



**Australian Government**  
**Productivity Commission**

Performance Benchmarking of  
Australian Business Regulation:  
The Role of Local Government  
as Regulator

Productivity Commission  
Research Report  
Volume 1

July 2012

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ISBN 978-1-74037-407-1 (Volume 1)

ISBN 978-1-74037-408-8 (Volume 2)

ISBN 978-1-74037-409-5 (Set)

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**An appropriate citation for this paper is:**

Productivity Commission 2012, *Performance Benchmarking of Australian Business Regulation: The Role of Local Government as Regulator*, Research Report, Canberra.

JEL code: A, B, C, D, H.

***The Productivity Commission***

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website ([www.pc.gov.au](http://www.pc.gov.au)) or by contacting Media and Publications on (03) 9653 2244 or email: [maps@pc.gov.au](mailto:maps@pc.gov.au)

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# Foreword

Local governments have expanded their role well beyond the provision of ‘roads, rates and rubbish’ into a range of community related activities and issues. They also have assumed key regulatory and compliance responsibilities on behalf of the state and Northern Territory governments. Indeed, all tiers of government are increasingly using local government to achieve their policy objectives at the local level.

This report is the latest in a series, initiated by COAG, directed at benchmarking different areas of state and territory regulation in terms of the relative burdens on business. For this study, the Commission was asked to examine the extent to which different approaches to exercising regulatory responsibilities by local governments affect costs incurred by business. It has also looked at how the relations between state/territory government and local governments are structured. It is the first such study comparing the regulatory roles of local government across Australia.

The Commission has identified a range of ‘leading practices’ for local government that would significantly improve governance and enhance the transparency, accountability and cost-effectiveness of business-related regulation.

The study was overseen by Commissioner Warren Mundy and Associate Commissioner Bernard Wonder, with a staff research team led by Sue Holmes.

The Commission was assisted by an Advisory Panel of senior officials from all governments. It also benefitted from many discussions with state, territory and local governments, businesses, organisations and individuals as well as those who completed detailed surveys. Thanks are extended to all those who contributed.

Gary Banks AO  
Chairman  
July 2012

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## Terms of reference

### PERFORMANCE BENCHMARKING OF THE ROLE OF LOCAL GOVERNMENT AS A REGULATOR

#### *Productivity Commission Act 1998*

I, Bill Shorten, Assistant Treasurer, pursuant to Parts 2 and 4 of the *Productivity Commission Act 1998* hereby request that the Productivity Commission undertake a research study to benchmark the extent to which particular approaches to the exercise of regulatory responsibilities by local government authorities, affect costs incurred by business, both within and between jurisdictions.

The responsibilities of local government authorities in Australia can be wide-ranging, covering areas such as food safety, planning and zoning, development and environmental assessment. In addition to requirements to enforce certain powers delegated to them by state and territory governments, local governments in most jurisdictions have the ability to make and enforce local regulations.

In undertaking this study, the Commission is to:

1. Identify the nature and extent of regulatory responsibilities exercised by local government authorities (including on behalf of other levels of government) where these responsibilities are likely to impose material costs on business, and significant variations in the distribution of these responsibilities between jurisdictions;
2. Clarify to what extent local governments implement and enforce national and state/territory policies (sometimes differently), and to what extent they apply additional policies of their own.
3. Identify indicators and use them to assess whether different regulatory responsibilities, and the approach to the exercise of those responsibilities, have a material effect on costs experienced by business; and
4. Identify whether particular approaches to the exercise of regulatory roles by local government have the capacity to reduce unnecessary costs incurred by business while sustaining good regulatory outcomes, and could therefore be described as best practice.

To reduce the consultation requirements for local governments, the Commission: may draw on previous evidence from benchmarking approaches to business registration, food safety, and planning, zoning and development approvals; may employ a range of approaches (including sampling and roundtables) to establish local governments' practices, including with respect to the objectives of the

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regulation concerned; and may wish also to draw on good overseas practices of regulation by sub-national governments.

A report is to be completed within 12 months of the receipt of this Terms of Reference. The Commission is to provide both a draft and final report, and the reports will be published.

BILL SHORTEN

Date received 4 July 2011



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# Abbreviations

ABS	Australian Bureau of Statistics
ALGA	Australian Local Government Association
BCA	Building Code of Australia
BCA	Business Council of Australia
BIS	Business Innovation and Skills (United Kingdom)
BRDO	Better Regulatory Delivery Office (United Kingdom)
CC	capital city local government classification
COAG	Council of Australian Governments
CPA	Competition Principles Agreement
Cwlth	Commonwealth
DPCP	Department of Planning and Community Development
EHOs	Environmental Health Officers
FTE	full time equivalent
HIA	Housing Industry Association
IPART	Independent Pricing and Regulatory Tribunal (NSW)
LARS	Local Authorities Regulatory Services (United Kingdom)
LBRO	Local Better Regulation Office (United Kingdom)
LGAQ	Local Government Association of Queensland
LG	local government
LGC	local government classification
MAV	Municipal Association of Victoria
NEPs	National Enforcement Priorities (United Kingdom)
NIS	National Indicators Set (United Kingdom)
NP SNE	National Partnership to Deliver a Seamless National Economy
NPROs	national priority regulatory outcomes (United Kingdom)
NRM	<i>Natural Resource Management Act 2010</i>
OECD	Organization for Economic Cooperation and Development

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PA	Primary Authorities (United Kingdom)
PC	Productivity Commission
RIA	Regulation impact analysis
RIS	regulatory impact statement
ROCs	regional organisations of councils
RT	remote local government classification
RU	rural local government classification
SALGA	Local Government Association of South Australia
SBDC	Small Business Development Corporation
UF	urban fringe local government classification
UM	urban metropolitan local government classification
UR	urban regional local government classification
VCAT	Victoria Civil and Administrative Tribunal
VCEC	Victoria Competition and Efficiency Commission
WALGA	Western Australian Local Government Association

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# OVERVIEW

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## Key points

- Implementing and enforcing state and territory laws, rather than local laws, dominates local governments' regulatory workload.
- While the Commonwealth has very limited powers to make laws for local government, it can influence them via national frameworks, such as food safety.
- In addition to local laws and quasi-regulatory instruments, rules can be imposed on business by 'decisions' determined under other laws, such as occurs with permits (including development approvals), licences, leases or registrations. Although they can impose costs on business and/or be anti-competitive, local instruments do not face as much scrutiny as state, territory or Commonwealth regulation.
- Burdens on business arise from delays, information requirements, restrictions on approvals, fees and penalties. Local governments can also prevent a business from operating or realising opportunities. Building, planning and land-use regulations impose the largest burdens on business.
- Unnecessary business burdens will be lower when local governments regulate well. The most important gaps in the support from states to local governments are:
  - insufficient consideration of local governments' capacity to administer and enforce regulation before a new regulatory role is delegated to them
  - limited guidance and training on how to administer and enforce regulations
  - no clear indication and ranking of state regulatory priorities.
- Leading practices for the states and the Northern Territory, include:
  - guidance to local government in writing regulation, such as Victoria's *Guidelines for Local Laws*
  - incentives for local governments to achieve scale and scope economies in regulatory functions
  - periodic assessment of the stock of local regulation and state regulation requiring a local government role
  - efficient cost recovery for local government regulatory functions
  - guidance to local government in the scrutiny of the impact of laws
  - graduated review and appeal systems for both local government decisions and processes
  - having regulatory decisions made by bodies which take account of all impacts
  - removing or managing the conflicting objectives between local governments' regulatory and other functions
  - a comprehensive central register of the state laws for which local government has a role in administration, enforcement and/or referral.

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# Overview

In February 2006, the Council of Australian Governments (COAG) agreed to adopt a common framework for benchmarking, measuring and reporting on regulatory burdens on business across all levels of government. In particular, governments have indicated that they want to identify unnecessary compliance costs, enhance regulatory consistency across jurisdictions and reduce regulatory duplication and overlap. COAG's concern is with both the written content of regulations and the way they are administered.

## **Purpose and scope of the study**

The purpose of this study is to benchmark the regulatory role of local government across all Australian states and the Northern Territory, with a particular focus on those local government responsibilities which materially impact on business costs.

This study is the first national study of the regulatory role of local government. The analysis covers 563 local governments across Australia with considerable diversity in their land area and population density as well as the range of business activities and incomes of residents (table 1). The focus of the study is on the particular practices used by local governments to administer regulation under each of the regulatory regimes subject to review, as well as the structure of the relationship between state and the Northern Territory governments and their respective local governments.

Regulation is defined widely to include all types of legislative instruments made by the Commonwealth and state and territory governments and administered by local government, as well as rules set by local governments themselves, such as local laws, guidelines, codes or policies and the conditions contained in licences, leases, and similar 'contracts'. The Commission's interest in these provisions focuses on whether they impose unnecessary compliance burdens on businesses or restrict competition. 'Unnecessary' compliance burdens are those which are not needed to achieve the regulatory objective and can therefore impose avoidable costs on business.

As well as the substance of the regulations, the ways in which they are implemented, administered and enforced by local governments can also have

material impacts on business. Local governments perform a range of functions in applying regulation, whether their own or delegated by their state or territory government, such as approvals, orders to commence or cease an activity, inspections, monitoring and reporting, and referrals to other agencies including state government departments.

**Table 1 Dimensions of local government diversity — selected summary characteristics**

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>	<i>Aust.</i>
<b>Number of local governments</b>								
Total	155	79	73	138	73	29	16	563
Urban metropolitan	31	22	6	21	14	0	0	94
<b>Population by local government</b>								
Median	20 906	42 921	4 910	2 926	9 390	12 654	7 146	9 390
Lowest	57	3 314	267	112	110	900	209	57
Highest	307 816	255 659	1 067 279	202 014	162 925	65 826	77 290	1 067 279
<b>Land area of local government (km<sup>2</sup>)</b>								
Median	2.69	1.53	7.62	2.34	1.434	1 154	7 468	2 339
Lowest	0.01	0.01	0.01	<0.01	<0.01	0.08	0.01	<0.01
Highest	53 509	22 085	106 170	371 603	102 864	9 574	323 755	371 603
<b>Population density (people/km<sup>2</sup>)</b>								
Median	8.40	26.16	0.72	0.58	9.74	5.45	0.61	5.45
Lowest	0.04	0.50	<0.01	<0.01	<0.01	0.29	0.02	<0.01
Highest	7 508	4 708	805	2 741	2 716	644	690	7 508
<b>Median average resident income (\$)</b>								
Median	39 555	40 464	38 661	41 870	37 613	37 387	42 233	39 555
Lowest	30 911	30 035	30 333	27 586	28 796	30 302	29 645	27 586
Highest	105 954	65 568	71 093	77 692	76 204	48 472	50 437	105 954

The regulatory responsibilities of local governments (many of which have been delegated to them by state governments) that impact on business costs cover the following areas:

- building and construction
- parking and transport
- public health and safety
- food safety and liquor licensing



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- environment
  - planning, rezoning and development assessment.

Compared to the states, the regulatory responsibilities of local governments in the Northern Territory are limited. In the ACT, these regulatory functions are performed by the territory government.

## **The Commission's methodology**

It is not possible to understand local government's regulatory role without appreciating its place in the hierarchy of governments and its relationships with the other two levels of government. Indeed, the source of burdens on business resulting from the regulatory activities of local governments can often be found in the policies and processes of other levels of government, most notably the states.

The Commission's methodology can be summed up as finding ways to assess the relative performance of Australian states and the Northern Territory against each other and, where relevant, against an ideal best practice or standard. After these comparisons have been made, leading practices are identified mainly from among what the jurisdictions are actually doing but also from New Zealand and the United Kingdom or approaches which the Commission considers would be better than any current practice. The term 'leading practice', as opposed to 'best practice', is used deliberately to indicate that the Commission is primarily choosing from actual practices. Where jurisdictions do not already have these leading practices in place, they are likely to find this is where further reform could be most beneficial. This overview is followed by a list of the leading practices.

Given the diverse regulatory responsibilities and roles of local government and the variety and sheer number of businesses they regulate, it has not been possible to measure the total compliance burden imposed on a typical business in each jurisdiction. Instead, the Commission has identified differences in either the regulatory framework or regulator behaviour and highlighted which jurisdictions are likely to impose higher costs in each case. In order to reduce the cumulative burden of regulation, it is necessary to examine and address the components of the burden and identify those which can be reduced while maintaining regulatory effectiveness.

By focusing on the costs imposed on business rather than the costs and benefits on all groups, the study is necessarily more limited in the insights it can provide.

Due to a lack of comparable data generally across jurisdictions, the Commission has conducted surveys of local governments in all jurisdictions and all key state and

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territory agencies which delegate regulatory or gatekeeper roles to local governments. The Commission has also used responses from a survey of small and medium sized businesses about business perceptions of local governments and submissions from businesses and local governments and their representative organisations.

## **National frameworks and local government**

The Australian Constitution provides very limited capacity for the Commonwealth Parliament to make laws with respect to local government. However, the Commonwealth can influence the regulatory responsibilities of local government and the way they are implemented via national frameworks or intergovernmental agreements.

National frameworks and intergovernmental agreements that involve the states and territories and require local governments to fulfil regulatory roles cover: competition policy; environment; water; coastal management; transport; food safety; building and plumbing codes; road rules; heavy vehicles; inter-governmental relations on local government matters; and the National Partnership Agreement to Deliver a Seamless National Economy.

It has been suggested to the Commission by some participants in the study that where national reform agendas have not delivered all the expected benefits, the fault may lie, at least in part, with local governments not fulfilling all the regulatory roles delegated to them. If this is the case, likely reasons include local governments having insufficient resources to implement the reforms, unclear specification and communication of the requirements and priorities of the reform agendas to local governments, and non-alignment of the priorities of local communities with those of higher levels of government.

## **Local laws and quasi-regulation**

Local governments are created by state and the Northern Territory governments, with their powers and functions set out in the relevant local government Acts and/or associated regulations and other legislation. In this study, the Commission's analysis is largely focused on local governments each with dual accountability to its local community and higher levels of government.

Local governments use various instruments to impose rules on business (box 1). Local laws are one of these, although their use varies, ranging from an average of just 2.5 local laws per local government in Tasmania to 59 in Queensland.

## Box 1 Local government regulatory instruments

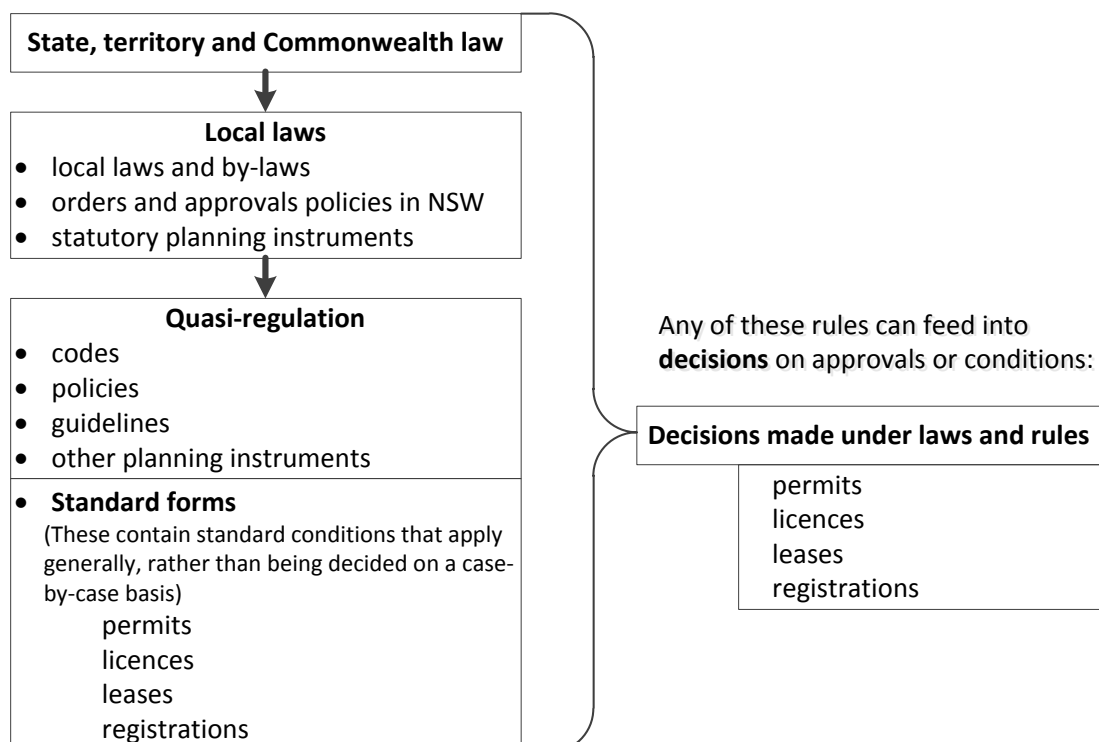
Local governments can make local laws (called ‘by-laws’ in South Australia, Tasmania and the Northern Territory, and ‘local orders and approvals policies’ in New South Wales) under powers delegated in the relevant local government Acts. Local laws are subordinate to state, territory and Commonwealth laws.

Local laws can be on any topic in Queensland, Western Australia, South Australia and the Northern Territory, and any topic for which the local government has powers in Victoria and Tasmania. In New South Wales, local orders and approvals policies can only be made on a limited list of topics. In practice, local laws are usually limited to areas, such as: building and construction; planning and land use; reserves; roads; traffic management and roadside parking; disposal of waste and stormwater; health and safety; and emergencies.

Quasi-regulation can take many forms, such as policies, guidelines or codes. Any rule that is not a law under a local government Act or another power may still be enforced in various ways and thus impact on business. The relationship between regulatory instruments is illustrated in figure 1.

In addition to local laws and quasi-regulatory instruments, rules can be imposed on business by ‘decisions’ determined under other laws, such as decisions to issue permits (including development approvals), licences, leases or registration. Decisions are binding between the authority and the applicant if the applicant chooses to engage in the activity in question. Sometimes these decisions may also apply more generally under standard form permits or licences — for example, standard conditions may apply generally to certain types of development.

Figure 1: Local government regulatory instruments



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In addition to local laws, local governments have developed quasi-regulations and rules which have a similar effect to local laws. Common forms include local government policies, codes, guidelines, and conditions on permits, licences, consents, leases or registrations. These can impose similar burdens on business as regulation because ‘non-compliance’ can result in various sanctions, including the cessation of an activity. For example, if an operator of a public car park does not comply with local policies, its licence or permit can be revoked or not issued even though its operations may not be directly regulated under a local law.

Local laws and quasi-regulatory instruments are not subject to the same level of scrutiny and are made via processes that are not as transparent as Commonwealth and state/territory laws:

- only local governments in New South Wales, South Australia and the Northern Territory are required to publish policies and local laws on their websites although almost everywhere else in Australia this is done by convention
- only Queensland, Western Australian, Tasmanian and the Northern Territory governments collect and publish a comprehensive state- or territory-wide list of local laws
- only Tasmanian local governments are required to subject local laws to regulatory impact analysis.

Publishing local laws on local government websites makes those laws accessible to local businesses, whereas a state or territory wide list facilitates comparison of levels of regulation across multiple jurisdictions. The latter helps businesses seeking to expand or establish operations. It also enables each jurisdiction to keep track of the cumulative regulatory burden on business, identify differences across local governments and review existing regulations. However, it is not as widely used across the jurisdictions and is likely to be more expensive to implement and maintain. There is a danger in publishing laws in more than one location as it may lead to legal uncertainty if lists are not kept exactly synchronised.

## **Concerns raised by business**

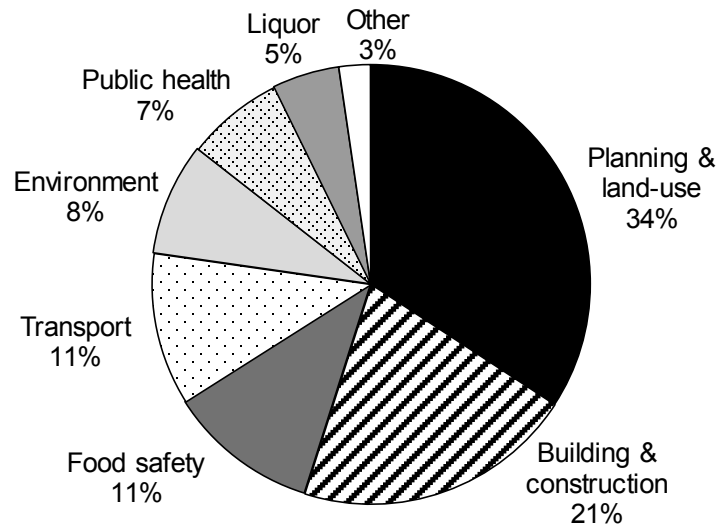
The costs of regulation imposed on business are many and varied in their size and character depending on the activities undertaken and their location. While some regulatory burdens may appear small, if they fall on small and medium sized businesses their impacts can be significant for individual businesses and large in aggregate.

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A survey of small and medium enterprises businesses, undertaken late in 2011, indicated that the regulation of planning and land use and building and construction have the largest impact on business (figure 2).

**Figure 2 Regulatory areas with the most impact, 2011**  
Per cent of businesses which had dealings in multiple regulatory areas

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Many of the concerns related to local government regulation and processes apply to more than one regulatory regime and can be broadly categorised as:

- complex regulatory frameworks
- intra- and inter-jurisdictional overlaps and inconsistencies in requirements
- uncertain and protracted timeframes
- lost business opportunities, including preventing a business from opening
- insufficient transparency in reporting requirements
- regulatory creep
- inadequate resourcing of local governments
- unreasonable payments such as through rates or extra fees and contributions
- the perception that local governments put a low priority on minimising business costs.

The majority of surveyed businesses were satisfied overall with their recent regulatory dealing with local government. Businesses in Queensland, Western Australia and New South Wales were the most likely to not be satisfied, while businesses in South Australia and Tasmania were the most likely to be satisfied.

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## Challenges for local government

### Expanding regulatory role of local government

Local government functions have expanded well beyond ‘roads, rates and rubbish’ to a much wider range of community related activities and issues. Aside from the Northern Territory where local governments have a limited regulatory role, the Commission estimates the number of state laws, under which local governments have regulatory responsibilities, ranges from 110 in Western Australia down to 18 in Queensland. The number of state agencies that have regulatory dealings with local government under these laws ranges from 17 in Victoria to only 4 in Queensland. The more numerous the number of state agencies delegating regulatory roles, the greater is the task of coordination between state and local governments. For example, a larger number of state government bodies will have more difficulty in reaching agreement on a consistent and comprehensive ranking of the state government’s priorities for local government regulation and in coordinating consistent support to local government.

Over the last 25 years, the legislation governing local governments has changed substantially. The intention has been to provide local governments with greater autonomy, flexibility and discretion to implement policy for their local communities, while being subject to greater public accountability. Previously, the roles of local government were detailed and prescribed and local government had to rely on an express or implied provision to support a particular role. Today, local government Acts are largely principles based, conferring general competence powers to local governments to act in the interest of their local communities in any area unless it is exclusively controlled by the Commonwealth and/or the states or prohibited by other legislation. The exception to this is New South Wales, where local governments can only make local policies in clearly stipulated areas.

Frequently, local governments are caught in a tug-of-war between strongly expressed local preferences and a growing list of responsibilities and requirements delegated to them by their state government. Around half of local governments in New South Wales and Queensland noted that increases in their regulatory responsibilities have not been matched by commensurate increases in resources.

### Subsidiarity and unaligned costs and benefits

The optimum decision-making unit varies according to the size of the community affected by any decision. When the impacts of decisions are felt by individuals

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throughout a local government area, and only in that area, the decisions are best made by the relevant local government. A core challenge in any of the regulatory regimes benchmarked for this review is where the costs (or benefits) of regulation are borne primarily by the residents in one or a few local governments while the benefits (or costs) are spread more widely across a whole city, region or the nation. For example, it might be desirable for a city to have a single toxic waste facility but its physical impacts and risks will be concentrated on a small number of local government areas. In these cases, the local government tends to act in the interest of its constituents even when negative consequences for other parties are ‘over-produced’ or positive outcomes are ‘under-produced’.

