable information is available on efforts undertaken to overcome the problems that may arise in ensuring equality of treatment under the federal system existing in Australia, but it is difficult to assess the extent to which effective mechanisms have actually been installed and solutions found or whether real or potential problems persist. Another case can be seen with respect to government assistance to industry. Whereas the extent and level of such assistance has been very significantly reduced over the past decades, the level of such aid was exceptionally high for the OECD area and, in a few cases, remains relatively high. Reforms in these areas should thus be pursued

to build on and complement the reforms begun earlier. While Australia should be commended for its high ambition to achieve "international best practice", further improvements are both desirable and possible in practice.

## 3.2. Policy options for consideration

- ***Follow up application of the provisions for specific assessment of trade and investment impacts in the RIA process, in particular by clarifying the use of the Trade Impact Assessment.***

There is widespread recognition today both inside and outside OECD of the importance of assessing impact of regulatory changes before undertaking them. As mentioned above in Section 2.3.1, Australia is one of the OECD countries that most clearly specifies procedures for including in RIA an assessment of trade and investment effects. Nevertheless there appear to be few cases where these procedures have actually been applied, so that the concept of best practice in this field – while clearly within Australia's grasp – remains elusive. In light of the importance for Australia to participate in the global economy, there is good cause to continue efforts to ensure effective implementation of trade impact assessments.

- ***Pursue and expand efforts to harmonise the FTAs in which Australia participates***

Australia is not unique in actively pursuing regional and bilateral trade agreements, and the overlapping obligations it has undertaken in these agreements are not excessively complex by international standards. However, a recent development could be a promising approach for the future by helping to overcome the "spaghetti bowl" effect. This is the goal of creating a sort of regional umbrella agreement through a Trans-Pacific Partnership Agreement linking a number of bilateral agreements involving Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore, the United States and Vietnam. Although planned, the negotiations have not yet begun and therefore their results cannot yet be assessed. They may however suggest a way to spread the benefits of trade liberalisation while providing an important element of harmonisation that could be a strong vector for international trade and investment. This is an approach that Australia should promote strongly. It can help harmonise and simplify regulatory requirements while reducing economically unjustified discrimination.

- ***Continue to reduce and rationalise government assistance to industry and services***

While Australia has made striking progress in reducing previously high levels of government assistance to certain industrial sectors, there remains scope to reassess the usefulness of continuing programs as the national economy evolves. In most of the sectors benefiting from aid, rapid economic expansion in Asia and the importance for Australia of participating in global value chains suggest the need for significantly different strategies on the part of Australian producers and a role for government firmly focused on strengthening international competitiveness. This in fact is the explanation given for changes in the assistance provided *e.g.* to the automobile sector, but continuing programs do not so far appear to have fully taken on board the new realities. In the automobile industry there is recognition of the importance of innovation and developing products that are more environmentally friendly; while new programs focus on these aspects, they continue to complement older programs reflecting a more protectionist approach to adjustment. A similar situation can be seen in the TCF industry, where the range of benefits provided to what is now a very small economic sector appears disproportionately expensive and economically distortive.

- ***Continue and strengthen efforts to harmonise Australian standards with international standards.***

Despite the clear trend in favour of harmonisation of the national output of standards, the stock of Australian standards aligned to international standards is relatively low compared to OECD best practices. Australia's geographic distance from other countries should not promote regulatory isolation but on the contrary encourage further integration to international markets so as to secure better access to international trade for Australian companies, shorter lead time for new products, faster approval of Australian products and enhanced public procurement opportunities in other countries thanks to product conformity.

- ***Strengthen transparency in standard-setting***

A number of steps could improve the ability of stakeholders to participate in the standard setting process and thus ensure that the results are more market- and trade-friendly. These include strengthening the accessibility of base documents for the elaboration of technical standards and regulations; enhancing opportunities for public comment; and pursuing the development of interactive web-based consultation mechanisms currently being undertaken by Standards Australia.

- ***Expand the Integrated Cargo System to include all permit-issuing agencies.***

The difficulty of co-ordination between border agencies and the reluctance to change well established procedures to move towards a unified approach are the most important challenges for the establishment of single windows in OECD and non-OECD countries alike. However, the benefits in terms of reduced development, maintenance and reporting costs for the government and the trading community, as well as of enhanced accuracy of data collection and documentary controls are well worth the effort to expand single window coverage to all concerned entities. Border agencies should pursue efforts to explore paper-free solutions so as to overcome the problems generated by the diversity and complexity of government permits processes highlighted by the Australian Customs Enhanced Trade Solutions programme.