Ideally, the jurisdiction of a decision-making body should capture all of the relevant costs and benefits relating to the decision. However, this is difficult to achieve since different decisions will vary greatly in the scope of their impact. In practice, but not always, issues are allocated to that level of government most likely to fully weigh all impacts to maximise social wellbeing. Sometimes, bodies fit for purpose, such as catchment management authorities or regional planning panels, are created. Such mechanisms provide a forum for cost effective decision making in the interests of the wider community while addressing individual local government concerns. These alternative decision-making bodies are more likely to make decisions which balance all impacts, ranging from local to national, if they:

- are independent
- comprise independent technical experts and elected local government representatives and, as appropriate, other levels of government
- have a jurisdiction which captures all of the relevant costs and benefits relating to the decision
- receive submissions from any interested party
- have clear criteria for what triggers referral to the body
- give reasons for their decision and these are made public.

### **Highly variable capacities of local government authorities**

There is considerable variation in the capacity of local governments to act as regulators, partly reflecting their underlying economic, social and environmental diversity.

The workforce sizes of local governments vary markedly. Brisbane City Council employs over 9000 people, while some smaller local governments have workforces that consist of fewer than 20 FTE employees. Generally, rural and remote local

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governments have the smallest workforces, but have more workers per resident than urban local governments. Queensland local governments have the highest number of local government workers, both in absolute numbers and on a per capita basis.

Local governments are often subject to a shortage of suitable workers and a high proportion of local governments indicate their staff face significant workload pressures. Information collected by the Commission suggests that vacancy rates were highest among urban local governments and were most pronounced in the eastern states.

Rates, fees, charges and contributions are the main ways local governments directly raise income. Rate restrictions appear to have had the greatest effect on New South Wales. Between 1998–99 and 2005–06, rate pegging in New South Wales dampened the revenue raised from rates relative to other states and there was little evidence that this was made up by non-rate revenue (PC 2008a). Across regulatory regimes and local governments, there is significant variability in fees for the same regulatory services and ways of determining what those fees should be.

Many local governments do not recoup the full costs of administering regulation from business. In such cases, except where it is efficient for the community to recover less than the cost of service provision, local governments are denied an efficient source of income (PC 2001). Fuller cost recovery could lead to better overall outcomes, albeit with higher fees for business.

In addition to regulatory fees, local governments source income from facilities and services they provide to the local community, such as car parking, caravan parks and waste collection. Capacity to raise revenue from these sources and rates varies markedly across local governments depending on income, population size and attractiveness as a tourist destination.

Local governments and others have expressed concerns about ‘cost shifting’ by the states onto local government. This issue has been previously identified in a number of forums, including a parliamentary inquiry and with respect to particular areas of regulation, such as the environment. Half of local governments in New South Wales and Queensland considered they had insufficient resources to undertake their regulatory roles.

That many local governments do not have sufficient resources to effectively undertake their regulatory functions may, in part, be due to state governments devolving additional regulatory responsibilities to local governments often without first ensuring they have sufficient resources — both in terms of finances and appropriately skilled staff.



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**Box 2      A statutory Regulators' Compliance Code — underpinned by the Hampton best practice compliance and inspection principles**

In 2005, a review commissioned by the United Kingdom Government and undertaken by Sir Phillip Hampton, *Reducing Administrative Burden: Effective Inspection and Enforcement* (or, the Hampton Review), provided the foundation for subsequent policy and improvement activity. The Hampton Review made a number of recommendations and articulated seven principles, all of which were accepted by the Government in the 2005 budget. These are:

- regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most
- regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take
- no inspection should take place without a reason
- businesses should not have to give unnecessary information, nor give the same piece of information twice
- the few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions
- regulators should provide authoritative, accessible advice easily and cheaply
- regulators should recognise that a key element of their activity will be to allow, or even encourage economic progress, and only to intervene when there is a clear case for protection.

In 2006, the so called 'Hampton principles' were embodied in a statutory Regulators' Compliance Code which requires regulators to:

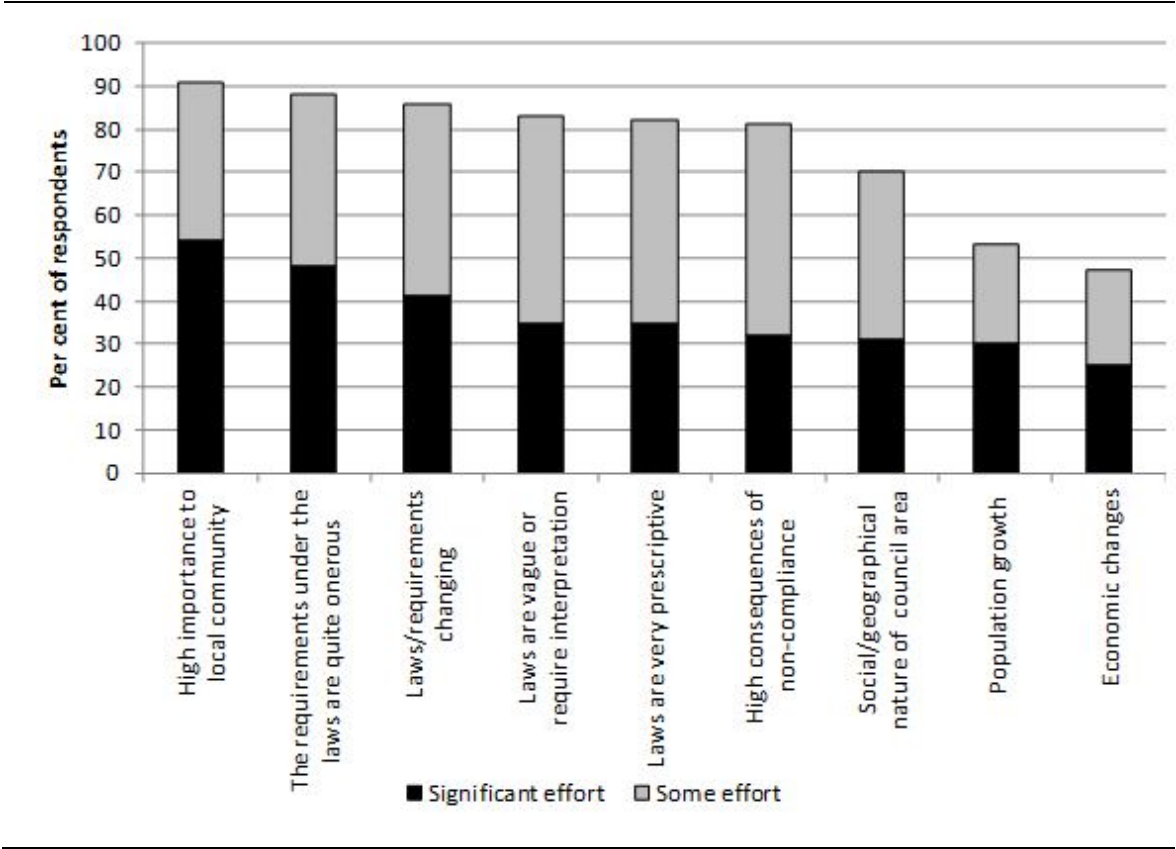
- support economic progress by performing regulatory duties without impeding business productivity
- provide information and advice in a way that enables businesses to clearly understand what is required by law
- only perform inspections following a risk assessment, so that resources are focused on those least likely to comply
- collaborate with other regulators to share data and minimise demand on businesses
- follow principles on penalties outlined in Macrory (2006) when undertaking formal enforcement actions, including sanctions and penalties
- increase transparency by reporting on outcomes, costs and perceptions of their enforcement approach.

With regard to the last point, the Commission found that no state government had provided comprehensive training or guidance on how to administer and enforce regulation. In contrast, the United Kingdom has addressed this issue and produced a

statutory Regulators’ Compliance Code to improve the quality and consistency of local government regulatory enforcement and inspection activities. It is underpinned by the Hampton best practice compliance and inspection principles as outlined in box 2.

Many local governments regularly cooperate and combine their resources to provide services, including regulatory services, as a way to address skill shortages — such as through regional organisations of councils, undertaking joint ventures and forming joint entities. Private sector service provision is another option that is used extensively in building and construction. Without state and Northern Territory government support, through well-designed legislative or assistance arrangements, local governments have little incentive to voluntarily coordinate or consolidate their regulatory activities to achieve improved outcomes.

Figure 3      **Factors contributing to regulatory burdens on local governments**



In an environment of constrained resources, how local governments allocate resources is an important consideration. Figure 3 indicates some of the issues identified by local governments as contributing to their workload. For regulatory functions, local governments identified: laws have high importance to the local community; laws and requirements were too onerous and that laws were subject to

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community; laws and requirements were too onerous and that laws were subject to constant change as the factors that took up the most of their time. Interestingly, with regard to the debate over whether it is better to have prescriptive or performance based regulations, local governments complained equally about problems with both types of regulation, the former giving inspectors little flexibility in assessing compliance and the latter being seen as vague and requiring interpretation. The risk posed by the matter being regulated is only the sixth most demanding issue and yet rational enforcement strategies would put this as the highest priority.

## **Some other concerns**

### **Conflicting objectives of local governments**

Due to the local scale of operation, local governments may face conflicting roles. Local governments can make and/or enforce laws in areas where they are also service providers. As well as conflicting roles, this raises concerns about competitive neutrality. For example:

- local governments can be the responsible planning authority for a proposed development while also being the owner of the land on which the development is being undertaken
- local governments can be the providers of certain facilities, such as waste depots and caravan parks, and regulate similar facilities provided by the private sector.

However, for practical reasons it is frequently difficult to remove such conflicts without significantly affecting the quality of services in many communities. Transparency, conflict resolution and probity requirements are needed to address the potential for these conflicting roles to result in compromised decision-making.

### **Unclear compliance with the Competition Principles Agreement**

Under section 7 of the Competition Principles Agreement (CPA), it was agreed that each state and territory would be responsible for applying competition policy principles to local government. Most jurisdictions have express provisions in their local government Acts prohibiting local governments from creating local laws that restrict competition, except where they satisfy a public interest test. In other jurisdictions, obligations concerning local government under the CPA are enforced through other mechanisms.

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In the course of this study, the Commission has found cases where local governments are not applying competition policy principles. A particular example is the anti-competitive conditions that can be included in licences for mobile food vans which ban them from trading within certain distances (200 metres is common but up to 1 kilometre) of fixed food businesses offering similar products.

Since conditions that are applied through approvals and registrations are given less scrutiny than conditions contained in local laws, there is greater scope for these conditions to impose direct or indirect costs on business and for competition to be restricted without being subject to a public interest test.

### **Limited low-cost graduated dispute handling**

In the event that administrators inadvertently or incorrectly impose costs on business, it is important that businesses have access to well-defined dispute handling processes that allow complaints and grievances to be considered in an objective and timely manner.

External judicial appeals processes allow businesses to lodge disputes about local government regulatory decisions for resolution by an independent body. Most local government Acts contain provisions for appeals of local government decisions. Also, administrative decisions made by local government — such as to grant a licence, approve a development or impose a penalty — can be appealed under administrative law. However, external judicial review can be highly formal and expensive for all parties and the resolution timeframes are often considerable.

Moreover, businesses have raised concerns about compliance costs which extend beyond final local government decisions to those concerning the process of obtaining a decision, such as delays and lack of communication. Poor local government processes can stifle business growth and lead to missed opportunities. There is a lack of review mechanisms, formal or informal, for problems that arise during local government processes.

As an alternative to external dispute resolution, internal reviews can provide a less formal, cheaper and faster dispute handling process for businesses to appeal local government decisions. Internal reviews are already part of the appeals path for local governments in most jurisdictions. These are generally conducted by another, often more senior, administrative officer. Business has, however, also raised concerns about the consequences of using internal as well as external review mechanisms or lodging a formal complaint about local government processes, fearing retribution and that future applications will not be treated fairly.

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Having a graduated review and appeal system available for matters relating to both local government decisions and matters of procedural fairness could decrease costs. Sometimes businesses require an independent arbiter or facilitator to address systemic issues or claims of unfairness. It can also be the case, particularly with small businesses, that sometimes they need help from a third party to understand their compliance obligations. To augment current judicial and internal appeals paths, a cost effective approach would be for Small Business Commissioners to have a mediating role between local government and businesses, as they do in New South Wales, South Australia and Western Australia.

## Leading practices

While the Commission has identified some leading practices that only apply to specific areas of regulation, other practices are relevant to the states and Northern Territory's overarching legal and governance frameworks for local government and/or apply generally to all regulatory regimes. The list of leading practices first presents those which have overarching relevance and application, followed by complementary leading practices specific to each regulatory area.

Adoption of the leading practices would be expected to significantly improve local government governance, as well as enhance the transparency, accountability and efficiency of business-related regulation. Overall there is an extensive range of initiatives which have the potential, if taken up, to reduce unnecessary burdens on business.

The identification of the overarching leading practices (pages 21 to 29) has been influenced by the underlying themes and characteristics discussed above, namely:

- the growing expectations put on local governments and the increased role given to them
- the optimum decision-making unit varies according to the size of the community affected by any decision
- the resource constraints of many local governments
- large variations in the fees charged by local governments for the same regulatory matters both within and across states indicating both under and over recovery of regulatory administrative costs
- various forms of coordination and consolidation to pool resources can provide local governments with access to additional skills and resources and reduce the delays and related costs faced by business
- local governments can be required to fulfil conflicting roles

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- state and territory governments are giving insufficient attention to the capacities of local governments to fulfil the regulatory roles given to them
  - local government regulatory matters are generally less transparent and face less scrutiny than for other levels of government
  - local governments would benefit from assistance in assessing and writing local laws or policies and in administering and enforcing regulation.

Some of the overarching leading practices will apply to all or several specific regulatory regimes. The leading practices which apply only to a particular regulatory regime (pages 29 to 36) are intended to address issues specific to each regime:

- *for building and construction*, local governments may impose unnecessary burdens on businesses by: local governments having higher standards than the National Construction Code; overly restrictive conditions on construction site activity; delays in processing applications; excessive inspections; and regulatory fees and charges which do not reflect their administrative costs
- *for parking*, local governments can impose high fees and limit parking availability
- *for road access for heavy vehicles*, many local governments do not have well developed processes for assessing applications for access and there is significant variation across local governments as to when access is granted, as well as approval times and conditions. Conditions can address time limits, speed limits, road condition, notification, land access, operating conditions, limits on the number of heavy vehicles on the road at any one time, and other requirements
- *for food safety*, all levels of government have put substantial efforts in recent decades to improve the consistency of food safety regulation, based on the principles of responsive and risk-based regulation and greater public transparency and availability of information. It is probably the best regulatory regime in terms of minimising unnecessary burdens on business, and thus the whole regulatory regime serves as a leading practice. Notable features include:
  - NSW Food Authority’s pursuit of greater coordination, consistency and clarity by establishing a memorandum of understanding with local governments
  - across Australia the use of a cooperative, graduated approach to achieve compliance and the application of risk management (PC 2009a)
- *for cooling towers and warm water systems*, it appears that inspections are infrequent and not based on a risk classification of the water systems nor on compliance history in most cases

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- *for brothels*, in Queensland and New South Wales, local governments are the lead agency, coordinating enforcement action with state and Commonwealth officials and it appears that they are insufficiently resourced to conduct the necessary investigation and coordination. There are also problems in trying to regulate brothels via planning law when the prime objective is to control the owners of the brothel rather than the owners of the building
  - *for environmental regulation*, local governments may impose burdens by requiring businesses to prepare a range of environmental plans to support development applications, install equipment and undertake practices which may not be the most cost effective way to address environmental goals. Local governments also impose: inspection, monitoring and compliance fees; restrictions on use or hours of operation of vehicles or equipment; and inconsistent enforcement. However, few small and medium businesses reported environmental regulation had a major impact on their business. In contrast, some large developers complained about having to conduct prolonged and expensive environmental impact analyses — while these are generally state/territory requirements, local governments are often the referring body
  - *planning, rezoning and development assessment* is a complex regulatory area which was benchmarked in the Commission's *Planning, Zoning and Development Assessments* report (2011b) where the focus was on cities. This review provides additional leading practices that relate, in particular but not exclusively, to concerns raised by industries operating outside of cities:
    - for mobile phone towers, the Mobile Carriers' Forum complained of excessive rental demands for facilities on local government land, excessive monetary contributions or conditions for capital works, and obstructive actions by councils in the approval process. However, on examination this was not always the case and there were examples where the carriers had contributed to delays
    - with regard to tourism, most concerns were about the planning system not being well equipped to cater for the industry's needs and the tensions that can sometimes accompany the introduction of new activities into areas practising more traditional land uses such as farming

for mining and extractive industries, some regulatory burdens on business arise from the lack of clarity in the scope of local government's role in the approval of major oil and gas projects and there has been limited progress in clarifying the responsibilities of state and local governments in relation to the approval of upstream petroleum developments.





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# Leading Practices

## Regulatory and governance frameworks

### *Statutory best practice regulation principles*

#### LEADING PRACTICE 2.1

*Well-established regulatory principles that have a statutory basis and apply to all levels of government — including local government — ensure more rigorous application by policy makers and delivery agencies, improve the transparency and accountability of the quality of regulations and send a strong signal about a government's commitment to regulatory reform as a micro-economic policy instrument. In adapting this leading practice to the Australian federal system of government, statutory best practice regulatory principles would ideally be formulated at a national level and given effect to state and local government regulation through state legislation.*

### *Local Better Regulation Office*

#### LEADING PRACTICE 2.2

*An agency, such as the United Kingdom's Local Better Regulation Office, which had a focus on the regulatory activities of local government, including those undertaken on behalf of other tiers of government, can coordinate and prioritise regulatory objectives, responsibilities and activities between, and within, tiers of government while allowing local governments the discretion and autonomy to respond to the needs and aspirations of local communities.*

### *Prioritising regulatory activities delegated to local government*

#### LEADING PRACTICE 2.3

*Given the broad range of regulatory functions which compete for resources against other functions undertaken by local governments in the interests of local communities, a short list of well-defined regulatory priorities would help to ensure that local governments are devoting sufficient resources to the achievement of the regulatory objectives of higher levels of government.*

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*Maintaining up-to-date registers of state laws which require local governments to play a regulatory role*

LEADING PRACTICE 3.1

*No jurisdiction has established a comprehensive list of the laws for which local government plays a role in administration, enforcement or referral. A complete and current list of those laws which require local governments to play a regulatory role would reduce overall compliance burdens for business and facilitate a better understanding of the regulatory workloads of local governments.*

*Assessment for local laws and state or territory laws that delegate regulatory roles*

LEADING PRACTICE 3.7

*It is leading practice for local governments to conduct impact analysis for proposed local laws at a level commensurate with the likely size of impact of the proposals. While full regulation impact analysis or quantitative cost benefit analysis will often not be justified, some level of consultation with and opportunity for interested parties to consider and comment on proposals is almost always appropriate.*

LEADING PRACTICE 3.8

*Developing tools to help local governments undertake simple impact assessments would improve regulatory outcomes.*

LEADING PRACTICE 3.2

*State or territory led development and regulatory impact assessment of model laws can reduce the burden on local governments and improve the quality of regulation, thus reducing costs to business.*

## *Transparency*

LEADING PRACTICE 3.3

*Publishing local laws on the internet improves the transparency of local government, whether the laws are published in a central register or on local websites. There is currently good use of web publishing for local laws across the jurisdictions. This could be made a legislative requirement if compliance or timeliness of publication became an issue in the future.*

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#### LEADING PRACTICE 3.5

*The maintenance of a database of all local laws in each jurisdiction would help to facilitate the management of red tape and review of the stock of regulation. Such databases are maintained by Queensland and Western Australia. The practice of listing all laws on one webpage, as in Tasmania and the Northern Territory, is appropriate for jurisdictions that do not have many local laws in total.*

#### LEADING PRACTICE 3.4

*It is leading practice to make publicly available all quasi-regulation that provides guidance on how to comply with legal requirements or how local governments will assess applications. These quasi-regulatory instruments include policies, guidelines, fact sheets and codes.*

#### LEADING PRACTICE 3.6

*The New South Wales Ombudsman has a memorandum of understanding with the NSW Department of Local Government to share information on complaints, the issues complained of, which local governments such complaints relate to and, as far as practicable, how complaints were disposed of. This practice supports probity and good governance.*

### *Enhancing competition*

#### LEADING PRACTICE 3.9

*Consistent with the Competition Principles Agreement, local laws are assessed for anti-competitive effects and, if found to be anti-competitive, are subjected to an agreed public interest test in Queensland, Victoria, South Australia, Tasmania and the Northern Territory. Similar assessments for quasi-regulation would further reduce potential adverse impacts of regulation on competition.*

#### LEADING PRACTICE 3.10

*Where local governments have regulatory roles that may conflict with their own interests and it is impractical to resolve these conflicts, there is the potential for compromised decision-making and the neglect of competitive neutrality requirements. Arrangements designed to meet the specific circumstances can address risks and deliver appropriate transparency, conflict resolution and probity.*

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## *Reviewing the stock of local government regulation*

### LEADING PRACTICE 3.11

*Local government reporting requirements and periodic reviews of regulation undertaken for state or territory governments can help to ensure that: local rules and regulations do not cause unintended consequences and do not overlap with other regulation; and, at a minimum, the benefits created outweigh the costs imposed, including costs to business. Examples include the Victorian Competition and Efficiency Commission's review of local government regulation and Western Australia's inclusion of local government in its state-wide red tape review.*

### LEADING PRACTICE 3.12

*Until recently, most of the jurisdictions' red tape reduction programs have been focused on state regulation. South Australia has recently piloted the extension of these programs to local government regulation and assessing the case for this wider coverage may find significant benefits.*

### LEADING PRACTICE 3.13

*Keeping a watching brief on the aggregate number and content of local laws and licensing/registration requirements would enable state and territory governments to regularly assess, say every ten years, whether existing instruments are relevant and to identify a subset that warrants further review.*

## *Reviewing and appealing local government decisions and procedures*

### LEADING PRACTICE 3.14

*Having a graduated review and appeal system available for matters relating to local government decisions and procedures provides a way for affected parties to obtain 'natural justice' (procedural fairness) and a merits review (a review of the outcome of the decision), while also reducing costs and formalities.*

*Augmenting appeal paths with internal review mechanisms, such as are already in place for local government decisions in most jurisdictions, is likely to reduce costs for business.*

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LEADING PRACTICE 3.15

*Enabling Small Business Commissioners to:*

- *have a mediating role between local government and businesses, as they do in New South Wales, South Australia and Western Australia*
- *investigate systemic issues raised through complaints*

*would provide business with a path of redress that is less formal, time-consuming and expensive than judicial appeals but more independent than an internal review.*

*Taking account of all costs and benefits in decision making*

LEADING PRACTICE 3.16

*While the principle of subsidiarity suggests that local government is likely to be the most effective and efficient regulation maker for local issues, when impacts extend beyond the local government area, higher-level decision making — such as by a state, territory or regional body — is more likely to deliver an overall net benefit to the community.*

*It may be appropriate for state or territory governments to use separate regional bodies with well-defined regulatory responsibilities which cross local government boundaries. Planning panels, inter-council coordination organisations and catchment management authorities provide examples with differing degrees of effectiveness across the jurisdictions.*

*Consider greater harmonisation*

LEADING PRACTICE 3.17

*There is a case for state, territory and local governments to assess the mechanisms available to harmonise or coordinate local regulatory activities where the costs of variations in local regulation exceed the benefits.*

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## Capacities of local governments

### *Ensuring local government regulatory capacity*

#### LEADING PRACTICE 4.1

*State governments, by ensuring local governments have adequate finances, skills and guidance to undertake new regulatory roles, can reduce the potential for regulations to be administered inefficiently, inconsistently or haphazardly. This could be achieved by including an assessment of local government capacities as part of the regulatory impact analysis for any regulation that envisages a role for local government.*

### *Assistance with setting fees*

#### LEADING PRACTICE 4.2

*The practice of publishing fee-setting guidelines and expectations for local governments, as currently done in New Zealand, assists local governments to set efficient charges for their regulatory activities.*

#### LEADING PRACTICE 4.3

*In general, if local governments set fees and levies to fully recover, but not exceed, the costs of providing regulatory services from the business being regulated, this will improve efficiency. There are possible exceptions: it may not be efficient to fully recover costs where public benefits are involved; and it may be efficient to charge more than the administrative costs where this would lead to businesses taking account of external costs imposed on the community. In addition, in order for it to be efficient to not just recover costs, it would need to be determined that fees charged to business are the best way to address these market failures.*

#### LEADING PRACTICE 4.4

*If state governments established systems and procedures to accurately measure the costs of providing regulatory services, and did not cap local government regulatory fees, this would assist local governments to accurately recover regulatory administrative costs.*

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## Assistance with writing laws

### LEADING PRACTICE 4.5

*Guidance for local governments on local law and policy making is useful, with Victoria's Guidelines for Local Laws Manual providing an example of this. The usefulness of such guidance is maximised when:*

- *it applies to both regulation development and review*
- *it is based on best-practice principles*
- *it includes not only written material but also training and ad hoc support.*

## Assistance with administering and enforcing regulation

### LEADING PRACTICE 4.6

*The use of a regulators' compliance code, such as that currently in operation in the United Kingdom based on the Hampton principles, would provide guidance for local governments in the areas of regulatory administration and enforcement. Key elements of any guide would include regulatory administration and enforcement strategies based on risk management and responsive regulation.*

### LEADING PRACTICE 9.2

*Burdens on businesses and local governments can be reduced if standardised forms are made available to local government regulators. This is currently done for food safety regulation by the NSW Food Authority, the South Australian Government and the Municipal Association of Victoria.*

## Capacity development and back-up

### LEADING PRACTICE 4.7

*Training for local government officers from relevant state government departments develops their capacity to administer and enforce regulations and assists with delivering good regulatory outcomes. The training associated with changes to the Victorian Public Health and Wellbeing Act 2008 is an example of leading practice in this area.*

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#### LEADING PRACTICE 4.8

*Accreditation of local government officers ensures that the local government workforce is suitably qualified to undertake all of their regulatory functions, although, there is a need to ensure the accreditation criteria used reflect the roles the officers are expected to perform.*

#### LEADING PRACTICE 4.9

*The use of flying squads, such as the Rural Planning Flying Squad established in Victoria, moderates the effects of local government skills shortages.*

#### LEADING PRACTICE 4.11

*There are benefits from state governments reviewing individual local governments as is the case with the Promoting Better Practice Review program in New South Wales. The benefits of such reviews are maximised when:*

- *they extend beyond a purely financial focus to encompass other aspects of local government operation such as governance, workforce and the use of technology*
- *they aim to identify leading and/or noteworthy practices in local governments as well as identify areas for potential improvement*
- *state and territory governments work with local governments to address identified areas for improvement*
- *the reviews are made publically available upon completion to enable other local governments to benefit from the relevant findings.*

### **Coordination and consolidation**

#### LEADING PRACTICE 4.10

*By making the optimal use of various forms of cooperation and coordination, local governments are able to achieve economies of scope and scale in resources and skills. Provisions under Western Australia's Building Act 2011 that allow local governments to share building approval services provide an example of this.*

#### LEADING PRACTICE 5.1

*Local government coordination or consolidation requires a genuine and clear agreement among local governments to achieve regulatory efficiency objectives, particularly to:*

- *reduce regulatory duplication or unwarranted inconsistency among local governments*



- 
- *improve the competency and capacity of local governments to effectively undertake their regulatory functions.*

*The agreement may be stand-alone, or mediated through a coordinating body or under legislation.*

#### LEADING PRACTICE 5.5

*Resource sharing among local governments can address deficiencies in the capacity of individual local governments to discharge their regulatory functions. In particular, sharing staff resources provides individual local governments with access to additional skills and resources which is likely to assist in reducing the delays on business in obtaining local government approvals and permits.*

#### LEADING PRACTICE 5.2

*Regulatory efficiency can be improved by including express provisions in local government Acts:*

- *to permit joint local government activities to address regulatory efficiency objectives*
- *to enable a joint local government entity to be established to undertake regulatory functions in an efficient manner.*

*In addition, state and Northern Territory governments could provide administrative guidance to clarify the scope of the provisions, including that coordination and consolidation is relevant to more than just service delivery.*

#### LEADING PRACTICE 5.3

*Legislative provisions that impede local governments from coordinating and consolidating in effective ways run contrary to leading practice.*

#### LEADING PRACTICE 5.4

*Suitable state government incentives and support to address regulatory efficiency improve the outcomes from local government coordination and consolidation.*

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## Specific regulatory regimes

### *Regulation of building and construction*

#### LEADING PRACTICE 7.1

*A gateway approach (similar to that used in Queensland, Victoria and Western Australia) to scrutinise proposed building standards that are inconsistent with either the National Construction Code or relevant jurisdictional Development Codes guards against potentially costly requirements being imposed by local governments.*

#### LEADING PRACTICE 7.2

*Use of enforceable conditions or standards in the regulation and management of construction site activity, with the conditions being flexible enough to deal with genuine differences in local circumstances, is the most consistent and effective means of regulating construction sites.*

#### LEADING PRACTICE 7.3

*The risk-based approach to building inspections being contemplated by Western Australia offers a more cost-effective means of regulating building compliance without compromising the integrity of the building process. Similarly, regulating compliance with relevant plumbing standards on the basis of risk would offer equivalent benefits.*

### *Parking regulation*

#### LEADING PRACTICE 8.1

*Local government policy on when cash-in-lieu contributions will be accepted as a substitute for providing parking spaces would be more transparent and provide more certainty to business if the policy is clear and accessible and outlines:*

- the circumstances in which cash-in-lieu contributions will be considered*
- how contributions will be calculated*
- how the money collected will be applied.*

*While no one local government appears to have a parking policy that addresses all of these issues, many local governments in Tasmania have clear and accessible cash-in-lieu policies, as do Redlands City Council (Queensland) and Darwin City Council.*

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## Heavy vehicle regulation

### LEADING PRACTICE 8.2

*In order to facilitate the development of maps indicating which roads can be accessed by compliant vehicles, state and the Northern Territory governments or the National Heavy Vehicle Regulator (when operational) could provide support, including technical and financial resources, to local governments in identifying and gazetting suitable roads according to the Performance Based Standards Classification.*

### LEADING PRACTICE 8.3

*It is more efficient for local governments to target the outcomes of transport activities (such as safety and road damage) where this approach can meet community expectations, rather than placing restrictive conditions on vehicle dimensions. That said, there may be times where the appropriate regulatory approach is to impose restrictive regulatory conditions (such as defined hours of operation to restrict noise levels).*

## Food safety regulation

### LEADING PRACTICE 9.1

*It is a leading practice to exclude businesses selling food with negligible risk from requirements to register or notify their business as a food business, as currently provided for in Victoria, Tasmania and Western Australia.*

### LEADING PRACTICE 9.3

*Burdens on business can be reduced if administrative arrangements only require food businesses to register with one local government. Victoria, Queensland, South Australia and Western Australia have introduced such arrangements (for example, in respect of mobile food vendors not having to register with multiple local governments).*

### LEADING PRACTICE 9.4

*In instances when states require food businesses to have food safety programs, it would assist local governments, which usually administer and enforce the food safety programs, if they also provided either templates for different types of business (as in South Australia and Victoria) or online tools that allow businesses to generate food safety templates (as is available for Victorian businesses).*

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#### LEADING PRACTICE 9.5

*If local governments systemically collect and use information on risk and the compliance history of individual food businesses to inform their regulatory practices — such as inspection frequency and fee setting — it should both improve outcomes and reduce burdens on low-risk and compliant businesses. This is already done by most local governments.*

#### LEADING PRACTICE 9.6

*Food businesses and consumers benefit from a transparent food regulation process. Examples include:*

- *providing information explaining the basis for food safety policy — particularly the reasons why some businesses are treated differently — to assist local governments and other parties in understanding the food safety system. The NSW Food Authority makes this information available to the public*
- *state governments providing information on various food safety regulatory activities of local governments, including fees and charges imposed, the frequency of inspection activities and the results of food safety enforcement actions, as is the case in New South Wales, Queensland, South Australia and Western Australia.*

### *Regulation of cooling towers and warm water systems*

#### LEADING PRACTICE 10.1

*When states collect data on the regulatory public health functions undertaken by local governments on their behalf, it is leading practice for that information to be published with information on each local government's performance. Most states do this for food safety and two states — South Australia and Tasmania — are moving towards this for public health and safety functions.*

#### LEADING PRACTICE 10.2

*To identify areas requiring more focused risk management and responsive enforcement approaches, states could review local government performance data. Appropriate actions to improve local government capacity can include articulating the expected performance of local governments (along with relative priorities), providing additional assistance to local governments, and education and training.*

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## Regulation of swimming pools

### LEADING PRACTICE 10.3

*Some states do not provide explicit guidance on what role — if any — local government should have in regulating public swimming pools. This can lead to uncertainty for affected businesses. Western Australia has addressed this by clearly enshrining the responsibilities that local governments have in relation to regulating public swimming pools in their regulations.*

### LEADING PRACTICE 10.4

*If local governments base the frequency of swimming pool inspections on both the identified risk categorisation and compliance history, this would reduce the unnecessary compliance burden on businesses subject to swimming pool regulations.*

## Regulation of brothels

### LEADING PRACTICE 10.5

*Local governments are not well placed to be the leading agency for brothel regulation. Two jurisdictions have alternative lead agencies: in the ACT, the Office of Regulatory Services is responsible for registering and regulating legal brothels and the police are responsible for regulating unregistered brothels; recent changes have allowed Victoria Police to take the lead role in investigating brothels, allowing effective collaboration between regulatory agencies.*

## Regulation of skin penetration premises

### LEADING PRACTICE 10.6

*Some local governments use a risk-based approach to determine the frequency of inspections of skin penetration premises taking into account the inherent risks of the activities undertaken and the prior compliance history of the business. There are merits in adopting such a system if the risk approach is based on state or nationwide data and supported by a rigorous testing regime to ensure the robustness of the approach.*

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## Regulation of premises selling alcohol

### LEADING PRACTICE 10.7

*Businesses have a better basis for determining the viability of proposed licensed premises if they have clear information about likely operational requirements at the project inception stage. Some local governments have a clear and publicly accessible policy indicating the conditions they will place on development approvals for licensed premises and the criteria they have for supporting applications to the relevant state regulator for a liquor licence — as is done by Byron Shire Council.*

### LEADING PRACTICE 10.8

*State licensing regulators providing explicit advice to prospective liquor licence applicants of the approvals that they need to get from local governments — as is done by the Office of the Liquor and Gambling Commissioner of South Australia — would assist applicants.*

## Environmental regulation

### LEADING PRACTICE 11.1

*To minimise the overall costs of regulation and in order to be useful to both business and local government, any additional environmental plans required with development applications, need to be requested by local governments at the appropriate stage of the development rather than requiring all information to be provided at the initial development application stage.*

### LEADING PRACTICE 11.2

*There is scope to reduce the regulatory burdens on business through the use of risk management by local governments in managing the regulation of development in coastal areas prone to sea level rises and tidal inundation.*

### LEADING PRACTICE 11.3

*There is scope to reduce the regulatory burdens on business by clearly delineating responsibilities between local governments and the often large range of state agencies with environmental responsibilities. While the boundaries of responsibility usually appear to be clear to local governments, there is some evidence of duplication in information requirements placed on business, for example, in relation to land clearing applications.*

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## *Planning, zoning and development assessment*

### LEADING PRACTICE 12.1

*Decision-making processes can be made more reflective of the relevant risks, reduce costs to business and streamline administrative processes through:*

- *pre-lodgement meetings with advice provided in writing, clear and accessible planning scheme information and application guidelines*
- *the use of a standard approval format*
- *timely assessment of applications and completion of referrals*
- *facilities that enable electronic submission of applications*
- *the wider adoption of track-based assessment.*

### LEADING PRACTICE 12.2

*The adoption of the following measures would assist in strengthening the overall planning system, reduce confusion for potential developers and assist local governments by facilitating early resolution of land use and coordination issues:*

- *developing strategic plans and eliminating as many uncertainties as possible at this stage and make consistent decisions about transport, other infrastructure and land use*
- *developing and implementing standardised definitions and processes to drive consistency in planning and development assessment processes between local governments*
- *ensuring local planning schemes are regularly updated or amended to improve consistency with state-wide and regional planning schemes and strategies*
- *providing support to local governments that find it difficult to undertake strategic planning and/or align local plans with regional or state plans.*

### LEADING PRACTICE 12.3

*Making information, on lodgement and decisions relating to planning applications, publicly available increases transparency for business and the community. Public confidence can be improved through periodic external auditing of assessment decisions and processes.*

### LEADING PRACTICE 12.4

*The implementation of broad land-use zones in local planning schemes that apply across the state or territory has the potential to increase competition, allow businesses to respond to opportunities more flexibly and reduce costs for businesses operating in more than one jurisdiction.*

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#### LEADING PRACTICE 12.5

*Engaging an independent consultant can increase transparency and probity where a development application relates to land owned by a local government, as practised by some local governments.*

#### LEADING PRACTICE 12.6

*Businesses wishing to expand mobile telecommunications infrastructure may benefit from clear state guidelines relating to the assessment of development proposals in this area. New South Wales, Victoria and Western Australia provide specific guidelines to promote consistent decision making and assist local governments in assessing development applications for mobile telecommunications infrastructure.*

#### LEADING PRACTICE 12.7

*Tourism developments can be more easily facilitated by allowing them to be tested against the strategic intent of the local planning scheme, as is the case in Queensland.*

#### LEADING PRACTICE 12.8

*Development of guidelines can clarify the responsibilities of each level of government, particularly local government involvement, in the development and regulation of mining and extractive industries.*

#### LEADING PRACTICE 12.9

*Following the guidelines proposed by the Local Government Planning Ministers Council to reduce the regulatory burden on home-based business, local governments can adopt:*

- *a self-assessment process (with prescriptive criteria) to determine whether development approval is required*
- *outcome-based criteria to ensure that home-based businesses do not adversely affect the amenity of the community where they operate.*

*State and local government websites can make online facilities more useful for potential home-based business operators by providing detailed information, including advice on development approval exempt characteristics to enable operators to undertake a self-assessment of whether they are compliant.*



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# 1 About the study

Regulations are requirements imposed by governments that influence the decisions and conduct of businesses, other organisations and individuals. Policymakers use regulations to shape outcomes and achieve policy goals — for example, occupational health and safety laws are used to ensure that employees are safe in their workplaces, while environmental regulation is used to prevent damage to the natural environment. Regulation, therefore, has an important role to play in influencing Australia's economic prosperity and social wellbeing.

However, regulation also imposes costs on businesses. Hence, it is important to ensure that regulation achieves its intended outcomes with minimal cost.

While the need for efficient regulation is relevant to all three tiers of government in Australia, this study focusses on the business impacts of local government regulation.

## 1.1 What the Commission has been asked to do

The Commission has been requested as part of its program of performance benchmarking, to examine the extent to which different approaches to the exercise of regulatory responsibilities by local governments (LGs) materially affect costs incurred by business, both within and between jurisdictions. As far as the Commission is able to tell, this study is the first to comprehensively review the regulatory activities of LGs from a national perspective. As such, the Commission has paid particular attention to placing these activities in the context of LG activities more generally and ensuring that this report can fill some of the information gaps that the Commission has identified during the course of the study.

This is the sixth benchmarking study that the Commission has undertaken on a regulation area (box 1.1) nominated by the Council of Australian Governments (COAG).

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### Box 1.1      **The Commission's performance benchmarking program**

In February 2006, COAG agreed that all governments would aim to adopt a common framework for benchmarking, measuring and reporting the regulatory burden on business (COAG 2006). This work was split into two stages — an initial feasibility study and an ongoing work program of regulation benchmarking in specific areas.

#### **Stage 1 — The 'feasibility' study**

Following COAG's agreement on benchmarking and measuring regulatory burdens, the Commission examined the feasibility of developing quantitative and qualitative performance indicators and reporting framework options (PC 2007). This study concluded that benchmarking was technically feasible and could yield significant benefits.

#### **Stage 2 — Regulation benchmarking in specific areas**

Since April 2007, the Commission has undertaken five regulatory benchmarking studies in the following areas nominated by COAG:

- *Quantity and quality of regulation* (PC 2008b) — examined indicators of the stock and flow of regulation and regulatory activities, and quality indicators for a range of regulatory processes, across all levels of government. The study highlighted the diversity across jurisdictions in the quantity and quality of regulation, reflecting inherent differences (such as in business structures and industry intensity) as well as different approaches to regulation.
- *Costs of business registrations* (PC 2008c) — estimated the compliance costs for business in obtaining a range of registrations required by the Australian, state, territory and selected local governments. The study revealed the limited differences in registration costs and processing times for applications.
- *Food safety* (PC 2009a) — compared the systems for food regulation across Australia and New Zealand. Considerable differences in regulatory approaches, interpretation and enforcement were found between jurisdictions — particularly in those areas not covered by the model food legislation (such as standards implementation and primary production requirements).
- *Occupational health and safety* (PC 2010) — compared the occupational health and safety regulatory systems of the Australian and state and territory governments. The study found a number of differences in regulations themselves (such as record keeping and risk management, worker consultation, participation and representation, and for workplace hazards including psychosocial hazards and asbestos) and in the enforcement approach adopted by regulators.
- *Planning, zoning and development assessments* (PC 2011b) — examined 24 Australian cities to assess how the states' and territories' planning and zoning systems impact on business compliance costs, competition and the overall efficiency and effectiveness of the functioning of cities. The study revealed considerable variation in how effectively different governments are dealing with planning and zoning issues and pointed to leading practices that could yield significant gains if extended more widely.

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## **The Commission's terms of reference**

The Commission has been asked to benchmark the role of LG as regulators and their impact on business costs by:

- identifying the nature and extent of LG regulatory responsibilities that impact on business costs and the variation in these responsibilities across LGs both within, and between, the states and territories
- clarifying the extent to which LGs implement and enforce national, state and/or territory policies and to what extent they apply additional policies of their own
- assessing whether differences in regulatory responsibilities and how they are exercised by LGs have material impacts on costs incurred by business
- identifying leading regulatory practices for LG, both domestically and internationally, which have the capacity to reduce unnecessary regulatory costs for business while sustaining good regulatory outcomes.

The terms of reference also advise that the Commission may draw on previous evidence from its earlier benchmarking studies to reduce the consultation requirements placed on LG when undertaking this study. The full terms of reference for this study are set out on page iii.

### *Regulation and business costs in scope*

For the purposes of this study, regulation has a very wide definition and refers to all types of legislative instruments used by the Australian, state and territory governments, as well as rules set by a LG, such as by-laws, guidelines, codes or policies. The conditions contained in licences, permits, consents, registration requirements and leases are also under reference where they impose a compliance burden on businesses or restrict competition.

As well as the substance of the regulations themselves, the ways in which they are implemented or enforced by LG can also have material impacts on business. The regulatory responsibilities of LG can encompass many different functions. For example, LG may have approval responsibilities (where they give permission for a certain activity to go ahead), monitoring responsibilities (where they ensure activities comply with the relevant regulations or permits) or enforcement responsibilities (where they issue penalties for regulatory breaches). All of these regulatory activities are within the scope of this study.

The procedures by which regulation is made are a critical determinant of both the effectiveness and efficiency of regulation. Many of the regulations applied by LG

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are not made by LG themselves, but by the relevant state or territory government. As such, the activities of state and territory governments in developing and making regulations to be administered or enforced by LG are in the scope of this study.

The terms of reference for this study require LG regulation to be benchmarked with respect to the costs that it imposes on businesses. These costs extend beyond the ‘dollar cost’ of complying with such regulations to also include any benefits or opportunities businesses forgo as a result of complying with LG regulations. Importantly, the definition of business used in this benchmarking study extends beyond incorporated enterprises to include unincorporated and not-for-profit organisations.

While the terms of reference require the Commission to investigate a broad range of LG regulatory impacts, there are a number of areas not within the scope of this study. These include:

- the provision of goods and services by LGs, such as libraries, parks, roads, bridges and services to care for the aged and disabled
- access to public land managed by LGs
- LG procurement practices
- regulations that primarily impact on individuals rather than businesses (such as the licensing and control of pets)
- regulations which codify LG election procedures
- the processes by which LG receive funding from the Australian and the state and territory governments
- the setting and raising of local rates by LGs
- issues associated with the recognition of LG in the Australian Constitution
- the freedom of information and information accessibility requirements of LG
- the legal principles associated with conflicting state and LG regulations
- issues associated with Western Australia’s Royalties for Regions program.

Aspects of city planning, zoning and development which were examined in the Commission’s previous benchmarking study — *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (PC 2011b) have not been re-examined in detail in this report and no new evidence has come to hand to warrant such a re-examination. That said, planning, zoning and development assessment issues that were not examined in that report, namely issues pertinent to non-cities, are an important component of this study.

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### *Benchmarking period*

The reference date for the performance benchmarking of regulatory activities by LG in this study is for the 2010-11 financial year for all indicators where such information was available (and where a particular date was required for benchmarking purposes, 30 June 2011 was used). However, when 2010-11 data is not available due to financial reporting requirements and constraints, the Commission has relied on data from the 2009-10 financial year.

The Commission has been mindful of the difficulties of benchmarking activities across different time periods. Where practicable, this was not done, and where unavoidable, appropriate caveats have been attached to the benchmarking indicators.

### *Which local governments are being benchmarked?*

All of Australia's 563 LGs are within the scope of this study. This includes Aboriginal and Torres Strait Islander shires and councils, although the regulatory interaction of businesses with these councils is typically small.

The ACT does not employ a system of LG. Instead, LG functions are administered on a territory-wide basis, generally by the ACT Territory and Municipal Services (TAMS). As such, ACT LG functions will be examined on a limited basis for benchmarking purposes in this study. The inclusion of the ACT will not, however, be relevant to all benchmarking undertaken in this report.

## **1.2 Conduct of the study**

In July 2011, the Commission received the terms of reference to undertake this study. The Commission advertised this study on its website, as well as in *The Australian* and *The Australian Financial Review* and issued a circular to advise interested parties of the study.

In September 2011, the Commission released an issues paper to assist interested parties to make a submission to the study. In conducting this study, the Commission has been assisted by an Advisory Panel consisting of representatives from the Australian Government, state and territory governments and the Australian Local Government Association (ALGA). The Advisory Panel met with the Commission in late August 2011 to discuss the scope, coverage and proposed methodology for the study. A subsequent meeting with the Advisory Panel occurred in early March 2012

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to discuss a working draft of the report, with the draft report being publicly released on 2 April.

In undertaking this study, the Commission consulted with a diverse range of interested parties including industry organisations, individual businesses, LG representatives and Australian, state and territory government departments. Consultations occurred in all Australian capital cities, as well as in Townsville and the south coast of New South Wales. The Commission also met with relevant bodies in New Zealand and the United Kingdom. The Commission also surveyed a wide range of businesses, state and territory governments and LGs.

In April 2012, the Commission also hosted a roundtable to canvass views on the draft report. It was attended by industry associations, small business representatives, local government representatives, Australian Government and state government agency representatives and academics. The Commission also consulted with the Advisory Panel again in June 2012 to discuss the final report.

The Commission also invited interested parties to make formal submissions to this study with 67 being received prior to the release of the final report.

The terms of reference, study particulars, survey questionnaires and submissions are listed on the Commission's website at <http://www.pc.gov.au/projects/study/regulationbenchmarking/localgov>. A full list of organisations the Commission met with in preparing this report, along with all those that provided a submission, can be found in Appendix A. The Commission thanks those who have provided input into this study.

## **1.3 Outline of the report**

The remainder of this report is structured as follows:

- chapter 2 examines the role of LG both in Australia and overseas
- chapter 3 examines the governance and regulatory frameworks under which LG operate
- chapter 4 examines the capacity of LG as regulators
- chapter 5 examines coordination and cooperation issues among LGs
- chapter 6 examines business perceptions of LG as a regulator.