- ***Take steps to introduce reforms to the quarantine inspection system, as recommended in the Beale report.***

Following the Beale Report recommendations, the Australian government should tighten the definition of biosecurity risk and appropriate level of protection, including a clarification of the economic assessment involved in the definition; improve the transparency of import risk analysis; and reinforce the analysis of risks and returns, to replace as a basis for quarantine inspections the currently applicable mandatory inspection targets. This would provide a more efficient protection of Australia's environment while removing the persistent irritants to Australia's trading partners.

- ***Pursue the COAG agenda towards harmonisation of product safety standards. Establish a clear basis for the mutual recognition of professional qualifications.***

The COAG process for harmonising product safety standards at the sub-federal level has already gained good momentum. Efforts should be pursued to ensure that the reform agenda is consistently implemented among Australian States. On the other hand, further clarifications are needed on the applicable qualification, registration, skills and experience standards for services in order to make sure that diverging approaches between States do not generate unnecessary barriers to trade. Enhancing inter-State regulatory confidence about the objectives pursued should greatly facilitate the recognition of equivalence of professional qualifications and activities.

## NOTES

1. The FOI Act is currently under reform to further reinforce the right of access (limited only where a stronger public interest lies in withholding access), and give greater weight to its role in the pro-active publication of government information. Details on the Government's proposed reforms are available at www.pmc.gov.au/consultation/foi_reform.

2. Where the document to which access is required contains personal information about an individual, business or State Government other than the applicant, these are considered affected third parties and need to be consulted.

3. A more detailed description and analysis of transparency and information dissemination provisions in Australia is provided in document GOV/PGC/REG(2009)6, "Government Capacity to Ensure High Quality Regulation in Australia".

4. *www.daff.gov.au/__data/assets/pdf_file/0011/399341/IRA_handbook_2007_WEB.pdf*

5. For example, any inquiries regarding the importation of food products to Australia can be directed to AQIS Imported Food Program *foodimp@aqis.gov.au*.

6. "*Customs Industry Engagement and Analysis Project*" TNS Social Research, September 2008

7. *www.codexaustralia.gov.au*

8. *www.daff.gov.au/animal-plant-health/plant/ippc-secretariat*

9. *www.daff.gov.au/animal-plant-health/animal/oie*

10. *www.finance.gov.au/obpr/docs/handbook.pdf*

11. A more detailed description and analysis of the consultation process in Australia is provided in document GOV/PGC/REG(2009)6.

12. The Australian government agency in charge of providing science based quarantine assessments and policy advice in order to protect Australia's favourable pest and disease status and to enhance Australia's access to international animal and plant related markets

13. *www.daff.gov.au/ba/memos*

14. *www.daff.gov.au/about/publications/quarantine-biosecurity-report-and-preliminary-response*

15. *www.amsa.gov.au/shipping_safety/marine_orders/Marine_Orders_being_drafted_or_redrafted/index.asp*

16. Under the TTMRA (and with limited exceptions), goods legally sold in one jurisdiction can be sold in the other without further requirements; also, a person who is registered to practice an occupation in either country is entitled to practice an equivalent occupation in the other. A description and analysis of the TTMRA can be found in Section 2.5

17. A more detailed description and analysis of the appeals process in Australia is provided in document GOV/PGC/REG(2009)6.

18. Available online at *www.competitiontribunal.gov.au/practice.html*

19. By virtue of the *Customs Act 1901,* interested parties are : the original applicant for dumping or countervailing measures; a party representing the industry, or a portion of the industry, which produces the goods which are the subject of the reviewable decision; a party directly concerned with the importation or exportation to Australia of the goods; a party directly concerned with the production or manufacture of the goods; a trade association, the majority of whose members are directly concerned with the production or manufacture, or the import or export of the goods to Australia; or the government of the country from which the goods originated or were exported.

20. At *www.ag.gov.au/www/agd/agd.nsf/Page/Trade_lawTrade_measures_reviewReviews*

21. It is recalled that, in accordance with established terminology in the WTO TBT agreement, technical regulations are documents with which compliance is mandatory, while standards provide rules and guidelines for common and repeated use but compliance with them is not mandatory

22. Productivity Commission 2006, Section 8, Assessment: governance and process

23. *www.finance.gov.au*

24. *www.tenders.gov.au*

25. *www.finance.gov.au/publications/statistics-on-commonwealth-purchasing-contracts/index.html*

26. AUD 80 000 for procurement by FMA agencies (government entities), other than construction services; AUD 400 000 for procurements by relevant CAC (Commonwealth Authorities and Companies) Act bodies (government enterprises), other than construction services; and AUD 9 million for procurement of construction services. Mandatory procurement procedures do not apply to certain types of procurement, including real estate property or accommodation, R&D services and motor vehicles.