Chapters 7–11 benchmark the performance of LG as regulators across a number of areas where they have regulatory responsibilities. These are:

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- chapter 7 — building and construction
  - chapter 8 — parking and transport
  - chapter 9 — food safety
  - chapter 10 — public health and safety
  - chapter 11 — environment
  - chapter 12 — planning, zoning and development assessment.

Chapter 13 contains the comments on the report made by those state and territory governments choosing to do so.

Appendix A of this report provides detail on the conduct of this study by providing the terms of reference, submission and visit lists as well as the details of those parties who responded to the surveys. Appendix B outlines the broad sources of information for the report and how the surveys were conducted. Appendix C provides information on the methodology adopted for this study. Appendix D explores the diversity of LG in Australia. Appendix E provides a broad overview of how LGs operate in New Zealand and the United Kingdom. Appendix F catalogues state and territory regulation requiring LG enforcement. Appendix G explores recent LG reforms. Issues dealing with the regulatory burdens faced by mobile food vendors are detailed in appendix H. Appendix I examines the principles of best practice regulation making and implementation processes. Appendix J examines the different approaches to co-ordinating and consolidating LG regulatory functions and sets out the legislative and assistance arrangements by state. Appendix K examines with building regulations. Appendix L outlines regional organisations of councils. Appendix M — available from the Commission’s website — provides a copy of the surveys undertaken by the Commission as part of this study.





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## 2 Local government in Australia and overseas

### Key points

- In Australia, local government combines the individual character of 563 autonomous entities to form an important single layer, and third tier, of government.
- While local government is not recognised in the Australian constitution and the Commonwealth has very limited powers to make laws for local government, the Australian Government provides substantial funding for local government and can influence their activities through national regulatory frameworks.
- The states and Northern Territory provide for a system of local government in their constitutions and define their roles and functions in legislation.
- There is substantial diversity in the regulatory roles and functions of individual local governments both across and within jurisdictions.
  - In part, this reflects differences in the regulatory and governance frameworks between jurisdictions. It also reflects the capacity for local governments to develop policy responses that accommodate a unique set of geographic, environmental, economic and social circumstances.
- Australian, state and territory governments are increasingly recognising the potential strategic importance of using local government to achieve their policy objectives at the local level.
- A key issue for intergovernmental coordination is the tension between allowing local government to autonomously respond to their local communities and the involvement of local government in policies and initiatives of higher levels of government which may, in some cases, be directed at a different set of objectives.
- The United Kingdom and New Zealand have some leading practices which can improve intergovernmental coordination of regulatory activities:
  - best practice principles for regulation that have statutory force accompanied by reporting requirements to monitor the compliance and performance of regulators (United Kingdom and New Zealand)
  - an independent agency with responsibilities and powers to manage and coordinate regulatory reforms at a local level (United Kingdom)
  - a short list of well-defined national priority regulatory outcomes to give local government clarity about the regulatory outcomes that are important to higher levels of government and to guide local government in the allocation of their resources and enforcement activities (United Kingdom).

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The terms of reference for this study ask the Commission to benchmark significant variations in the nature and extent of local government (LG) regulatory responsibilities, including on behalf of other levels of government, where these responsibilities are likely to impose material costs on business. The terms of reference also suggest drawing on good international regulatory practices by sub-national governments. With the objective of providing some context to the variation in regulatory responsibilities exercised by LG within and across jurisdictions in Australia, this chapter:

- identifies some aspects of LG diversity across and within jurisdictions and describes the Commission’s approach to classifying LGs used to identify differences in regulatory approaches for LGs that have similar operating environments although not necessarily in the same jurisdiction (section 2.1)
- details the broad roles and functions undertaken by LG (section 2.2)
- outlines the current operational environment for LG with a focus on its relationship to the Australian and state and territory governments (section 2.3)
- provides lessons from regulatory reform initiatives for LGs in New Zealand and the United Kingdom (section 2.4).

## **2.1 Local government diversity**

In Australia, LG combines the individual character of 563 autonomous entities to form an important single layer, and third tier, of government. Across Australia, there is substantial diversity in the roles and functions of LGs both between, and within, jurisdictions. While this diversity can be attributed to differences between the legislative and governance frameworks for LG between jurisdictions (examined in more detail in chapter 3), it can also reflect other factors which relate to their geography, size and density of population, and financial capacity as well as differences in community needs and aspirations as a result of changes in their demography and/or economic conditions (for example, ageing populations, ‘sea’ and ‘tree’ changers, and growth in mining communities). Some dimensions of LG diversity are presented in table 2.1. Appendix D provides more details on LG diversity relating to geographical distribution, land area, population and population density, income sources, types of expenditure and fiscal capacity.

Table 2.1 **Dimensions of local government diversity — selected summary characteristics**

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>	<i>Aust.</i>
<b>Number of local governments<sup>a</sup></b>								
Total	155	79	73	138	73	29	16	563
Urban metropolitan <sup>b</sup>	31	22	6	21	14	0	0	94
<b>Population by local government<sup>c,d</sup></b>								
Median	20 906	42 921	4 910	2 926	9 390	12 654	7 146	9 390
Lowest	57	3 314	267	112	110	900	209	57
Highest	307 816	255 659	1 067 279	202 014	162 925	65 826	77 290	1 067 279
<b>Land area of local government<sup>e,d</sup> (km<sup>2</sup>)</b>								
Median	2.69	1.53	7.62	2.34	1.434	1 154	7 468	2 339
Lowest	0.01	0.01	0.01	<0.01	<0.01	0.08	0.01	<0.01
Highest	53 509	22 085	106 170	371 603	102 864	9 574	323 755	371 603
<b>Population density<sup>f,d</sup> (people/km<sup>2</sup>)</b>								
Median	8.40	26.16	0.72	0.58	9.74	5.45	0.61	5.45
Lowest	0.04	0.50	<0.01	<0.01	<0.01	0.29	0.02	<0.01
Highest	7 508	4 708	805	2 741	2 716	644	690	7 508
<b>Median average resident income<sup>g,d</sup> (\$)</b>								
Median	39 555	40 464	38 661	41 870	37 613	37 387	42 233	39 555
Lowest	30 911	30 035	30 333	27 586	28 796	30 302	29 645	27 586
Highest	105 954	65 568	71 093	77 692	76 204	48 472	50 437	105 954

<sup>a</sup> Based on Productivity Commission's definition of, and approach to classifying, LGs and DORA classification of LG (unpublished). <sup>b</sup> This includes all LGs classified as 'urban developed' by DORA in 2011. This may include more or less LGs than indicated by the metropolitan boundaries or footprints included in capital city strategic land use plans or other planning documents. <sup>c</sup> Based on ABS data for 2009-10. <sup>d</sup> Excludes data for Gerard (SA), Nipapanha (SA), and Yalata (SA). <sup>e</sup> Based on ABS land area data (unpublished). <sup>f</sup> Based on ABS land area data (unpublished). <sup>g</sup> Based on ABS data for average wage and salary income (excludes unincorporated business income; investment income; superannuation and annuity income; and government pensions and allowances).

Sources: ABS (Regional Population Growth, Australia, 2010-11, Cat. no. 3218.0); ABS (Estimates of Personal Income for Small Areas, Time Series, 2003-04 to 2008-09, Cat. no. 6524.0.55.002); ABS land area data (2010, unpublished); DORA classifications of LG (2011, unpublished); DRALGAS (2012); PC calculations.

## Defining local governments

The diversity of LG is captured in its naming conventions. Although generally referred to as councils, LGs are also known as boroughs, cities, districts, municipalities, regions, shires, towns, community governments, Aboriginal shires and boards. In general, but not uniformly across all jurisdictions, a LG where a majority of the population resides or works in a dominant urban centre is called a city — as in the City of Melville in Western Australia or the Warrnambool City

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Council in Victoria — while a LG where a majority of the population is spread across predominantly rural land is called a shire — as in the Shire of Forbes in New South Wales or the Shire of Cloncurry in Queensland.

LGs can be established in a variety of ways. For the incorporated LG areas in each jurisdiction,<sup>1</sup> local authorities have been established under state or Northern Territory Local Government Acts and/or associated regulations. However, in some unincorporated areas, local governing bodies have also been ‘declared’ typically by state governments but also, in some rare instances, by the Australian Government. While the governance structures and regulatory frameworks for declared LGs are uniquely specified in separate legislation, they generally have a statutory obligation to operate in accordance with the Local Government Act that applies in their jurisdiction.

In this study, the Commission’s analysis is largely focused on LGs with dual accountability to their local communities and higher levels of government. The Commission’s analysis includes local governing bodies in some unincorporated areas such as Tibooburra in New South Wales and Nipapanha in South Australia. However, the Commission’s analysis excludes:

- Commonwealth territories other than the Northern Territory
- authorities which have been set up to provide local services in unincorporated areas but are administered centrally by state agencies, such as the Outback Communities Authority in South Australia
- authorities which have been set up by private corporations to provide local services, such as Weipa in Queensland.

The ACT Government takes full responsibility for state and local government functions. For the most part, the Commission has not included the ACT as a LG in this study although some survey results for the ACT are reported.

The Commission’s approach to defining LG differs slightly from the approach taken by the Australian Bureau of Statistics (ABS) and the Department of Regional Australia, Local Government, Arts and Sports (DRALGAS):

- the ABS generally only identifies LGs operating within incorporated LG areas<sup>2</sup>

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<sup>1</sup> In this context, incorporation refers to ‘municipal incorporation’ which occurs when municipalities become self-governing entities under legislation.

<sup>2</sup> Although the ABS identifies Weipa in Queensland as a LG.

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- DRALGAS identifies all local governing bodies which receive funding from the Australian Government for the purposes of LG including those directly administered by state agencies or the Australian Government.<sup>3</sup>

As a result, in instances where the Commission has relied on data provided by the ABS or DRALGAS, some LGs may be excluded, or included, in the analysis. These instances will be clearly identified.

The Commission has identified 563 LGs in Australia. Across the jurisdictions, New South Wales has the largest number of LGs and the Northern Territory has the least. While the number of LGs in any given jurisdiction will reflect its land area, and population distribution and density, it will also depend on the extent to which state and territory governments have undertaken structural reforms resulting in LG amalgamations.

## **Classifying local governments**

At opposite ends of a spectrum, some LGs are located in densely populated urban areas with well-established infrastructure and good access to human and physical capital while others are located in sparsely populated remote areas with limited access to even basic infrastructure and resources. In order to identify different regulatory approaches for LGs that are operating in similar environments although not in the same jurisdiction, the Commission has classified LGs according to differences in their geography, population and population density.

As described in box 2.1, the Commission's approach to classifying LGs is almost identical to the Australian Classification of Local Governments (ACLG) which has been used by other Australian government agencies, the Australian Local Government Association and in academic literature.

Based on this approach, the Commission defines six LG classifications: capital city (CC); urban metropolitan (UM); urban regional (UR); urban fringe (UF); rural (RU); and remote (RT). These LG classifications are adopted in subsequent chapters and appendices in this report.

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<sup>3</sup> DRALGAS includes the Outback Communities Authority in South Australia and Local Government Association of the Northern Territory (LGANT) as local governing bodies which receive Financial Assistant Grants for the provision of services in the unincorporated areas of those jurisdictions. The funding provided by the Australian Government to the LGANT is only for the provision of roads (Northern Territory Government, pers. comm., 15 March 2012).

## Box 2.1 The Commission's classification of local government

In this study, the Commission has employed an approach similar to the Australian Classification of Local Government (ACLG) which has been used widely by governments and academics to categorise LG. This approach categorises each LG based on its total population, population density, geographic location and nature of economic activity. The only differences between the Commission's approach and the ACLG's approach relate to the definition of LG and naming conventions for the categories.

<i>Step 1</i>	<i>Step 2</i>	<i>ACLG category</i>	<i>PC category</i>
<b>Urban</b>			
Population more than 20 000 OR If population less than 20 000 EITHER Population density more than 30 persons per km <sup>2</sup> OR 90 per cent or more of local government area (LGA) population is urban	Capital city	Urban Capital City	Capital City (CC)
	Part of an urban centre of more than 1 000 000 or population density more than 600/km <sup>2</sup>	Urban Developed	Urban Metropolitan (UM)
	Part of an urban centre with population less than 1 000 000 and predominantly urban in nature	Urban Regional	Urban Regional (UR)
	A developing LGA on the margin of a developed or regional urban centre	Urban Fringe	Urban Fringe (UF)
<b>Rural (R)</b>			
An LGA with population less than 20 000 AND Population density less than 30 persons per km <sup>2</sup> AND Less than 90 per cent of LGA population is urban	Agricultural	Rural agricultural	Rural (RU)
	Remote	Remote	Remote (RT)

Source: DRALGAS (2012).

In determining the classification of individual LGs, the Commission has relied on data provided in 2011 by Department of Regional Australia, Regional Development and Local Government (DORA), now known as the Department of Regional Australia, Local Government, Arts and Sports (DRALGAS). The Commission is aware that some jurisdictions may prefer to use a different approach to identifying and classifying individual LGs (Western Australian Department of Planning, pers. comm., 22 June 2012; New South Wales Division of Local Government, pers. comm., 22 June 2012; Brisbane City Council, sub. DR64). In particular, some jurisdictions may have an alternative definition for the metropolitan boundary of their capital cities (for example, as provided in their own capital city strategic land

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use plans). However, the Commission is satisfied that the data provided by DORA is robust and that any difference in approach between DORA's classifications and the jurisdictions will not have a material effect on conclusions drawn in this study.

## **2.2 Roles and functions of local government**

In the last thirty years, the responsibilities of most LGs in all jurisdictions except the Northern Territory have moved from being simply a provider of property related services — caricatured in the expression 'roads, rates and rubbish' — to increased involvement in the provision of community social services, such as health awareness and management, recreational facilities and sporting venues, and active promotion of local economic development including tourism. In regulatory areas, LGs have been playing an increasing role in the areas of development and planning, public health and environmental management; and have increasingly been undertaking compliance, monitoring and enforcement activities on behalf of state and territory governments. In addition, LG regulatory responsibilities have been, and continue to be, shaped by broader micro economic reform agendas and other policy initiatives of higher levels of government such as the *National Competition Policy* agenda and the *National Partnership Agreement to Deliver a Seamless National Economy*.

### **Beyond roads, rates and rubbish**

As examined in more detail in chapter 3, across the jurisdictions, the primary legislative framework for LG is defined in state and Northern Territory Local Government Acts. Table 2.2 outlines, in broad terms, the roles and responsibilities of LG as specified in these Acts.

The Local Government Acts are now principles based, conferring a general power of competence for LGs to act in the interest of their local communities in any area as long as it is not exclusively controlled by the Australian Government or the states or prohibited by other legislation. The intention of the current legislation is to provide LGs with greater autonomy and flexibility to implement discretionary policy in response to the increasingly diverse needs of their local communities, while being subject to greater public accountability and stricter regulation for corporate planning and reporting. Despite these broad powers, the activities of LGs are generally subject to strict oversight by the state and territory governments.

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**Table 2.2 Roles and functions of local government**

<i>Role</i>	<i>Description</i>
Governance	To provide open, responsive and accountable government and ensuring that available resources are used fairly, efficiently and effectively.
Service and infrastructure provider	To provide and plan for adequate, appropriate and equitable services and infrastructure in their local communities (either directly or on behalf of other levels of government) striking a balance between social, environmental and economic objectives.
Advocacy	To promote proposals which are in the best interests of local communities, including to state and Australian governments.
Coordinator	To share resources and work consultatively and cooperatively with other LG authorities and the tiers of government.
Regulator	To exercise regulatory functions either directly or on behalf of other levels of government; and making and enforcing local laws in the best interests of their local communities.
Financial manager	To raise funds for local purposes by the fair imposition of rates, charges and fees, fines, and by responsibly managing the assets for which they are responsible including income from investments.

*Sources: Local Government Act 1993 (NSW); Local Government Act 1989 (Vic); Local Government Act 2009 (Qld); Local Government Act 1999 (SA); Local Government Act 1995 (WA); Local Government Act 1993 (Tas); Local Government Act 2008 (NT); VCEC (2010); IPART (2009).*

It is difficult to be definitive about the typical nature of roles and responsibilities for an individual LG. While some LG functions are statutory (for example, formulation of planning policy for the area and some environmental health services), most LGs have a choice about the manner in which these are interpreted and administered. Further, many LG functions are non-statutory and only provided at the discretion of the LG. A broad set of the types of activities that can be potentially provided by LG in the states is provided in table 2.3.

The priority that individual LGs place on different roles and functions varies substantially. LG priorities relate to a range of factors including differences in legislative powers conferred by each state and territory government; availability of resources; relative costs of undertaking various activities; and community needs and preferences for the allocation of resources. For example, many rural and remote LGs with smaller populations and rates revenue bases have contained their roles and functions to a narrower range of traditional services.



**Table 2.3 Local government activities by functional area<sup>a</sup>**

<i>Functional area</i>	<i>Roles</i>
Engineering and infrastructure	Public works design; construction and maintenance of roads; bridges, footpaths; drainage; cleaning; waste collection and management.
Property-related	Domestic waste management including solid waste and recycling services, water and sewerage. <sup>b</sup>
Planning and development	Land use and town planning (including heritage); development approvals; building inspection; licensing, certification and enforcement; administration of aerodromes <sup>c</sup> , quarries, cemeteries, parking stations, and street parking.
Environment and health	Catchment management, parks and gardens, tree removal, pest and weed control, water sampling, food sampling, immunisation, toilets, noise control, meat inspection and animal control.
Community and social	Aged care and child care services, health clinics, youth centres, community housing refuges and facilities, counselling and welfare services.
Recreation, culture and education	Swimming pools, recreation centres, community halls, sports facilities, lifeguards, camping grounds, community festivals, libraries, art galleries, theatres and museums.
Other	Bus services, abattoirs, sale-yards, markets and group purchasing schemes.

<sup>a</sup> A majority of these activities are not provided by Northern Territory. In the Northern Territory, LG responsibilities are limited to traditional property-related services.<sup>b</sup> Water and sewerage are provided by some LGs in New South Wales, Queensland and Tasmania only. These services are not provided by Northern Territory LGs except in the town of Jabiru in West Arnhem Shire Council. Some LGs in South Australia are involved in the operation of effluent drainage schemes. <sup>c</sup> In Victoria, administration of aerodromes (etc) falls under the functional area 'engineering and infrastructure'.

Source: PC (2008a).

The Australian Local Government Association (ALGA) states:

The fact that it is elected by the community and responsible for a broad range of services in a clearly defined geographic area means that local government is well placed to understand and meet local needs and respond to those needs in ways that are most appropriate to local conditions. Within its jurisdiction of general competence, local government is multifunctional and, unlike other spheres of government, is able to combine and integrate services to best satisfy community expectations. (2010a, p. 5)

## Local government regulatory roles

The Local Government Acts in all jurisdictions require that LGs undertake regulatory functions devolved to them under any state and territory legislation.

Defined broadly, these regulatory roles can be categorised as:

- *approval functions* — under which LGs give their permission prior to the commencement of an activity (for example, the development and operation of a caravan park may require planning approval)

- 
- *order functions* — under which LGs order the commencement or cessation of an activity (for example, LGs may require local business to provide sufficient parking spaces for their customers<sup>4</sup>)
  - *enforcement functions* — under which LGs issue penalties for regulatory breaches (for example, parking fines for car parking infringements)
  - *monitoring and reporting functions* — under which LGs undertake periodic evaluation of effectiveness and outcomes of regulations against intended objectives (for example, the monitoring of cooling towers for Legionnaires' disease and associated reporting requirements)
  - *referral functions* — under which LGs refer matters to other agencies, including state and territory government departments, for the purposes of decision making.

In addition, the Local Government Acts in all jurisdictions provide LGs with discretion, albeit to varying degrees, to make and enforce local regulations provided they are consistent with national, state and territory policies and good governance or not precluded by other legislation. The areas in which LG makes regulations can be classified into three types:

- to strengthen or complement the laws of other levels of government
- to address issues which are common to most communities and which are not covered by the laws of other levels of government
- to address issues specific to a local community.

There can be complex interactions between LG regulatory activities and the other activities of LG undertaken in response to the needs and aspiration of local communities particularly as these relate to service provision. As stated by ALGA in their submission to this study:

It should also be acknowledged that many councils are also active participants in strengthening economic development in their local or regional communities and as such are equally impacted, directly and indirectly by regulations impacting businesses. (sub. DR52, p. 5)

In subsequent chapters of this study, the Commission confines its analysis to business burdens associated with LG regulatory roles and, where relevant, indicates areas in which these roles could have an impact on LGs' own activities.

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<sup>4</sup> In Victoria, this requirement is more likely to be imposed through an 'approval' or 'enforcement' (Victorian Government, pers. comm., 14 March 2012).

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## 2.3 Current operational environment

Of the three tiers of government, LG has the closest relationship with local communities and therefore has a unique opportunity to gain an understanding of, and to meet, their specific needs. Australian and state governments are increasingly recognising the potential strategic importance of using LG to achieve their policy objectives at the local level. As identified by PriceWaterhouseCoopers (2006), box 2.2 outlines the benefits offered by LGs in delivering regional policy objectives for the other tiers of government.

### Box 2.2 Benefits of local government delivery of policy objectives on behalf of higher levels of government

In a report commissioned by the Australian Local Government Association, *National Sustainability Study of Local Government*, PriceWaterhouseCoopers (2006) identifies benefits to the other tiers of government from LG delivery of policy objectives. These include that:

- LG offers a wide and well-established national network of public administration including a significant presence in rural and remote areas where it may be the only institutional presence
- LG has strong links to the community and is accountable to the communities it represents. Its legislative basis generally makes LG both durable and financially stable
- in some cases, the integrated structure of LG can allow a high level of coordination between different activities
- the links between LG and local business and industry put LGs in a good position to foster a 'bottom up' approach to regional development and makes LGs a sensible point of access to inform business about other governments' services and programs and a possible location for delivery of such services
- LG is well positioned to provide information to higher levels of government to support regional policy development and initiatives.

Source: PriceWaterhouseCoopers (2006).

Regulation is an important LG activity. In particular, LG undertakes regulatory functions that would be difficult for higher levels of government to perform due to geographical dispersion and the varying nature of population and resources. As such, LG plays an important role in delivering the policies of all tiers of governments at the grass roots and, in particular, can impact on the effectiveness of programs initiated by other levels of government.

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## Relationship to the Australian Government

While not currently recognised under the Australian Constitution, it is clear that the Australian Government considers LG to be an important third tier of government. Through ALGA's membership of the Council of Australian Governments (COAG), some of COAG's ministerial councils, and the Australian Council of Local Governments (ACLG), LG is closely consulted on national policies and programs, including regulatory reforms, which affect local communities.

The Australian Government is increasingly requiring the assistance of LG in the delivery of its policies to foster wellbeing at the local level. In recent times, LG has played a significant role in the delivery of Australian Government initiatives relating to roads; emergency and disaster management; health; and communications. In addition, LG has been allocated regulatory roles and functions under national frameworks typically given effect through state and territory laws (discussed in more detail in chapter 3).

Successive Australian Governments seem to have interpreted the Constitution in such a way that has enabled them to provide funding to LG and hence influence their activities and outcomes. Currently, the Australian Government transfers funds to LG through:

- *financial assistance grants* (FAGs) administered under the *Local Government (Financial Assistance) Act 1995* and passed through the states and the Northern Territory to LG with no conditions attached to expenditure by LG. These include General Purpose Payments and local road grants
- *specific purpose payments* (SPPs) that are generally distributed through the states and the Northern Territory to LG but are sometimes paid directly to LGs with special conditions tied to expenditure. The main policy areas in which the Australian Government has provided SPPs are local roads, child care, aged care, disability, and infrastructure.

The amount of Australian Government grants to LG (including FAGs and SPPs) across the jurisdiction in 2009-10 is provided in table 2.4. The level of Australian Government grants to LG per capita was highest in Tasmania at \$191 per person and lowest in Victoria at \$116 per person.

**Table 2.4 Australian Government grants to local governments**  
2009-10

	NSW	VIC	QLD	WA	SA	TAS	NT
Financial Assistance							
Grants to LG <sup>a</sup> (\$ millions)	614	460	386	230	148 <sup>b</sup>	63	28
Specific purpose payments to LG <sup>c</sup> (\$ millions)	234	184	242	119	65	39	10
Total Australian Government grants to LG (\$ millions)	848	644	628	349	213	97	30
Australian Government grants to LG (\$ per person)	117	116	139	152	130	191	136

<sup>a</sup> Includes General Purpose Payments and identified local roads grants. <sup>b</sup> Includes a special purpose payment for Supplementary funding to South Australian LGs for local roads. <sup>c</sup> Based on actuals for 'Australian Government Payments directly to local government' in 2010-11 *Budget Paper No. 3, Appendix B*.

Sources: ABS (*Regional Population Growth, Australia, 2009-10*, Cat. no. 3218.0); Australian Government (2010b); DRALGAS (pers. comm., 29 May 2012); PC calculations.

While FAGs remain the primary mechanism for the transfer of funds from the Australian Government to LG, over the past decade, the Australian Government has shown a preference for direct funding when establishing new programs designed to achieve national objectives. For example:

- in 2001, the directly funded Roads to Recovery Program was established to improve the quality of access for the local roads network
- in 2008, the directly funded Regional and Local Community Infrastructure Program was established in response to the Global Financial Crisis.

For the Australian Government, the benefits of direct funding to LG are that it allows targeting of specific investment to achieve national objectives; a direct partnership with LG; and direct engagement with local communities rather than operating through the filter of state governments. However, for LG, direct funding can involve risk and uncertainty particularly when it requires the development of service delivery programs that are dependent on recurrent funding. Not only are SPPs entirely subject to the discretion of the Australian Government and under almost constant review, but the recent High Court decision in *Pape v Commissioner of Taxation 2009*<sup>5</sup> has very clearly cast doubt on the constitutional validity of some funding schemes under which funds are transferred directly to LG by the Australian Government.

<sup>5</sup> 238 CLR 1

DRALGAS currently has responsibility for delivering Australian Government commitments in relation to LG. While the Australian Government has no direct oversight role of LG, the Minister for LG is responsible for reporting to the Commonwealth Parliament on the level of Australian Government funding provided to them; and on their performance.

## Relationship with state and territory governments

Each state has responsibility to establish, recognise and guarantee a system of LG and all jurisdictions (except the ACT) provide for its legislative framework.

The constitution of each state provides for a system of LG. An overview of constitutional references and provisions relating to LG for each state is provided in table 2.5. The New South Wales Constitution is the only state constitution that does not ensure an elected system of governing bodies. In New South Wales, LGs can be either elected or appointed.

**Table 2.5 Local government references in State Constitution Acts**

<i>State</i>	<i>Act</i>	<i>Reference</i>	<i>Provisions</i>
NSW	<i>Constitution Act 1902</i>	Part 8 s. 51 Local Government	Ensures the existence of a system of local governing bodies either elected or appointed. Parliament determines functions and powers.
Vic	<i>Constitution Act 1975</i>	Part IIA Local Government	LG is recognised as a distinct and essential tier of government consisting of democratically elected councils. Parliament determines functions and powers.
Qld	<i>Constitution of Queensland 2001</i>	Chapter 7 Local Government	Provides for a system of LG consisting of a number of elected LG bodies. Parliament determines functions and powers.
SA	<i>Constitution Act 1934</i>	Part 2A Local Government	Ensures the existence of a system of elected local governing bodies. Parliament determines functions and powers.
WA	<i>Constitution Act 1889</i>	Part IIIB Local Government	Provides that the legislature shall maintain a system of elected local governing bodies. Legislature determines function and powers of such bodies.
Tas	<i>Constitution Act 1934</i>	Part IVA Local Government	Provides for a system of elected local governing bodies. Parliament determines function and powers of such bodies.

*Sources: Constitution Act 1902 (NSW); Constitution Act 1975 (VIC); Constitution of Queensland 2001 (QLD); Constitution Act 1934 (SA); Constitution Act 1889 (WA); Constitution Act 1934 (TAS); DTRS (2006); McBride and Moege (2005).*

As the Constitution Acts are statutes of the state parliaments, the level of entrenchment of the current system of LG in each jurisdiction state depends on the respective legislative processes for amending the relevant provisions. A comparison of legislative requirements for changing the system of LG in each state is provided in table 2.6.

**Table 2.6 Legislative processes to change the current LG systems**  
By jurisdiction

<i>State</i>	<i>Requirements for amending the Constitution with respect to LG</i>	<i>Requirements for changing the process of amending the Constitution with respect to LG</i>
NSW	Majority of members voting in the Legislative Assembly and in the Legislative Council.	Majority of members voting in the Legislative Assembly and in the Legislative Council.
Vic	Majority of members voting in the Legislative Assembly and in the Legislative Council	Majority of electors at State wide referendum
Qld	Majority of electors at State wide referendum	Majority of members voting in the Legislative Assembly
SA	Majority of all members of the House of Assembly and of the Legislative Council	Majority of members voting in the Legislative Assembly and in the Legislative Council
WA	Majority of all members of the Legislative Assembly and of the Legislative Council	Majority of members voting in the House of Assembly and in the Legislative Council
Tas	Majority of members voting in the House of Assembly and in the Legislative Council	Majority of members voting in the House of Assembly and in the Legislative Council.

*Sources: Constitution Act 1902 (NSW); Constitution Act 1975 (Vic); Constitution of Queensland 2001 (Qld); Constitution Act 1934 (SA); Constitution Act 1889 (WA); Constitution Act 1934 (Tas); DTRS (2006).*

Across the jurisdictions, a system of LG is:

- effectively entrenched in Queensland and Victoria since such an amendment requires the majority approval of electors at a state-wide referendum
- fairly well entrenched in South Australia since any such amendment requires an absolute majority approval of all of the members in each House of the Parliament
- not so strongly entrenched in New South Wales, Western Australia and Tasmania since, as with amending any other statute, it only requires a simple majority of the members voting in each House of Parliament.

Notwithstanding this entrenchment, the states are able to control most aspects of LG activity. For example, the states can dismiss elected councillors for mal-administration and abolish individual LGs by merging with others or dividing them. While the territories do not have separate Constitution Acts, the Commonwealth Parliament has provided plenary powers for the territory

governments to establish a separate system of LG in the *Northern Territory (Self Government) Act 1978 (Cwlth)* and the *ACT (Self Government) Act 1988 (Cwlth)*. While the Northern Territory has used these powers, the ACT Government has retained responsibility for state and local government functions.<sup>6</sup>

The state and Northern Territory governments also provide some grant funding to LG. Across the jurisdictions, these grants are directed at a wide variety of purposes reflecting differences in state and LG policy objectives. The DRALGAS estimates of state and Northern Territory funding to LG are provided in table 2.7.

**Table 2.7 Local government grants to state governments<sup>a</sup>**  
2009-10

	NSW	VIC	QLD	WA	SA	TAS	NT	Total
Total state and territory grants to local government (\$ millions)	1 390	1 372	1 199	536	253	107	122	4 979
FAGs (\$ millions)	614	460	386	230	148	63	28	1 929
Net state grants <sup>b</sup> (\$ millions)	776	912	813	306	105	44	94	3 050
State funding as a percentage of all government grants (%)	56	67	68	57	42	41	77	61

<sup>a</sup> Any conclusions based on the data in this table must be treated with caution as the total state and territory grants to local government reported to the ABS by the States and Territory Grants Commission may not include all, or any, Special Purpose Payments to LG. <sup>b</sup> Net State government funding to LG is inferred from ABS estimates of total state and territory grants to local government and the DRALGAS data on Australian Government Financial Assistance Grants. For all jurisdictions listed, data on intergovernmental grants to LG is based on the ABS government finance statistics and FAGs actuals for 2009-10.

Source: DRALGAS (pers. comm., 29 May 2012).

These estimates must be treated with caution as they are inferred from total state and territory grants to local government reported by the State and Territory Grants Commissions to the ABS, which may not include all, or any, SPPs from the Australian Government to LG. The DRALGAS estimates assume that only FAGs are included in the ABS data. Subject to this caveat, state and Northern Territory funding to LG as a proportion of total inter-government grants in 2009-10 comprised an average of 61 per cent. This proportion ranged across the jurisdictions from 77 per cent in the Northern Territory to 41 per cent in Tasmania.

<sup>6</sup> In the ACT, local government functions are undertaken by the ACT Territory and Municipal Directorate.



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The Commission notes that it is inherently difficult to estimate state and territory grants to LG government. There is inconsistent reporting of this information in the State and Territory budget papers and by the State Grants Commissions to the ABS. ALGA has drawn attention to similar issues in their submissions to a number of parliamentary inquiries (ALGA 2008; ALGA, 2010a).

## **Intergovernmental coordination**

Due to LGs' dual accountability to its local constituents and to higher levels of government, a key issue for intergovernmental coordination is the management of tensions between allowing LGs to autonomously respond to the needs and aspirations of each local community; and the involvement of LGs in policies and initiatives of higher levels of government that may, in some cases, be directed at a different set of objectives. Another related issue is the resourcing and capacities of LG to undertake the responsibilities devolved to them. This latter issue is explored in more detail in chapter 4.

### *Between LG and the Australian Government*

The Australian Local Government Association (ALGA) is recognised as the peak national representative body for LG across all jurisdictions — including the ACT Government.<sup>7</sup> Its policies and priorities are determined by the ALGA Board, comprising two members from each of the state and territory Local Government Associations.

The ALGA President is a full member of COAG and is the Deputy Chair of the Australian Council of Local Government. In addition to its representative role, ALGA participates in Australian Government policy reviews; provides submissions to, and appears before, Commonwealth Parliamentary inquiries; and seeks out opportunities for LG to inform the development of national initiatives which have an impact on them.

COAG is the peak intergovernmental forum in Australia. It has an important role in promoting cooperation across all levels of government particularly in relation to the Australian Government's micro-economic reform agenda. Most recently, COAG's reform efforts have been directed through the *National Partnership Agreement to Deliver a Seamless National Economy* and focused on progressing national regulatory frameworks (where practicable) and reducing unnecessary or poorly designed regulation across and within the jurisdictions.

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<sup>7</sup> In recognition of the LG functions undertaken by the ACT Government.

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### *Between LG and state/territory governments*

As listed in table 2.8, Local Government Associations (LGAs) exist in each jurisdiction. In most jurisdictions, the LGAs are incorporated bodies with voluntary membership of all incorporated LGs. The LGAs undertake a diverse range of roles and responsibilities including:

- advocacy — to represent the needs and interests of LG and to strengthen relationships between, other levels of government and stakeholders
- capacity building — to enhance the financial capacity of LGs and to assist the professional development of elected and non-elected members through the provision of training and education programs
- networking — to coordinate and support opportunities for LGs to share knowledge on best practice and plan responses to the policy initiatives of other tiers of government which affect LG
- policy development and support — to set standards and develop policies for LG including sector wide regulations and codes; and to support them to improve their operation within communities particularly when there is significant change or new requirements
- awareness raising — to promote participation in, and enhance community understanding of, LG.

**Table 2.8 State Local Government Associations**

<i>Jurisdictions</i>	<i>Local Government Association</i>
NSW	Local Government and Shires Associations of New South Wales (LGSA)
Vic	Municipal Association of Victoria (MAV)
Qld	Local Government Association of Queensland (LGAQ)
SA	Local Government Association of South Australia (SALGA)
WA	Western Australian Local Government Association (WALGA)
Tas	Local Government Association of Tasmania (LGAT)
NT	Local Government Association of Northern Territory (LGANT)

Across the jurisdictions, the Commission has identified a number of forums designed to foster cooperation and improve the coordination of regulatory activities between state/territory and local governments. Good examples include:

- the Local Government Planning Forums in New South Wales which provide LGs with up-to-date information on planning activities and enable LG representatives to have early input in planning policy

- 
- the Memorandum of Understanding between the Minister for Health and the Local Government Association of South Australia which reflects the shared responsibility for food safety and clarifies state and local government responsibilities.

However, many of these arrangements tend to focus on coordination and cooperation issues within a single regulatory area rather than to reconcile or prioritise state and territory regulatory objectives against local priorities, or to achieve greater consistency across LGs in the delivery of regulatory functions delegated to them.

In particular, the Commission has not been able to identify an intergovernmental institutional arrangement at the state or territory level with a specific focus on regulatory reform at a local level with a view to achieving greater consistency across the range of regulatory functions that LG administers and/or enforces on behalf of state and territory governments. Further, the Commission has not been able to identify a forum that provides guidance about state or territory government priorities across the broad range of areas that LGs regulate on their behalf.

Despite recent changes to LG Acts that provide greater autonomy for LG to respond to local priorities, state governments have retained authority over local government activities. In a roundtable of participants to this study, a view was expressed that the nature and extent of LG related regulatory burdens were not only dependent on differences in the statutory obligations imposed by higher levels of government, but also on philosophical differences between state governments in their readiness to seek regulatory solutions. In part, these differences reflect divergent political opinions on the extent to which regulation addresses, or exacerbates, market failures once compliance costs for business are taken into account.

The impact of variations to the state government's 'regulatory approach' on LG regulatory roles were summarised by Greg Hoffman PSM, General Manager - Advocacy, Local Government Association of Queensland, a participant at the round table, as follows :

... the new government has come in and proposes that the state reduce all regulation by 20 per cent. Now that is a shift in fundamental principles. The state and local governments' approach to regulation is interconnected. In this way, regulatory roles of local government are dynamic and very much about political perspectives and matters of the moment ... there are costs associated with undoing a culture within government. (PC Roundtable, 24 April 2012)

The preferences of state governments, either towards or away from regulatory solutions, can become entrenched in the regulatory culture of all levels of government, including LG. Hence, given a change in state government, there can be

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differences in the costs and reaction times for LGs as they adjust not only to changing priorities, but also to a new regulatory approach. Over the adjustment period, there can be inconsistencies in state and LG regulatory priorities. This can accentuate inconsistencies and lack of harmonisation in regulatory priorities across LGs due to variations in implementation lags associated with differences in the physical and financial capacities of any individual LG to manage change.

*Given the broad range of regulatory functions devolved to LG under national frameworks or in state and territory legislation — and which can shift with a change of government — and LG’s democratic mandate to act in the interests of their local communities, the Commission considers that there would be considerable merit in state and territory governments providing guidance about regulatory outcomes that are of particular importance to higher levels of government. This would assist LG in the allocation of their resources and enforcement activities.*

## **2.4 Lessons from the United Kingdom and New Zealand**

The terms of reference encourage the Commission to draw on good overseas regulatory practices by sub-national governments. To address this requirement, the Commission’s research has been assisted by visits to stakeholders in the United Kingdom and New Zealand.

The focus of this section is on LG reforms in the United Kingdom and New Zealand which apply more generally to the LG sector and are designed to:

- improve the efficiency and effectiveness of LGs in undertaking their regulatory responsibilities
- foster harmonisation of regulatory activities between, and within, levels of government with a view to reducing the burden of regulation on business from unnecessary, inconsistent or duplicated regulation.

Background information about LG systems in the United Kingdom and New Zealand, with a focus on their regulatory framework, is provided in Appendix E. Leading practices from the United Kingdom and New Zealand which relate to other issues are highlighted, as relevant, in subsequent chapters of this report.

### **Overview of governance and regulatory frameworks**

LG has no formal constitutional standing in either the United Kingdom or New Zealand. Rather, in both countries, a system of LG is established and defined by

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central government legislation,<sup>8</sup> which can be amended or revoked at any time. Similar to Australia, the Local Government Acts in both countries are principles based and confer general competence powers to LG. In the United Kingdom, these powers are broad and, most recently, they have been extended by the *Localism Act 2011*. In New Zealand, these powers are narrower and, in contrast, recent proposed legislative amendments seek to impose further limits.<sup>9</sup>

In both the United Kingdom and New Zealand, LGs have a responsibility to undertake any regulatory role devolved to them in Local Government Acts or any other central government legislation.

In the United Kingdom, regulatory responsibilities are split between national regulators and Local Authorities Regulatory Services (LARS); and national regulators have the discretion to devolve functions to LARS. In both countries, LGs have the power to make local laws to address local needs and circumstances. In the United Kingdom, LG has the power, in principle, to make local laws to address local priorities where national legislation has not addressed the issue of concern. These local laws must be approved by central government departments to ensure that they are not in conflict with existing government policy. In practice, UK LGs make very few local laws (LBRO, pers. comm., 15 September 2011). In New Zealand, LGs are only able to make local laws in areas which are explicitly identified in the *Local Government Act 2002* and these must be consistent with national policies. Local laws must be reviewed within five years and thereafter at ten year intervals, or otherwise they lapse two years after their due date for review.

## Structural reforms

Unlike Australia, which has a single tier of LG, much of England and almost all of New Zealand operates with a two tier structure of LG. One type of LG (called ‘county councils’ in England and ‘regional councils’ in New Zealand) has responsibility for regulatory functions which are more efficiently provided if spread over a larger regional area. The other type (called ‘district’ or ‘borough’ councils in England and ‘territorial authorities’ in New Zealand) has responsibility for regulatory functions that are more effective if tailored to local communities with

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<sup>8</sup> In the case of Scotland, Wales and Northern Ireland, LG is established in the legislation of the devolved sub-national governments which are themselves statutory creatures of the central government.

<sup>9</sup> For example, in 2012, the New Zealand Government has proposed to replace the purpose of LG to promote the ‘social, economic, environmental and cultural well-being of communities’ with a new purpose to ‘provide good quality local infrastructure, public services and regulatory functions at the least possible cost to households and business’ (NZ DIA 2012).

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similar needs and aspirations. In both countries, ‘unitary authorities’ take on all LG functions.

In the United Kingdom, the general trend has been a movement away from a two tier system of LG towards establishing unitary authorities through a process of LG amalgamations. Currently, all of Scotland, Wales and Northern Ireland operate with a single tier of LG; while, in England, the latest round of structural reform resulted in an amalgamation of 44 LGs to form nine unitary authorities.

In contrast, the two tier structure of LG in New Zealand is the outcome of a radical reorganisation of LGs by the central government in 1989 which reduced approximately 830 LGs to 78 (comprising 11 regional council and 67 territorial authorities). As measured against the system that it replaced, commentators have judged New Zealand’s current LG system favourably on efficiency grounds. However, Dollery, Keough and Crase (2007) have argued that the reorganisation finished with ‘too much and not enough’ leaving small communities feeling powerless and cities still governed by multiple councils that remained too fragmented.

The difficulties of operating a two tier system in city areas has become more apparent to the New Zealand central government. In 2007, a Royal Commission into the governance arrangements for Auckland concluded that a two tier system of LG had resulted in weak and fragmented regional governance, and poor community engagement. In 2010, the New Zealand Government amalgamated Auckland’s territorial and regional authorities into a single unitary authority with a unique governance structure. In 2011, the (then) New Zealand central government announced a comprehensive review of LG to consider the overall structure, functions and funding of LG and, in particular, the usefulness of unitary authorities for metropolitan areas.<sup>10</sup> A two tier system of LG has the potential to provide efficiency gains and increased capacity for LG by allowing an allocation of regulatory responsibilities across the two tiers so that LGs which serve:

- a number of local areas (for example, the New Zealand regional councils) have responsibility for those regulatory functions where the cost of provision decreases if spread over a larger population base or when regulatory harmonisation is a paramount consideration

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<sup>10</sup> In 2012, the New Zealand Government announced that the *Local Government Act 2002* would be amended to streamline consideration of reorganisation proposals and to extend the criteria to specifically include the benefits to be gained from simplifying processes and efficiency improvements; and to give councils and the Local Government Commission greater flexibility in the determination of ward boundaries in rural areas to take into account communities of interest (NZ DIA 2012).

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- a single local area (for example, the UK district councils) can dedicate their more limited resources to regulatory functions which are more effective at achieving their objectives if targeted at the unique circumstances of a local community or when local proximity is a priority.

However, a two tier system of LG also has the potential to add complexity since LG functions must then be divided across regional and district areas. While in principle these could be divided according to the tier of LG that provides the most efficient and effective delivery platform, in practice, this division is unlikely to be clear cut providing more scope for regulatory inconsistencies and duplication and, consequently, increasing administrative and compliance costs.

*Recent experience in New Zealand and the United Kingdom tends to suggest that the efficiency benefits from a two tier system of LG — where one of the tiers has responsibility for regulatory functions that can be provided at a lower cost if spread over a larger population or regional area — are unlikely to outweigh costs associated with added complexity and risks associated with policy fragmentation.*

## **Better regulation**

Both the United Kingdom and New Zealand national governments have identified regulatory reform as a key micro-economic policy instrument to improving productivity and enhancing economic growth. To improve the quality of regulation, both countries have introduced best practice principles for regulation. These were first articulated in the United Kingdom, by the Better Regulation Taskforce in 2000; and, in New Zealand, by the Regulatory Responsibility Taskforce in 2009. In addition, in 2011, the UK Government articulated *Principles for Economic Regulation* to guide the high-level institutional design of regulatory frameworks (UK BIS 2011a).

Similar to the principles of good regulation first articulated in Australia by COAG in 2004 (and outlined in Box I.2), the United Kingdom and New Zealand best practice principles for regulation have been broadly designed to improve the transparency, accountability, proportionality, consistency and targeting of regulatory measures. However, unlike Australia, the United Kingdom and New Zealand best practice principles have statutory force. In the United Kingdom, the relevant legislation is the *Legislative and Regulatory Act 2006* and, in New Zealand, it is the *Regulatory Standards Bill 2011*. In New Zealand, Ministers and Chief Executives are required by law to certify whether or not a regulatory proposal is consistent with the set of good practice regulatory principles and to justify any departures.

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Prior to the introduction of the *Regulatory Standards Bill 2011* in New Zealand, good regulatory principles were scattered in various policy guidance documents — although most prominently in the Legislative Advisory Committee (LAC) Guidelines — which effectively provided a ‘checklist’ that placed the onus on public officials to ensure compliance. A report by the Regulatory Responsibility Taskforce (2009) described compliance with good practice regulatory principles as ‘patchy’ and expressed the view that:

Guidelines have not had the desired effect in encouraging policy-makers and legislators to quantify and evaluate the costs of particular legislation. Something stronger is needed to require policy-makers to confront regulatory effects on productivity and economic costs earlier rather than later.

... Those principles should in the Taskforce’s view be backed by effective mechanisms to secure transparency in their application, and incentivise compliance (p.16).

In the United Kingdom, statutory best practice principles of regulation generally apply to all regulators, including LG. In contrast, in New Zealand, the statutory principles only apply to central government, which also have statutory reporting requirements to ensure their compliance. The Commission is unaware of any New Zealand government initiatives to extend the principles to LG.

#### LEADING PRACTICE 2.1

*Well-established regulatory principles that have a statutory basis and apply to all levels of government — including local government — ensure more rigorous application by policy makers and delivery agencies, improve the transparency and accountability of the quality of regulations and send a strong signal about a government’s commitment to regulatory reform as a micro-economic policy instrument. In adapting this leading practice to the Australian federal system of government, statutory best practice regulatory principles would ideally be formulated at a national level and given effect to state and local government regulation through state legislation.*

### Improving enforcement and compliance

In 2005, a United Kingdom government review led by Sir Phillip Hampton, *Reducing Administrative Burden: Effective Inspection and Enforcement* (the Hampton Review) articulated seven best practice principles for regulatory inspection and enforcement activities (known as the ‘Hampton Principles’). These principles effectively required regulators to minimise the burden of enforcement by taking a risk based approach to secure compliance rather than routinely carrying out inspections. In 2008, the Hampton Principles were enshrined in a statutory



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Regulator's Compliance Code. The seven 'Hampton Principles' and the Regulators' Compliance Code are described in detail in box 2.3.

**Box 2.3      A statutory Regulators' Compliance Code — underpinned by Hampton best practice inspection and enforcement principles**

In 2005, a review commissioned by the UK Government and undertaken by Sir Phillip Hampton, *Reducing Administrative Burden: Effective Inspection and Enforcement* (the Hampton Review), provided the foundation for subsequent policy and improvement activity. The Hampton Review made a number of recommendations and articulated seven principles, all of which were accepted by the Government in the 2005 budget. These are:

- regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most
- regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take. No inspection should take place without a reason
- businesses should not have to give unnecessary information, nor give the same piece of information twice
- the few businesses that persistently break regulations should be identified quickly
- regulators should provide authoritative, accessible advice easily and cheaply
- regulators should recognise that a key element of their activity will be to allow, or even encourage economic progress, and only to intervene when there is a clear case for protection
- no inspection should take place without a reason.