27. Conditions for participation may include a requirement to undertake an accreditation or validation procedure.

28. Agencies have previously identified all potentially interested eligible suppliers through a request for application or expression of interest or the granting of a specific licence essential for the conduct of the procurement.

29. Requirement for works of art; patented or copyrighted work; absence of competition for technical reasons.

30. www.dfat.gov.au/

31. Best Practice Regulation Handbook, Box 3.3 'Other Impacts' Checklist.

32. Australia terms RIA "*the process of examining the likely impacts of a proposed regulation and alternative policy options to assist the policy development process*". The Regulation Impact Statement (RIS) is one of the outcomes of this process, "*a document that details the regulatory impact assessment process, including the problem requiring government intervention, the proposed regulation and its alternatives, the impacts of the different options, and consultation with stakeholders*".

33. A more detailed description and analysis of the RIA process in Australia is provided in document GOV/PGC/REG(2009)6

34. *Principles and Procedures for Commonwealth-State Consultation on Treaties*

35. In the Australian Treaties Library, *www.austlii.edu.au/au/other/dfat*

36. In accordance with Sections 51 and 86 of the Australian Constitution

37. The issue of Commonwealth-State relations will be more particularly addressed in a separate, forthcoming report .

38. See further details in document GOV/PGC/REG(2009)13 on State-Federal Relationships

39. A complete set of communiqués and associated documents is available at *www.coag.gov.au*

40. For instance, co-operation programmes have allowed to narrow regulatory divergence in the areas of gas appliances and radio communications devices, making mutual recognition possible for certain goods, such as natural gas appliances.

41. Lead time is understood as the average time from port of discharge to consignee for 50% of shipments.

42. The proportion is lower, at 16% and 4% respectively, for air cargo.

43. 1% for air cargo and 12% for sea cargo when the goods are physically available for delivery.

44. ICON (import conditions) ePermits was introduced in September 2008 with the aim to increase the speed and convenience of import permit requirements for importers. Since implementation 30% of permits are now being applied for online.

45. In accordance with established terminology in the WTO TBT Agreement, mandatory technical specifications are referred to as "technical regulations", while rules and guidelines provided for common and repeated use but with which compliance is not mandatory are referred to as "standards".

46. The latest MOU was signed in 2008; it should be reviewed after a period not exceeding five years.

47. And, for further details, document GOV/PGC/REG(2009)13, on State-Federal Relationships

48. To the extent that they include provisions to "*take such reasonable measures as may be available to it to ensure compliance by regional or local governments and non-governmental bodies*".

49. Signed on 25 August 2008. Implementation arrangements are currently underway.

50. NARIC is a UK body responsible for providing information, advice and expert opinion on vocational, academic and professional skills and qualifications from over 180 countries worldwide.

51. ISO/IEC Guide 2, EN45020.

## BIBLIOGRAPHY


Beale, Fairbrother, Inglis, Trebeck (2008), *One Biosecurity, a Working Partnership*, The independent review of Australia's quarantine and biosecurity arrangements. Report to the Australian Government.

Australian Customs Service (2008), "Delivering Today and Building our Capabilities for the Future", Annual Report 2007-08.

Australian Government (2007), *Best Practice Regulation Handbook*, Canberra.

Council of Australian Governments (2007), *Best Practice Regulation, A Guide for Ministerial Councils and Standard Setting Bodies.*

Department of Finance and Administration (2006), *Selling to the Australian Government, A Guide for business*, Asset Management Group.

Department of Finance and Administration (2006), *Chief Executive's Instructions and Operational Guidelines for Procurement*, Canberra.

Department of Foreign Affairs and Trade (2005), *Signed, Sealed and Delivered. Treaties and Treaty Making: An Officials' Handbook*, Canberra.

Department of Agriculture, Fisheries and Forestry (2007), *Import Risk Analysis Handbook 2007*, Canberra.

OECD (2005), *Guiding Principles for Regulatory Quality and Performance*, Paris.

Productivity Commission (2003), *Evaluation of the Mutual Recognition Schemes*, Research Report, Canberra.

Productivity Commission (2006), *Standard Setting and Laboratory Accreditation*, Research Report, Canberra.

Productivity Commission (2009), *Review of Mutual Recognition Schemes*, Research Report, Canberra.

Review of Export Policies and Programs (2008), *Winning in World Markets. Meeting the competitive challenge of the new global economy* (the "Mortimer" report), Canberra.

TNS Social Research (2008), "Customs Industry Engagement and Analysis Project, A Research Report", Canberra.

World Customs Organisation (2002), *Guide to Measure the Time Required for the Release of Goods.*