In 2006, the so called 'Hampton principles' were embodied in a statutory Regulators' Compliance Code which requires regulators to:

- support economic progress by performing regulatory duties without impeding business productivity
- provide information and advice in a way that enables businesses to clearly understand what is required by law
- only perform inspections following a risk assessment, so that resources are focused on those least likely to comply
- collaborate with other regulators to share data and minimise demand on businesses
- follow principles on penalties outlined in Macrory (2006) when undertaking formal enforcement actions, including sanctions and penalties
- increase transparency by reporting on outcomes, costs and perceptions of their enforcement approach.

Sources: Hampton (2005); UK BERR (2007).

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*In Australia, across the states and territories, the Commission is not aware of any best practice principles, statutory or otherwise, that can be used to guide regulators in their enforcement and inspection activities. The Commission considers this to be a gap in the regulatory framework.*

*As developed further in chapter 4, the Commission considers that a statutory Regulator's Compliance Code is a leading practice approach to improve the quality and consistency of LG regulatory enforcement and inspection activities and, consequently, to minimise the impact of these activities on business and the economy.*

## **Improving intergovernmental cooperation and coordination**

As in Australia, LGs in the United Kingdom and New Zealand have dual accountability to their local constituents and to higher levels of government. Similarly, a key issue is intergovernmental cooperation and coordination to reconcile the sometimes competing interests and priorities of central and LG and to ensure the consistency of regulation and their enforcement practices across LGs.

Compared to Australia and the United Kingdom, the New Zealand Government has taken a more direct approach to coordinating national and LG priorities by including more prescription in its legislation about the roles and functions of LG, and the ways in which these can be discharged.

In 2011, to clarify the role of LG with respect to central government and the private sector, the (then) New Zealand Government proposed a legislative amendment to the *Local Government Act 2002* for LGs to focus on core activities defined as network infrastructure, public transport services, solid waste collection and disposal, the avoidance or mitigation of natural hazards, libraries, museums, reserves, recreational facilities and other community infrastructure.<sup>11</sup>

To minimise duplication of regulatory functions between the tiers of LG, New Zealand has also used a more direct approach of narrowly prescribing the responsibilities for each tier in legislation (for example, the *Resource Management Act 1991*). However, despite this more direct approach (and other legislative requirements for all local authorities in a region to enter into 'triennial agreements' that contain communication and co-ordination protocols), the New Zealand Government continues to identify regulatory duplication across the tiers of LG in

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<sup>11</sup> In 2012, the incoming New Zealand Government proposed to refocus the purpose of LG in the *Local Government Act 2002* to replace references to the 'social, economic, environmental and cultural well-being of communities' (the four well beings) with a new purpose for councils of 'providing good quality local infrastructure, public services and regulatory functions at the least possible cost to households and business' (NZ DIA 2012).

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key functional areas including planning, transport, community and economic development and civil defence.

The proposed legislative amendments to the New Zealand Local Government Act designed to restrict LG roles and functions have been broadly criticised by sectors in the business community currently reliant on LG activities that have not been identified as a central function of LG. In particular, the Tourism Industry Association New Zealand has indicated that the amendments would substantially reduce the role of LG in tourism promotion for local regions (TIANZ, pers. comm., 3 April 2012).

*The direct approach of prescribing, or limiting, LG activities through legislation may have some merit. The New Zealand Government has indicated that it improves the transparency, accountability and financial management of LG. In this context, the Commission considers that any advantages should be weighed carefully against the risk that imposed limits may restrict the ability of LGs, or businesses, to undertake activities in response to the diverse needs, interests and aspirations of local communities and, hence, reduce the wellbeing of some communities.*

The UK Government has taken a different approach to intergovernmental cooperation and coordination. In 2008, it established the Local Better Regulation Office (LBRO) as a lever for embedding initiatives under the Better Regulation Agenda at the local level. In their *Review of Better Regulation in the United Kingdom*, the OECD described the LBRO as a promising initiative ‘in a vigorous effort by the UK central government to strengthen both the national-local and local-local interfaces’ essential to the success of the Better Regulation Agenda (2009b, p. 106).

Up until March 2012, the LBRO operated as an independent statutory agency with powers and responsibilities to:

- develop formal partnerships with regulators across all levels of government
- provide advice to central government on regulatory and enforcement issues associated with LG
- issue statutory guidance to LG in respect of regulatory services
- nominate and register ‘primary authorities’ to provide advice and approve inspection plans for businesses that operate across council boundaries and arbitrate any disputes
- maintain a list of National Priority Regulatory Outcomes for LG

- 
- invest in programs to achieve strategic outcomes notably through the dissemination of innovation and good practice.

In 2012, the functions of the LBRO were transferred to the Department of Business, Innovation and Skills to be delivered by a dedicated, streamlined unit called the Better Regulation Delivery Office (BRDO).<sup>12</sup> In contrast to the LBRO, which was principally concerned with implementing regulatory reforms at the local level, the BRDO has a broader focus on improving the delivery of regulation across all levels of government (that is, enforcement and compliance).

*In adapting this agency to the Australian federal system of government, a state or Northern Territory agency with responsibilities similar to the former LBRO could provide a forum for these governments to:*

- *implement, monitor and coordinate regulatory activities and reforms at the local level*
- *manage incidences of conflicting regulatory roles and functions created either through local laws, state laws or their interaction*
- *provide guidance to local government about state regulatory priorities across the broad range of responsibilities delegated to them under state legislation and by state government departments.*

Whether these agencies are independent, or located within existing local government departments or regulation units (often located in Treasury departments), would be a matter of weighing the likely costs of setting up an independent agency against the potential for less effectiveness if the function is located in an existing government department that does not have well developed capacity or becomes one of many functions in the agency department competing for priority and resources.

#### LEADING PRACTICE 2.2

*An agency, such as the United Kingdom's Local Better Regulation Office, which had a focus on the regulatory activities of local government, including those undertaken on behalf of other tiers of government, can coordinate and prioritise regulatory objectives, responsibilities and activities between, and within, tiers of government while allowing local governments the discretion and autonomy to respond to the needs and aspirations of local communities.*

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<sup>12</sup> This development was part of a wider UK Government policy aimed at reducing expenditure for Non-Departmental Public Bodies.

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For New Zealand, the Commission has not been able to identify a forum or institutional arrangement similar to the LBRO. However, the Commission notes that the New Zealand Central Local Government Forum (CLGF) has been influential in establishing policies that assist central and LGs to coordinate their activities. For example, the *Policy Development Guidelines for Regulatory Functions Involving Local Government* are an initiative arising from the CLGF. These guidelines are similar to the *Inter-Governmental Agreement Establishing Principles to Guide Inter-Governmental Relations on Local Government Matters* agreed by COAG in 2006.

### **A short list of national priority regulatory outcomes**

One of the functions of the LBRO that was transferred to the BRDO in 2012 was a statutory responsibility to manage a short list of National Priority Regulatory Outcomes (NPROs) to give clarity to LG about the regulatory outcomes that are important at a national level. The intention of this short list was to ensure that, across the range of regulatory functions undertaken by, or delegated to, local government, sufficient resources were devoted to those regulatory areas where a coordinated approach at the local level was necessary to achieving the regulatory objectives of higher levels of government. The current list of NPROs, and the processes associated with their development, are described in box 2.4.

In a review conducted in 2011, the LBRO found that an outcomes-based approach to defining regulatory priorities for local government, as embodied in the NPROs, was superior to an alternative approach of defining these priorities in terms of functional activities (for example, ‘air quality’ or ‘hygiene of food businesses’) because it allowed LG to direct sufficient resources to achieve national objectives while flexibly accommodating local priorities.

As stated by the LBRO:

[Priority regulatory outcomes] ... provide a transparent framework which allows local delivery to support national ambitions, whilst empowering local regulatory services to use discretion and autonomy when tailoring approaches to the needs of local communities. (2011, p. 2).

In Australia, LGs undertake a broad range of regulatory functions on behalf of higher levels of government. These functions are specified in state legislation and national frameworks that are given effect through state laws. The effectiveness of LGs in delivering these functions will depend on the resources and capacity of individual local governments. For LGs that are resource constrained, it will also depend on their willingness and ability to divert resources away from other functions undertaken in the interests of local communities and often required by their democratic mandate.

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#### Box 2.4      **National Priority Regulatory Outcomes**

In 2007, the UK government commissioned a review to develop a list of national enforcement priorities for LARS. Using an evidenced-based approach to evaluate the risks attached to policy areas that LARS aim to control and the effectiveness of LARS regulatory activities in addressing those risks, the Review identified a short list of five narrowly defined National Enforcement Priorities (NEPs). In 2008, based on evidence that an outcomes based approach could achieve the same objectives while giving LG more flexibility to accommodate local priorities, the LBRO replaced the NEPs with National Priority Regulatory Outcomes (NPROs). As articulated by the LBRO, these are to:

- support economic growth, especially in small businesses by ensuring a fair, responsible and competitive trading environment
- protect the environment for future generations including tackling the threats and impacts of climate change
- improve quality of life and wellbeing by ensuring clean and safe neighbourhoods
- help people to live healthier lives by preventing ill health and harm and promoting public health
- ensure a safe, healthy and sustainable food chain for the benefits of consumers and the rural economy.

Source: LBRO UK (2011).

*Similar to the United Kingdom's NPROs, a short list of regulatory priorities that are of particular importance to the Australian and state and territory governments would help to ensure that LGs are devoting sufficient resources to those regulatory areas where, in particular, achievement of the regulatory objectives of higher levels of government necessarily requires a coordinated, cohesive and consistent approach at the local level. This short list would be best developed at the state level where the state body takes responsibility for including national regulatory objectives in its ranking of all LGs' regulatory responsibilities. This short list would ideally be based on an assessment of the risks that LG regulatory activities aim to control as well as the effectiveness of LGs as regulator of those risks.*

#### LEADING PRACTICE 2.3

*Given the broad range of regulatory functions which compete for resources against other functions undertaken by local governments in the interests of local communities, a short list of well-defined regulatory priorities would help to ensure that local governments are devoting sufficient resources to the achievement of the regulatory objectives of higher levels of government.*

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### *The primary authority scheme*

Another function of the LBRO that was transferred to the BRDO in 2012 was a statutory responsibility to manage the Primary Authority (PA) scheme. The key aspects of this scheme are described in box 2.5.

#### **Box 2.5      The Primary Authority scheme**

The key aspects of the Primary Authority scheme are:

- regardless of its size, any company operating across council boundaries has the opportunity to form a partnership with a single local authority in relation to regulatory compliance. These agreements can cover all environmental health and trading standards legislation, or specific functions such as food safety or petroleum licensing
- a central register of the partnerships, held on a secure database, provides an authoritative reference source for businesses and councils
- if a company cannot find an appropriate partner, it can ask the LBRO to find a suitable local authority for it to work with
- a primary authority provides robust and reliable advice on compliance that other councils must take into account, and may produce a national inspection plan at the request of the business, to coordinate activity
- before other LGs impose sanctions on a company, including formal notices and prosecutions, they must contact the primary authority to see whether the actions are contrary to appropriate advice it has previously issued. (This requirement to consult is waived if consumers or workers are at immediate risk). If the proposed action is inconsistent with advice previously issued by the primary authority, it can prevent that action being taken
- where the authorities cannot agree, the issue can be referred to the LBRO for a ruling, which is made within 28 days
- the question of resourcing the partnership is up to the councils and businesses concerned. Where necessary, a primary authority can recover its costs.

*Source:* VCEC (2010).

Underpinned by principles of mutual recognition, the PA scheme is designed to reduce compliance costs for multi-site businesses deriving from inconsistent administration and enforcement practices across LGs by establishing a statutory partnership between a business operating across LG boundaries and a single LG, which takes on the role of ‘primary authority’ The primary authority liaises with other LGs to provide advice to the business on its compliance with Local Authorities Regulatory Services, which must then be respected by other LGs when carrying out their own inspections or dealing with non-compliance by that business.

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In addition to reducing compliance costs for business, the LBRO has indicated that another benefit of the PA scheme has been a fundamental shift towards a genuinely more collaborative approach between businesses and LGs to secure regulatory compliance.

In the United Kingdom, the PA scheme has achieved a significant take up rate establishing partnerships covering major supermarkets, retailers, manufacturers and a number of smaller, regional enterprises. In 2011, the UK Government announced that the scheme would be extended to include coverage for a larger range of businesses. In 2010, the Victorian Competition and Efficiency Commission (VCEC) examined the PA scheme with a view to determining its value in reducing compliance costs for business in Victoria. After considering the advantages and disadvantages,<sup>13</sup> VCEC (2010) concluded that scheme was most suitable for regulations where subjective judgements about local conditions are less important (such as, food safety); but less suited to areas where decisions are dominated by judgements about impacts on local amenity (such as planning).

*The Commission considers that the PA scheme has merit in reducing compliance costs for business that operate across LG boundaries; and in some key functional areas which currently impose significant costs including public health and safety, and some aspects of environmental regulation.*

*However, a risk of the PA scheme is that business may seek to partner LGs known to be ‘soft’ on inspection and enforcement and this has the potential to undermine the effectiveness of these activities more broadly.*

*Given the success of the PA scheme in the United Kingdom in reducing compliance costs for some businesses, the Commission considers that it might be worthwhile to undertake a trial of the scheme (for example, as part of a COAG project) to determine the nature and extent of both the benefits and risks of the scheme.*

The extent to which mutual recognition is an effective and useful means for improving coordination between LGs is considered further in chapter 5.

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<sup>13</sup> The advantages and disadvantages of the PA scheme as initially identified by VCEC are listed in appendix D.



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### 3 Governance and regulatory frameworks

#### Key points

- While the Commonwealth has limited ability to affect local government regulatory activities, state governments can, and do, delegate substantial regulatory responsibilities through legislation.
  - Compared to other jurisdictions, LGs in the Northern Territory have been delegated far fewer regulatory responsibilities.
- All local governments are able to make local laws. This includes New South Wales local governments, which have the power to make ‘local orders and approvals policies’ that are similar to local laws.
  - There is scope to improve the transparency and accountability of local laws.
- All local governments can also use quasi-regulatory instruments to impose binding rules on business, which include: conditions on permits, licences, leases or registration; policies; codes; and guidelines. Although their impact and effect can be similar to local laws, state, territory and local government oversight of quasi-regulatory instruments is far less rigorous.
- There is some scope for expanding web based publishing of local regulations to increase transparency and reduce burdens on business.
- State and local laws can require local governments to be both a service provider and a regulator of private providers capable of providing the same service. This can create conflicts in objectives and lead to anti-competitive behaviour.
- While appeal processes are clearly defined in legislation, there is scope to improve opportunities for business to make complaints or challenge LG decisions through a more graduated review and appeal system.
  - A cost effective approach could be to augment current appeals paths with internal reviews and to provide a broader role for Small Business Commissioners to also consider issues relating to local government processes which impose costs on business (for example, delays in decisions).
- Where variations in local regulations impose costs that exceed benefits, both state and local governments should consider mechanisms to achieve greater harmonisation and coordination.
- While local government regulation is often the most effective and efficient for local issues, sometimes regulatory functions are more appropriately undertaken by state or by regional bodies — for example, when effects are felt beyond local boundaries.

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This chapter outlines the basic legal and governance frameworks for LG regulation in the states and Northern Territory. In particular, this chapter examines:

- Commonwealth laws and national frameworks (section 3.1) and state legislation and governance structures which delegate a regulatory role for LG (section 3.2)
- LG law making (section 3.3) and quasi-regulation (section 3.4)
- transparency and accountability in the design, implementation and enforcement of LG regulations including processes for complaints, appeals and review (sections 3.5–3.8)
- issues relating to subsidiarity (section 3.9) and harmonisation (section 3.10)
- appendix F lists state and territory laws that delegate a regulatory role to LG, and appendix G notes significant recent reform of LG in the states and Northern Territory.

### **3.1 Commonwealth laws and national frameworks**

The Australian Constitution does not provide for the Commonwealth Parliament to make laws with respect to LG. There is a limited number of Commonwealth laws relevant to LG, including:

- the *Environment Protection and Biodiversity Conservation Act 1999*, which does not directly mention LG but creates a referral role for development applications that trigger environmental assessment under the Act
- the *Australian Citizenship Act 2007*, which contains limited roles for LG in conducting citizenship ceremonies and assisting with some aspects of business-sponsored immigration.

The Commonwealth is also responsible for the non-self-governing Territories and has enacted LG legislation modelled on the Western Australian LG Act for Christmas Island and Cocos (Keeling) Islands (Australian Government, pers. comm., 13 September 2011 to 2 November 2011).

When the Commonwealth does create a regulatory role for LG, this is done via national frameworks which are legislated by the states and territories. The national frameworks with regulatory implications for LG are listed in table 3.1.

**Table 3.1 National frameworks with a regulatory role for LG**  
2011

The three agreements of the National Competition Policy (1995)
Heads of Agreement on Commonwealth and State roles and responsibilities for the Environment (COAG 1997)
Intergovernmental Agreement on the Environment (1992)
Intergovernmental Agreement on a National Water Initiative (signed progressively by the Commonwealth and state governments over the period from 2004 to 2006)
National Cooperative Approach to Integrated Coastal Zone Management: Framework and Implementation Plan (2006)
Inter-Governmental Agreement for the Regulatory and Operational Reform in Road, Rail and Intermodal Transport (2003)
The Food Regulation Agreement (2008)
The intergovernmental agreement establishing the Australian Building Codes Board (1994)
Australian Road Rules (Australian Transport Council 2007)
Intergovernmental Agreement on Heavy Vehicle Regulatory Reform (2011)
The Inter-governmental Agreement Establishing Principles Guiding Inter-governmental Relations on Local Government Matters (2006)
National Partnership Agreement to Deliver a Seamless National Economy (2008)

## 3.2 State and territory laws

As described in detail in chapter 2, each state and the Northern Territory has responsibility to establish, recognise and guarantee a system of LG, and to provide for its regulatory framework.

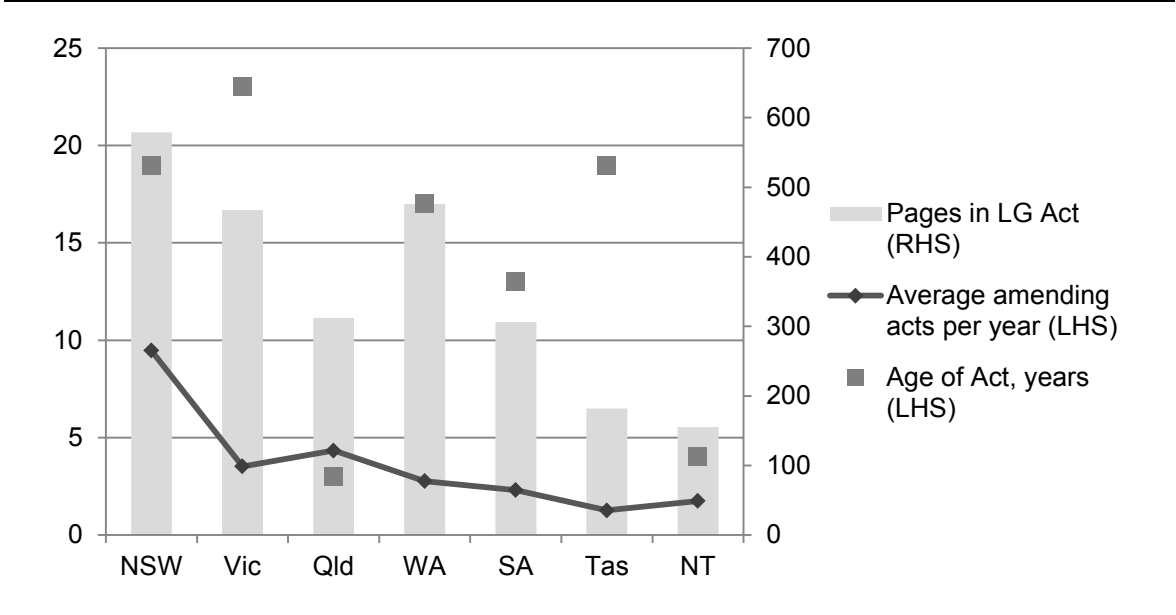
### Responsibilities under local government Acts

The LG Acts in each jurisdiction delegate powers, roles and responsibilities to LG. Information on the age and length of LG Acts in each jurisdiction, as well as the frequency of their amendment, is provided in figure 3.1 (a further breakdown of the data is provided in appendix F).

The *Local Government Act 1989* (Victoria) is the oldest Act and the *Local Government Act 2009* (Queensland) is the most recently enacted. Over the last 25 years, the LG Acts in all jurisdictions have been substantially reviewed, amended and/or replaced. While these changes have allowed legislation to reflect current circumstances and community expectations, they have also imposed administrative costs on LG to remain informed and compliant while adjusting their activities and focus accordingly. Up until June 2012, the NSW *Local Government Act 1993* had been amended approximately 10 times per year on average in the 19 years it has been in place — significantly more than all other jurisdictions, which have amended their LG Acts less than five times per year on average. The NSW Government has

committed to reviewing the Local Government Act, commencing in 2012 (Page 2011).

Figure 3.1      **Length, age and frequency of amendment of LG Acts**  
2012



Data sources: Local Government Act 1993 (NSW); Local Government Act 1989 (Vic); Local Government Act 2009 (Qld); Local Government Act 1995 (WA); Local Government Act 1999 (SA); Local Government Act 1993 (Tas); Local Government Act 2008 (NT).

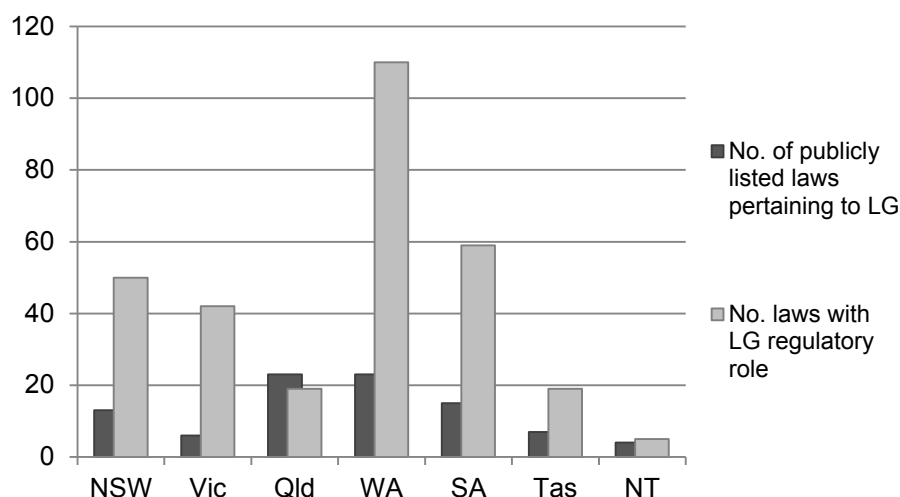
Across the jurisdictions, LG Acts varied considerably in length: New South Wales had the longest Act at 579 pages and the Northern Territory had the shortest at 155 pages. However, the number of pages in the LG Act is only a blunt measure of complexity or number of requirements under the Act, as some jurisdictions have significant sections of their frameworks in associated Acts or regulations.

New South Wales, Victoria, Queensland and South Australia have separate Acts for their capital cities which delegate unique responsibilities to their capital city LG (also listed in appendix F).

**Responsibilities under other state legislation**

Across the jurisdictions, there is a substantial number of Acts and associated legislation which delegate regulatory roles to LG that include creating, imposing, enforcing or administering rules that prescribe the actions of others. These are listed in full in appendix F and summarised in figure 3.2.

Figure 3.2 **State laws under which LG has regulatory responsibilities**  
2011



*Data sources:* Productivity Commission survey of state governments (2011-12, unpublished); State and territory LG agency websites.

Over the course of this benchmarking study, all jurisdictions struggled to provide the Commission with a comprehensive list of legislation that created a regulatory role for LG. While all jurisdictions had lists of legislation pertaining to LG (including legislation only relevant to service provision) on their LG department website, these lists were not complete and fell significantly short of capturing all laws under which LG had a regulatory role (figure 3.2). A comprehensive list has been recommended by the Commission in other work (PC 2012b).

In their submission to this study, the Queensland Government commented that:

Whilst the establishment of a register could have merits, the establishment and ongoing maintenance costs could be significant for both levels of government, and an assessment of these costs should be undertaken. (sub. DR51, p. 2)

The Commission supports an assessment of the costs and benefits involved.

***Benefits of a comprehensive public list of laws which delegate a regulatory role to LGs would include:***

- ***better business understanding of their compliance obligations***
- ***clarity for state and local governments***
- ***more information for state and local governments in discussing and setting priorities***
- ***a better understanding of regulatory burdens placed on business***

- 
- *a clearer understanding of whether LGs are resourced adequately to fulfil their regulatory roles (discussed in chapter 4).*

*It may also be appropriate for state governments to keep a watching brief on the aggregate number of state laws that confer a regulatory role on LG and regularly assess, say every ten years, whether existing instruments are relevant and to identify a subset that warrant further review. Periodic reviews undertaken by the state government would help to ensure that laws do not cause unintended consequences, do not overlap with existing regulation, and that the benefits created outweigh the costs imposed, including costs to business.*

#### LEADING PRACTICE 3.1

*No jurisdiction has established a comprehensive list of the laws for which local government plays a role in administration, enforcement or referral. A complete and current list of those laws which require local governments to play a regulatory role would reduce overall compliance burdens for business and facilitate a better understanding of the regulatory workloads of local governments.*

### **LG interactions with state and territory agencies**

In 2011, every jurisdiction had a Minister responsible for LG and an administrative agency with primary responsibility for LG. The LG Ministers and their respective agencies are listed in table 3.2. Western Australia was the only jurisdiction in which the LG agency was a stand-alone department. In the other jurisdictions, the LG agency was either located within a department with combined responsibilities for planning and/or community and regional development or was a division of the Department of Premier and Cabinet.

Across the jurisdictions and to varying degrees, LG Ministers have powers to define LG areas, such as for the purposes of amalgamation, as well as power to investigate LGs or dismiss elected councillors. LG agencies promote cooperation and regional approaches, administer programs that distribute resources and training on behalf of government and, in some cases, assess LG laws and other legal instruments.

The substantial number of Acts and associated legislation which delegate a regulatory role to LG have created a multitude of complex interactions between LGs and state government agencies (but not in the Northern Territory where LGs deal with far fewer laws and agencies). Table 3.3 lists the number of state agencies responsible for administering Acts and regulations that give regulatory powers to LG; and the agencies and their laws are listed in Appendix F. Victorian LGs had

**Table 3.2 Local government agencies**  
2011

	<i>Agency</i>	<i>Minister</i>
Commonwealth	Department of Regional Australia, Local Government, Arts and Sport	Minister for Regional Australia, Regional Development and Local Government
NSW	Division of Local Government (Department of Premier and Cabinet)	Minister for Local Government
Vic	Department of Planning and Community Development	Minister for Local Government
Qld	Department of Local Government and Planning	Minister for Local Government
WA	Department of Local Government	Minister for Local Government
SA	Department of Planning and Local Government <sup>a</sup>	Minister for State/Local Government Relations
Tas	Local Government Division (Department of Premier and Cabinet)	Minister for Local Government
NT	Department of Housing, Local Government and Regional Services	Minister for Local Government

<sup>a</sup> Currently transitioning to the new Department of Planning, Transport and Infrastructure.

the most state agencies to deal with, and Northern Territory LGs had the fewest. Some Acts delegate regulatory responsibilities (for example, the Food Acts which are administered by the state government health agencies) while others require LG to make referrals; for example, under Planning Acts, LGs refer development applications to State government agencies (table 3.4).

**Table 3.3 Number of state agencies with LG regulatory dealings**  
2011

<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>
15	17	3	6	12	5	2

Source: Productivity Commission survey of state governments (2011-12, unpublished).

**Table 3.4 Number of Acts and regulations requiring referrals**

<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>
6	21	8	7	3	1	0

Source: Productivity Commission survey of state governments (2011-12, unpublished).

### 3.3 Local government laws

LGs have very broad powers to make laws in every jurisdiction except New South Wales (table 3.5). In New South Wales, local orders and approvals policies are similar to local laws in that they are made by elected officials under powers in the

LG Act, and are required to go through public consultation and other validation processes. The key difference is their limited scope, as they can only be made in relation to specific topics listed in the LG Act<sup>1</sup> (for a summary of differences, see table 3.9). A local orders policy sets out criteria under which a LG will issue an order, and an approvals policy specifies the criteria that must be met for the activity to be exempt from LG approval. This reduces red tape as a business is exempted from seeking approval where a LG has an adopted local approvals policy in place and the business's activities meet the requirements of the policy for an exemption. Future references to 'local laws' should be taken to include New South Wales local orders and approval policies.

In other jurisdictions, LG can make local laws (called 'by-laws' in South Australia, Tasmania and the Northern Territory) on any topic 'for the good governance' of their LG area provided it is consistent with the law of higher levels of government or not precluded by other legislation. Victorian and Tasmanian provisions carry the additional requirement that local laws must be on a topic for which the LG has powers. In practice, local laws exist for a range of regulatory areas including: LG administration; municipal places and assets; trading activity; environmental management; roads; parking; animals and waste.

**Table 3.5 Power to make local laws**

New South Wales	<i>Local Government Act 1993 s. 68</i>
Victoria	<i>Local Government Act 1989 s. 111</i>
Queensland	<i>Local Government Act 2009 s. 28</i>
Western Australia	<i>Local Government Act 1995 s. 3.5</i>
South Australia	<i>Local Government Act 1999 s. 246</i>
Tasmania	<i>Local Government Act 1993 s. 145</i>
Northern Territory	<i>Local Government Act 2008 s. 188</i>

Table 3.6 provides information on the number of local laws by jurisdiction. Across the jurisdictions, the number of local laws varies significantly, both in aggregate, across LGs, and on average, per LG. In particular:

- Western Australia has the largest number of local laws in aggregate of any jurisdiction at 4643, while Queensland has the highest average number of local laws per LG at 59
- the Northern Territory has the least number of local laws at 47, while Tasmania has the lowest average number of local laws per LG at 2.5
- New South Wales, Victoria and South Australia were not able to provide total or average number of local laws.

<sup>1</sup> Section 68.



Although the number of local laws may be an indicator of the regulatory burden of LG on business, it is important to note that LG regulation consists of more than local laws. Regulation also includes a range of rules, instruments and standards ('quasi-regulation') which governments use to influence business behaviour but which do not involve 'black letter law'. These are discussed in section 3.4.

**Table 3.6 Number of local laws by jurisdiction**

	<i>Number of local laws</i>	<i>Average laws per LG</i>	<i>Comments</i>
NSW	na	na	LGs make local orders and approval policies, similar to local laws, which are not published in a common register.
Vic	na	na	The Commission estimates that LGs have an approximate average of 4 local laws each, but there is no database or single place they can be accessed or counted.
Qld	4336	59	The register of local laws includes 1500 subordinate local laws.
WA	4643	33	The Commission estimates that LGs have an approximate average of 7 local laws each, but there is no database or single place they can be accessed or counted.
SA	na	na	
Tas	70	2.5	The NT legislation database has a separate list of by-laws, which also includes non-LG by-laws.
NT	47	2.9	

na Not available.

Sources: State and territory LG agency websites.

## Scope for Local Government to impose rules on business

Under LG Acts, LGs have responsibility to perform any regulatory roles delegated under any state legislation and a capacity to create their own local laws and other regulatory instruments. These local instruments can be used to pursue local regulatory agendas and also to implement state and territory rules.

Based on the Commission's survey of state governments, table 3.7 compares differences in the areas that LGs can impose rules on business.<sup>2</sup> According to this survey, in most jurisdictions LGs had a regulatory role in areas relating to building and construction; planning and land use; reserves; roads; traffic management and roadside parking; disposal of waste and stormwater; health and safety; and emergencies.

<sup>2</sup> These rules can take any form and may not be legislative instruments.

**Table 3.7 Areas in which LGs can impose rules on business**  
2011

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>
Building and construction	✓	✓	✓	✓	✓	✓	x
Planning and land use	✓	✓	✓	✓	✓	✓	xa
Development assessment	✓	✓	✓	✓	✓	✓	x
Biodiversity and vegetation protection	✓	✓	✓	✓	x	x	✓b
Other landcare	✓	✓	✓	✓	x	x	✓b
Control of pest animals and plants	✓	✓	✓	✓	x	x	✓b
Wetlands and inland waterways	✓	✓	x	✓	x	x	x
Coastal management	✓	✓	x	✓	✓	x	x
Indigenous affairs	x	x	✓b	x	x	x	x
Reserves and picnic areas	✓	✓	✓	✓	✓	✓	✓
Noise and air quality	✓	✓	✓	✓	✓	x	✓c
Bridges and loading	✓	✓	✓	✓	x	✓	✓
Street lighting and footpaths	✓	✓	✓	✓	✓	✓	✓d
Waste disposal and management	✓	✓	✓	✓	✓	✓	✓
Stormwater and drainage	✓	✓	✓	✓	✓	✓	✓
Water collection and reuse	✓	x	x	✓	x	✓	x
Water quality and monitoring	✓	x	x	✓	x	x	x
Third party infrastructure	✓	✓	x	x	x	x	x
Food and liquor	✓	✓	x	✓	✓	✓	x
Traffic management including signage, signals and calming devices	✓	✓	✓	✓	✓	x	✓
Road side parking	✓	✓	✓	✓	✓	✓	✓
Railroad crossings	x	x	✓	x	x	x	x
Community health and public safety	✓	✓	✓	✓	✓	✓	x
Carbon management measures	x	x	x	x	x	x	x
Emergencies	✓	✓	x	✓	✓	✓	✓
Other	x	x	✓e	x	x	x	✓e

**a** Limited role in the approval process. **b** Limited. **c** Not air quality. **d** Not street lighting. **e** Animal management (cats and dogs).

Source: Productivity Commission survey of state governments (2011-12, unpublished).

The state and territory survey responses indicated that:

- the range of areas in which LGs could impose rules on business was widest in NSW and narrowest in the Northern Territory
- the only jurisdiction where LGs could impose rules on third party infrastructure was New South Wales
- New South Wales and Western Australia were the only jurisdictions where LGs could impose rules on business regarding water quality and management

- New South Wales, Western Australia and Tasmania were the only jurisdictions where LGs could impose rules on business regarding water collection and reuse
- in all jurisdictions except Queensland, LGs could not impose rules on business regarding Indigenous affairs and, in Queensland, LGs only had a limited scope
- in all jurisdictions, LGs could not impose carbon management rules on business.

## Law making constraints

All local laws are subordinate to state and territory laws. This means that LGs cannot enact a binding rule or law that contradicts a provision in a state or territory law, unless the state or territory law expressly allows it.

LGs in Queensland, Tasmania and Western Australia are permitted to create an offence through local laws. All jurisdictions (except New South Wales) allow for the creation of penalties for violation of local laws, although the dollar amount of the penalty that can be imposed under a local law is limited by the LG Act (table 3.8).

**Table 3.8 Maximum financial penalty LG may apply under local law**  
Dollar value of penalty units as at June 2012

	<i>NSW</i>	<i>Vic</i>	<i>Q/d</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>
Maximum penalty (\$)	22 000	2 000	8500	5000	750	2600	68 500

Sources: LG Acts.

Table 3.9 summarises jurisdictional approaches to local laws. These are discussed in the following text.

## Model laws

Model laws are drafted by the relevant state authorities and made available to be adopted, usually voluntarily, by individual LGs. In most jurisdictions, LGs have the discretion to make any changes to the model law considered necessary for adaptation to local circumstances.

*The most obvious benefit of model laws is that they provide consistency and predictability while retaining the flexibility for LG to apply variations. This reduces costs for businesses that operate in multiple LG areas by reducing the cost of becoming familiar with and complying with different laws. Even where*

*there are frequent departures from the model text, only one general framework needs to be understood.*

**Table 3.9 Jurisdictional comparisons of LG law making**

<i>Local laws:</i>	<i>NSW<sup>a</sup></i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>
<i>Content</i>							
are subordinate to state and Commonwealth laws	✓	✓	✓	✓	✓	✓	✓
can be made on any topic for the good governance of the LG area	x	✓ <sup>b</sup>	✓	✓	✓	✓ <sup>b</sup>	✓
can create an offence	x	x <sup>c</sup>	✓	✓	x <sup>c</sup>	✓	✓
may be based on model laws	✓	x	✓	✓	✓	✓	✓
<i>Process to develop, adopt and publish</i>							
must pass a regulatory impact assessment	x	x	x	x	x	✓	x
are subject to public consultation during development	✓	✓	✓	✓	✓	✓	✓
are subject to approval from LG or other department	x	x	x	x	x	x <sup>d</sup>	x
are disallowable instruments	x	x	✓	✓	✓	✓ <sup>e</sup>	✓
are published on a state-wide basis	x	x	✓	✓	x	✓	✓
are published on LG websites	✓	✓ <sup>f</sup>	g	✓ <sup>f</sup>	✓	✓ <sup>f</sup>	✓
<i>Review and sunset</i>							
are reviewed post-implementation by an external body	x <sup>h</sup>	x	x	x	x	x	x
must not restrict competition (except if certain tests are satisfied)	✓	✓	✓	i	✓	✓	✓
sunset after a period of time	x	✓	x	x <sup>j</sup>	✓	✓	x

<sup>a</sup> LGs in New South Wales cannot make local laws; however, local approvals and orders policies and other instruments impose requirements on business in much the same way as local laws. The content of these instruments is, however, more limited than for local laws in other jurisdictions. <sup>b</sup> Only in respect of any topic for which the LG has powers. <sup>c</sup> Penalties may be created. <sup>d</sup> Except under the *Building Act 2000* (s. 238 provides that the Minister for Workplace Relations must approve any new laws that impose standards on the design of buildings). <sup>e</sup> Parliament's subordinate legislation committee can disallow. <sup>f</sup> By convention not requirement. <sup>g</sup> Some LGs do but not all. <sup>h</sup> Some policies are reviewed by agencies. For example, the Local Environment Plan (planning instrument) is reviewed and made with the direction of the Department of Planning and Infrastructure, but not 'post-implementation'. <sup>i</sup> From a planning perspective only. <sup>j</sup> A review is required after 7 years.

Source: Productivity Commission survey of state governments (2011-12, unpublished).

As well as cost savings to business, model laws can lead to LG cost savings and better regulation. Use of model laws reduces the cost to LG of drafting legislation. Further, if states create model laws, state-wide regulatory impact assessment can be conducted, improving the quality of regulatory outcomes and reducing costs on LGs, particularly smaller LGs which may not have the necessary expertise to do such an assessment. However, regulatory impact assessment done on a state or

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territory level does not negate the need for other processes for implementing local laws, such as community consultation.

#### LEADING PRACTICE 3.2

*State or territory led development and regulatory impact assessment of model laws can reduce the burden on local governments and improve the quality of regulation, thus reducing costs to business.*

Queensland, Western Australia, South Australia and Tasmania have provided model local laws to LG. The New South Wales standard instrument Local Environmental Plan (LEP) guides LGs in creating LEPs, which are legally binding, in much the same way as a model law. Queensland currently has seven model laws which are designed to be adapted to local circumstances through the use of subordinate local laws (Queensland Department of Local Government and Planning 2012a); and once adopted, can be amended or repealed like any other law. South Australia has only one model law (LGA SA 2012); however, in South Australia, the Local Government Association has developed template laws for LGs to adapt to their own circumstances. In Tasmania, model laws must be adopted in entirety (if adopted), and only very limited modifications are permitted (such as inserting the LG name). The Northern Territory LG Act refers to model laws, although currently there are none.

### 3.4 Quasi-regulation

Quasi-regulation can take many forms such as policies, guidelines or codes; or conditions on permits, licences, leases or registration. LGs can use quasi-regulation to impose binding rules on business which impact business much like local laws and other similar ‘black-letter’ laws such as statutory planning instruments. Table 3.10 contains a summary of their use across jurisdictions.

Local laws (including local orders and approvals policies in New South Wales) are created under requirements set out in the LG Acts and, as black-letter law, have greater weight than other LG regulatory instruments. Quasi-regulation, here, refers to subordinate forms of regulation that apply generally, such as guidelines or policies. While they are not always legally binding, they may nonetheless be treated as binding when enforced by regulators.

The relationship between, and legal standing of, regulatory instruments is by no means straightforward.

**Table 3.10 Alternative local government regulatory instruments**

	<i>Conditions on permits, licences, leases or registration</i>	<i>Policies</i>	<i>Planning instruments</i>	<i>Other</i>
NSW	✓	✓	✓	✓ <sup>a</sup>
Vic	✓	✓	✓	✗
Qld	✓	✓	✓	✗
WA	✓	✓	✓	✗
SA	✓	✓	✓	✗
Tas	✓	✓	✓	✗
NT	✗	✗	✗	✗

<sup>a</sup> Orders.

Source: Productivity Commission survey of state governments (2011-12, unpublished).

Some quasi-regulatory instruments, such as guidelines, are written primarily to explain the content of legal rules to businesses and other members of the local community. Given that most members of the community would otherwise struggle to understand their requirements under law, this practice by LGs should not be discouraged. However, caution is needed to ensure the accuracy and completeness of guidelines, as the courts have held parties in breach of rules even when they followed the relevant guidelines (*Humane Society International Inc v Minister for the Environment & Heritage*<sup>3</sup>).

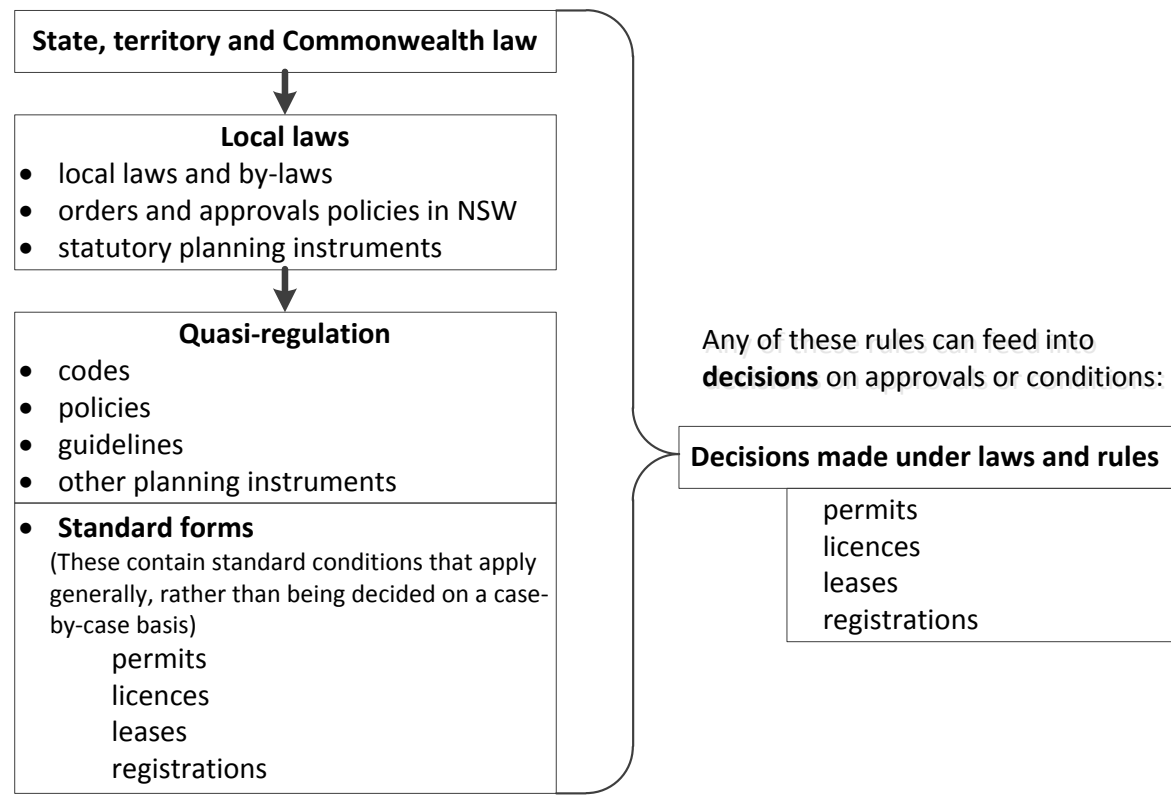
In addition to local laws and quasi-regulatory instruments, rules can be imposed on business by ‘decisions’ determined under other laws. For example, a development approval is issued for a specific development and may contain a range of conditions for a business to comply with, which may not be confined to the physical development of the property but may extend to business decisions such as opening hours or signage. Rules contained in these ‘decisions’ are not necessarily subordinate to black letter or quasi-regulation; indeed, they tend to have a similar weight to a contract between the regulator and the regulated.

This is further complicated by standard conditions, which are not specific to circumstances but made under standard form permits or licences. For example, standard conditions may apply generally to certain types of development, and requirements for registering of a food business or applying for a busking permit are often in standard forms which include conditions that regulate the operation of the business. These could be described as ‘quasi-regulation’.

The key black-letter laws, quasi-regulatory instruments and types of decisions are illustrated in figure 3.3.

<sup>3</sup> [2003] FCA 64.

Figure 3.3 Local Government regulatory instruments



Where the precise legal standing of an instrument is debatable, that very uncertainty imposes costs on businesses as they must either comply with requirements or risk the cost and time involved in defending legal action (box 3.1).

### Costs and impacts of quasi-regulation

Quasi-regulation can impose significant costs on business through:

- information costs in identifying all the instruments that must be complied with
- the cost of compliance where additional or higher requirements are imposed
- the cost of defending a departure from instruments which are not legally enforceable but may nevertheless be enforced by the courts in some circumstances (box 3.1)
- the cost of not being able to establish a business because failure to comply with non-legal requirements may result in the refusal of an application
- informational and legal costs caused by inconsistent rules.

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### Box 3.1 Quasi-regulation in the courts

Judicial consideration of LG regulation is generally confined to the lower courts and tribunals which do not create precedent, however published cases shed some light on the way quasi-regulation is taken into account.

- In Victoria, **LG codes and policies** are not considered binding but are generally followed unless they are found invalid or there is a compelling reason to depart from them. For example, *Modelstars v Yarra CC*<sup>4</sup> was an appeal against a LG rejection of the development of restaurant and bar as it was not compliant with a LG policy restricting trading beyond 1:00 am. VCAT allowed the development.
- In New South Wales, the court may uphold provisions in **LG codes** or not, according to the specifics of the case. In *Zhou J v Marrickville C*,<sup>5</sup> proposed signage did not comply with the code and was not permitted by the court; but in *Loombah Investments v Ku-ring-gai Council*,<sup>6</sup> non-compliance with the code was relevant but not determinative to an application to build a second dwelling on a property, which the court allowed.
- **Development approvals** may contain legally enforceable conditions specific to the development, and can be used to regulate a wide range of items, for example liquor licence restrictions (*Fenwick v Melbourne City Council*<sup>7</sup>). Subdivisions (a subset of development approvals) can also contain binding conditions, as in *Dept of Natural Resources & Environment v Horsham Rural CC & Ors*<sup>8</sup> where the condition was that any future purchaser must be notified of potential nuisance from a nearby farm.
- **Codes** can become enforceable through incorporation in the LG planning scheme, as occurred with a code for broiler farms (*Stoiljkovic v Cardinia SC*<sup>9</sup>).
- **Permits** can also be binding, although the permit in *City of Glen Eira v J&M Korolik & Ors*<sup>10</sup> was criticised as ‘very very far from clear.’ The Senior Member presiding said, ‘I think that the result of all this is a hopeless confusion where it is next to impossible for the Koroliks or anyone else to determine quite what is required of them and whether such requirements have legal force.’
- **Transitional planning scheme provisions** were found not to be enforceable unless formally built in to the planning scheme in *Maffra v Wydham CC*.<sup>11</sup>

Business disputes with LG over the content, validity and/or enforceability of codes, guidelines and other quasi-regulation indicate that LGs use these to constrain business activities. The ability of third parties to use policies and other instruments to appeal development consent also creates significant costs on businesses if they have to justify their development in court (as in *Citywide Property Services v Monash CC & Anor*<sup>12</sup>).

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<sup>4</sup> [1996] VICCAT 492.

<sup>5</sup> [2005] NSWLEC 101.

<sup>6</sup> [2005] NSWLEC 681.

<sup>7</sup> [2003] VCAT 1440.

<sup>8</sup> [1998] VCAT 253.



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Examples of the impacts of quasi-regulation on specific types of business are provided in the case studies included in boxes 3.2 (commercial film and photography) and 3.3 (busking). Other examples are discussed in chapter 8 (parking) and in chapter 9 and appendix H (mobile food vans).

These examples highlight the wide variety in the type, number and content of instruments used to regulate the same subject matter. The myriad of types of regulatory instruments used by LG, and the wide range of topics on which they can be created, increases the risk of regulatory creep, whereby the reach of regulation impacting on business, including smaller businesses, becomes more extensive over time (PC 2011a).

Often, differences in the content of quasi-regulatory instruments are strongly linked to differences in local needs and preferences of LG — for example, rules about the areas and hours that busking can take place as well as the standard of performance. ***In these cases, rather than trying to standardise conditions, good practice would be to use the minimum number of instruments, accompanied by a clear statement about whether the intent of an instrument is to be legally binding (or not). It would also be desirable for all relevant rules to be located in a single location for each LG.*** Some consistency between LGs as to the type of instruments used would also be of assistance to businesses that operate in more than one LG area. For example, some LGs include conditions on busking in policy documents; others place them in permit forms (box 3.3).

In other cases, there seems less justification for differences in content of quasi-regulatory instruments between LG areas — for example, the registration of mobile food vans. In these cases, consistent treatment would significantly reduce the regulatory burden on business and may encourage competition. ***There are several ways that LG could improve consistency, including electronically available conditions and permit forms, and thereby reduce the cost to business of obtaining information.***

In general, quasi-regulation is less transparent than black letter law, because it is not equally constrained by rules of process, which are described in section 3.3. Transparency issues are discussed in section 3.5.

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<sup>9</sup> [2006] VCAT 738.

<sup>10</sup> [1998] VCAT 101.

<sup>11</sup> [2008] VCAT 1583.

<sup>12</sup> [2002] VCAT 724.

### Box 3.2 Case study — commercial filming and photography

All jurisdictions allow LGs to impose fees and conditions on commercial filming and photography. Across and within all jurisdictions, except New South Wales, there is considerable variation in regulatory instrument, conditions, and charges. The following table provides a snapshot comparison of the extent and nature of differences.

#### Commercial filming and photography

	<i>LG</i>	<i>Instrument</i>	<i>Accessibility</i> <sup>a</sup>	<i>Conditions</i> <sup>b</sup>	<i>Charge for Photography</i>	<i>Charge for Filming</i> <sup>c</sup>
NSW	Sydney	Guideline, permit	High	Basic	\$0	\$660
NSW	Woollahra	Permit	High	Detailed	\$0	\$660
Vic	Melbourne	Permit	High	Detailed	None	\$1000/day
Vic	Port Phillip	Policy, local law, permit	High	Basic	\$344	\$767.40
Qld	Brisbane	Permit	Low	None	None	\$563
Qld	Cairns	Policy, permit	High	Basic	\$151	\$177
WA	Perth	Permit	Low	Detailed	None	\$256.50
SA	Adelaide	Permit	High	Basic	\$130	\$130
Tas	Hobart	Licence	Low	None	\$250	\$580
NT	Darwin	Local law	High	Basic	N/A	\$120

<sup>a</sup> Accessibility refers to ease of access on LG websites and conditions written in plain English.

<sup>b</sup> Conditions over 1000 words are categorised as detailed. <sup>c</sup> Cost for a medium sized project.

The level of variation, even within the same city, is difficult to justify based on differences in local circumstances. The NSW Government's response has been to enact legislation on this topic to remove LG discretion — hence the uniformity observed for that jurisdiction. However, as provided in the NSW Business Chamber in their submission to this study, there are no similar restrictions on fees for stills photography and a variety of fees are charged by LGs across Sydney (sub. 11). A snapshot comparison is provided in the following table.

#### Stills photography fees across LGs in Sydney

<i>LG</i>	<i>Type</i>	<i>Cost</i>
Sydney	Ultra Low Impact (<10 crew)	Free
Manly	Commercial Stills Photography	\$825 (day) or \$410 (half day)
Mosman	Stills Photography	\$370 (4 hours) then \$35 per hour
North Sydney	Stills Photography	\$150 Lodgement Fee
Randwick	Stills Photography	Free
Warringah	Stills Photography	\$235 (2 hours) or \$780 day
Waverley	Stills Photography	\$315.20 per hour
Woollahra	Ultra Low Impact (<10 crew)	Free

Sources: LG websites.

### Box 3.3 Case study — busking regulations

It is now quite common for LGs to regulate busking in their local area, for example to avoid nuisance to pedestrians and businesses and ensure public liability insurance is provided if necessary. Formal requirements give LGs power to enforce common sense, according to a spokesperson for the City of Sydney, where busking requirements, 'are set out in a 13-page policy, 18 pages of busking guidelines, 14 pages of site maps and a six-page explanation of the whole busking regulation framework that has been published on the City of Sydney's website' (Moore 2011).

A wide range of restrictions and requirements are imposed. The following examples are specific to the LG area and the nature of the performance in question:

- auditions
- professional buskers only
- no amplification (and in one LG, no bagpipes)
- no animals
- no dangerous acts, and/or safety review, and/or public liability insurance
- rules prohibiting buskers from competing with other activities authorised by LG
- restrictions on the time of day or time spent in each location
- location restrictions.

#### Busking

	<i>LG</i>	<i>Instrument</i>	<i>Accessibility<sup>a</sup></i>	<i>Conditions<sup>b</sup></i>	<i>Fee<sup>c</sup></i>
NSW	Sydney	Interim policy and guidelines	High	Detailed	\$12
NSW	Woollahra	none	Not applicable	None	none
Vic	Melbourne	Policy, guidelines, fact sheet, permits (four types, one form)	High	Detailed	\$10
Vic	Port Phillip	Local law, guidelines, permit	High	Basic	\$57
Qld	Brisbane	Local laws, licence	Low	Basic	\$0
Qld	Gold Coast	Local law, guidelines, permit	Low	Detailed	\$78
WA	Perth	Local law, policy (not on web), permit	Low <sup>d</sup>	Detailed	\$72
SA	Adelaide	Guidelines, permit	Low <sup>d</sup>	Detailed	\$69
Tas	Hobart	Local law, licence	Low <sup>d</sup>	Basic	\$0
NT	Darwin	Policy, permit	Low <sup>d</sup>	Basic	\$225

<sup>a</sup> Accessibility refers to ease of access on LG websites and conditions written in plain English.

<sup>b</sup> Conditions over 1000 words are categorised as detailed, including more than 14 pages of guidelines in Melbourne, Sydney and Gold Coast. <sup>c</sup> Cost of three month permit (permits in Darwin are daily not monthly). <sup>d</sup> Permit form not available on the web, only over the counter.

Sources: LG websites.

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## 3.5 Transparency

The importance of regulatory transparency is reflected in the following statement by the OECD (2002):

Transparency's importance to the regulatory policy agency springs from the fact that it can address many of the causes of regulatory failures, such as regulatory capture and bias toward concentrated benefits, inadequate information in the public sector, rigidity, market uncertainty and inability to understand policy risk, and lack of accountability.

Transparency encourages the development of better policy options, and helps reduce the incidence and impact of arbitrary decisions in regulatory implementation. Transparency is also rightfully considered to be the sharpest sword in the war against corruption. (pp. 65–66)

Transparency issues are important for LGs particularly given their close proximity to local constituents. LG regulatory decisions must not only balance the requirements of business, but also the needs and aspirations of the local community and the wider intent of state and territory legislation. While there are many cases where business and community interests coincide, there are cases where these compete. Full and accessible information creates a level playing field, at least initially, so that anyone who is sufficiently motivated can navigate the system, know their responsibilities and defend their rights.

### Consultation and communication

One of the best methods of achieving transparency and accountability of regulatory process is to provide open and public access to information about processes, decisions and rules. Box 3.4 outlines the Council of Australian Governments' (COAG) principles for best practice consultation guidelines for Ministerial councils which can also be adapted by other regulators. The Commission endorses these principles.

#### *Publishing requirements*

The key to publishing requirements for local laws is that all laws must be accessible to the public. The manner in which they are published will influence the cost to businesses of identifying the legal requirements relevant to them. In most jurisdictions the only publishing requirement is that each LG keep a register of local laws that can be viewed and/or purchased at LG offices (table 3.11).

The expansion of web-based information is probably overdue for some LGs, but others have engaged with innovative and leading publication practices, such as

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Adelaide City Council with its dedicated internet portal for business (sub. DR43, p. 6).

**Box 3.4 COAG's principles of best practice consultation**

The Council of Australia Governments has outlined seven principles for best practice consultation for ministerial councils that can be adapted to LG. The principles are:

- *Continuity* — Consultation should be a continuous process that starts early in the policy development process.
- *Targeting* — Consultation should be widely based to ensure it captures the diversity of stakeholders affected by the proposed changes.
- *Appropriate timeliness* — Consultation should start when policy objectives and options are being identified. Throughout the consultation process stakeholders should be given sufficient time to provide considered responses.
- *Accessibility* — Stakeholder groups should be informed of proposed consultation, and be provided with information about proposals, via a range of means appropriate to those groups.
- *Transparency* — The objectives of the consultation process and the regulation policy framework within which consultations will take place should be clearly explained. Feedback should be provided on how consultation responses have been taken into consideration.
- *Consistency and flexibility* — Consistent consultation procedures can make it easier for stakeholders to participate. However, this must be balanced with the need for consultation arrangements to be designed to suit the circumstances of the particular proposal under consideration.
- *Evaluation and review* — Consultation processes should be evaluated and examined with a view to improving effectiveness.

Source: COAG (2007).

Another element of transparency is sufficient notification of new laws. In all jurisdictions, public notification and consultation is a legal requirement during the development of all local laws. This requirement includes advertisement of the local law and consideration of any submissions.

**LEADING PRACTICE 3.3**

*Publishing local laws on the internet improves the transparency of local government, whether the laws are published in a central register or on local websites. There is currently good use of web publishing for local laws across the jurisdictions. This could be made a legislative requirement if compliance or timeliness of publication became an issue in the future.*

**Table 3.11 Consultation on new laws and policies<sup>a</sup>**

	<i>Consultation requirement</i>	<i>Publishing requirement</i>	<i>Reference</i>
NSW	public notice; public exhibition for 28 days; consider all submissions; public notice of adoption of local policy	public inspection and/or purchase at the LG offices; rules published on LG's website	<i>Local Government Act 1993</i> , chapter 7 part 3; <i>Government Information (Public Access) Act 2009</i>
Vic	notice in the Government Gazette and public notice; consider all submissions; notice in the Government Gazette and public notice of adoption of new law	public inspection and/or purchase at the LG offices	<i>Local Government Act 1989</i> , part 5
Qld	LG may decide its own process for making a local law	public inspection at the LG offices; only new local laws require web publishing	<i>Local Government Act 2009</i> chapter 3, part 1
WA	State-wide and local public notice; consider all submissions; publish new law in the Gazette and give local public notice of new law	LG is to take reasonable steps to ensure that the inhabitants of the district are informed of the purpose and effect of all of its local laws	<i>Local Government Act 1995</i> , part 3, Division 2
SA	public exhibition, newspaper advertisement (and internet availability as far as reasonably practicable) 21 days prior; reasonable consideration to any written submissions; notice of the new law in a local newspaper	public inspection and/or purchase at the LG offices; laws published on LG's website	<i>Local Government Act 1999</i> chapter 12 part 1, chapter 8 part 5
Tas	notice of proposed law 21 days prior; consider all submissions; published in the <i>Gazette</i>	public inspection and/or purchase at the LG offices	<i>Local Government Act 1993</i> , Part 11
NT	proposed law available at office, on web and in newspaper 21 days prior; consider all submissions	public inspection and/or purchase at the LG offices; laws published on LG's website	<i>Local Government Act 2008</i> , part 13.1; ss. 190, 192

<sup>a</sup> For New South Wales, the information relates to statutory publishing requirement for local policies.

Sources: LG Acts.

### *Public registers*

Table 3.12 provides information on State government registers of local laws as well as their electronic accessibility. Queensland and Western Australia have comprehensive and searchable databases of local laws; while Tasmania and the Northern Territory list all local laws in one place (the small total number of local laws in these jurisdictions removes the need for a searchable database).

No jurisdiction has a broad requirement for all quasi-regulations in that jurisdiction to be listed on a publicly available register. This would seem appropriate given the high cost that would be involved in identifying and keeping a current list of every policy, guideline, code, permit, licence, registration, planning instrument and the

like. However, where the purpose of LG quasi-regulation is to provide guidance on how to comply with regulation (including explanations of the objectives and requirements of local laws in an informal way) it is important that they be accessible and published in the way that best facilitates this purpose.

**Table 3.12 Registers of local laws**

	<i>Common register</i>	<i>Comments</i>
NSW	No	LG can make policies and put conditions in licences and similar instruments. These are not published in a common register.
Vic	No	There is no database or single place local laws can be accessed.
Qld	Yes	The register of local laws includes 1500 subordinate local laws.
WA	Yes	All local laws are contained in a single, publically accessible database.
SA	No	There is no database or single place local laws can be accessed.
Tas	Yes	All local laws are listed on the LG department website.
NT	Yes	The legislation database has a separate list of by-laws, which also includes non-LG by-laws.

*Sources:* State and territory LG agency websites.

Generally, the commission considers it leading practice to make all quasi-regulation publically available if it provides guidance on how to comply with legal requirements. These quasi-regulatory instruments apply more broadly and are typically policies, guidelines, fact sheets and codes. They should be transparent and accessible, as local laws are, since businesses are required either to comply with them or at least consider them. The use of internet publishing should always be considered.

#### LEADING PRACTICE 3.4

*It is leading practice to make publicly available all quasi regulation that provides guidance on how to comply with legal requirements or how local governments will assess applications. These quasi regulatory instruments include policies, guidelines, fact sheets and codes.*

For specific instruments which are more in the nature of a contract between a LG and another party, such as permits, leases, contracts and licences, the costs of making the content of those decisions public is likely to outweigh the benefits. However, the LG still has a responsibility to ratepayers to demonstrate accountability to the community interest and this could be done by making public guidance as to the objectives and broad means that will be used in writing these specific agreements between two parties.

*The maintenance of a database of all local laws in each jurisdiction would help to facilitate the management of red tape and review of the stock of regulation. Such databases are maintained by Queensland and Western Australia. The practice of listing all laws on one webpage, as in Tasmania and the Northern Territory, is appropriate for jurisdictions that do not have many local laws in total.*

### **Open meetings**

Regular, formal meetings between LG and key stakeholders provide the opportunity for an open exchange of information, opinions and feedback on regulatory matters. Open LG meetings can be particularly valuable in enhancing the transparency of contentious and discretionary decisions and to gauge business and community support.

***As listed in table 3.13, LGs in all jurisdictions have statutory obligations under their LG Act to hold open council meetings.*** NSW also has a requirement that these meetings have to be held regularly and at least 10 times a year with each meeting being in a different month. Equally, in all jurisdictions except the Northern Territory, LGs have discretion to hold closed council meetings when the matter to be discussed is of a confidential or sensitive nature. In the Northern Territory, LGs do not have closed council meetings as such. Rather, LGs move to have a pre-determined confidential session at an open meeting. LGs in South Australia have a statutory obligation to report annually on the number of closed council meetings held during the preceding year.

### **Probity**

Allegations or perceptions of corruption affect community and business confidence that LG regulations are being administered objectively and in the best interests of society. Lack of confidence can lead to increased uncertainty for business, reduced voluntary compliance, increased litigation, and general unhappiness in local communities. The states and Northern Territory use a wide variety of measures to identify and prevent corruption. These processes are listed in appendix I.

Conflict of interest provisions are contained in LG Acts to guide councillors and LG staff in exercising their responsibilities in a manner that instils confidence in the community. These are listed in appendix I. Complaints may also be made to state and territory ombudsmen, who have jurisdiction to investigate actions of LG officials.



**Table 3.13 Requirements for open meetings in LG Acts**

<i>Jurisdiction</i>	<i>Description</i>
NSW	All council ordinary and extraordinary meetings are open to the public, unless grounds exist to close them as identified in the LG Act. Parts of council meetings may be closed to the public to discuss matters of a confidential nature referred to in the LG Act. Ordinary council meetings are held on a regular basis, as decided by the LG. Each council must meet at least ten times a year, with each meeting being in a different month (s. 365 of the LG Act).
Vic	General (ordinary) council meetings are open to the public. Each LG is required to make local laws regarding meeting procedures.
Qld	All Council meetings are open to the public, unless the LG or committee has resolved that the meeting is to be closed. This includes all LG meetings and all meetings of a LG committee. A meeting can be closed to discuss certain procedural or sensitive matters as defined in the LG Act.
WA	All Council meetings and all Committee meetings that have delegated power or duty from Council to make decisions are to be open to the public. LGs have the discretionary power to ensure other meetings are open to the public.
SA	A meeting of a council or its committee must be open to the public (LG Act s. 90) unless it is necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter in the instances listed in the LG Act. Each council is required to report annually on the number of 'closed' meetings it conducts during the preceding year.
Tas	Councils may close meeting for reasons listed in Regulation 15(2) of the <i>Local Government (Meeting Procedures) Regulations 2005</i> . Councils' committee meetings may be closed on the same basis.
NT	As a general rule, all meetings of a council or council committee must be open to the public unless the matter under consideration is classified as confidential according to the LG Act. Councils do not have confidential meetings. Instead, councils move to a pre-determined confidential session of the meeting and then after the confidential session is completed, the meeting is open again to the public.

*Source:* Productivity Commission survey of state governments (2011-12, unpublished).

In addition to these requirements and processes that support probity and good governance, the New South Wales Ombudsman has a memorandum of understanding with the NSW Department of Local Government (2003) to share information on complaints. The memorandum states:

Each agency will, where practicable, provide the other with monthly statistical details on the number of local government complaints received during the previous month, the issues complained of, which councils such complaints relate to and, as far as practicable, how they were disposed of.

#### LEADING PRACTICE 3.6

*The New South Wales Ombudsman has a memorandum of understanding with the NSW Department of Local Government to share information on complaints, the issues complained of, which local governments such complaints relate to and, as far as practicable, how complaints were disposed of. This practice supports probity and good governance.*

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## 3.6 Accountability

The accountability of LG is a complex issue. On the one hand, LGs are recognised by state and the Northern Territory governments as a distinct and important level of government with statutory responsibilities and a democratic mandate to act in the best interests of their communities. On the other hand, LGs are statutory bodies of state and North Territory parliaments and, as such, must be mindful of their regulatory obligations under LG Acts. Despite recent changes in LG legislation in many states, state governments still fully retain absolute power over LG.

### State government oversight of local regulations

LG laws and regulatory instruments undergo various levels of scrutiny when they are first created and after they are implemented. The nature of this scrutiny as it applies to different regulatory instruments is set out in table 3.14.

LGs in all states must lodge local laws with the state or territory department or parliament, and in most jurisdictions local laws are disallowable instruments. In Western Australia, the Governor may amend or repeal local laws and in Victoria he or she can revoke a local law on the recommendation of the Minister for Local Government.

Local laws and other LG regulatory instruments do not undergo as much scrutiny or assessment as state or Commonwealth laws. In particular, the regulatory policy practices developed by the Commonwealth and the States and the Northern Territory, such as regulatory impact assessment, though varied and imperfect, have generally not been duplicated at the LG level. Rather, the focus appears to be primarily on public consultation and ministerial assent.

Regulatory impact statements (RISs), which are required for Commonwealth and state and Northern Territory laws to ensure that the costs and benefits have been adequately considered, are only mandatory for local laws in Tasmania. While the Commission commends this approach, the cost of the regulatory assessment and the burden on LG should be carefully weighed against the potential adverse impact of the regulation before deciding what level of assessment is necessary for new LG regulation.

The benefits of post implementation review include identifying regulations or elements of regulations that are not working optimally, and improving the quality of future regulation by learning from past mistakes. Post implementation review is not required under legislation and is only conducted on an ad-hoc basis. At the Commonwealth level, a post implementation review is required for every regulation

that proceeded without an adequate regulatory impact statement (RIS) (PC 2011a, p. K.63). As most local laws do not require a RIS, this would suggest that a post-implementation requirement should, like a RIS requirement, only be applied where there are significant impacts that warrant doing so. Review of the stock of regulation, such as through red tape reduction programs or government inquiries, is a form of post-implementation review and is discussed in section 3.7.

Of the quasi-regulatory instruments identified in table 3.14, LG policies and conditions on permits, licenses, leases and registration receive the least scrutiny. Relative to other jurisdictions, New South Wales and Western Australia apply the most scrutiny to LG policies. In these latter jurisdictions and Tasmania, LG policies are subject to periodic review.

Given a lack of transparency and scrutiny, it has been impossible for the Commission to measure the nature and extent of quasi-regulation across the jurisdictions, or trends over time. However, anecdotal evidence suggests that quasi-regulation is increasingly being used by LGs in some jurisdictions. This may reflect, in part, advantages such as greater flexibility, or may, in some instances, reflect attempts by LG to avoid greater scrutiny.

**Table 3.14 State and Northern Territory government oversight of local government regulatory instruments**

<i>State government oversight</i>	<i>Lodge with state government</i>	<i>Public register</i>	<i>Disallowable instrument</i>	<i>Periodic review</i>	<i>Impact analysis</i>
<b>NSW</b>					
Local laws	..	..	..	..	..
Conditions on permits, licences <sup>a</sup>	✓ <sup>b</sup>	x	x	✓	x
Policies	(✓) <sup>c</sup>	x	x	✓	x
Enforceable planning instruments	✓	x	x	✓	x
Other — Orders	✓	x	x	x	x
<b>Vic</b>					
Local laws	✓	✓	x	✓	x
Conditions on permits, licences <sup>a</sup>	✓	x	x	x	x
Policies	x	x	x	x	x
Enforceable planning instruments	✓	✓	✓	x	x
<b>Qld</b>					
Local laws	✓	✓	✓	✓ <sup>d</sup>	✓ <sup>e</sup>
Conditions on permits, licences <sup>a</sup>	x	x	x	x	x
Policies	x	x	x	x	x
Enforceable planning instruments	x	x	x	x	✓
<b>WA</b>					
Local laws	✓	✓	✓	✓	✓
Conditions on permits, licences <sup>a</sup>	✓	x	x	✓	x
Policies	x <sup>f</sup>	✓	x	✓	x
Enforceable planning instruments	x <sup>g</sup>	✓	x	✓	x

(Continued next page)

Table 3.14 (continued)

<i>State government oversight</i>	<i>Lodge with state government</i>	<i>Public register</i>	<i>Disallowable instrument</i>	<i>Periodic review</i>	<i>Impact analysis</i>
<b>SA</b>					
Local laws	✓ <sup>h</sup>	✓	✓	✓ <sup>i</sup>	✓ <sup>j</sup>
Conditions on permits, licences <sup>a</sup>	x	x	x	x	x
Policies	x	x	x	x	x
Enforceable planning instruments	✓	✓	✓	✓ <sup>k</sup>	✓
<b>Tas</b>					
Local laws	✓	✓	✓	✓	jl
Conditions on permits, licences <sup>a</sup>	x <sup>m</sup>	x	✓	x	x
Policies	x	x	x	✓	x
Enforceable planning instruments	✓	x	x	x	x
<b>NT</b>					
Local laws	✓	✓	✓	x	x
Conditions on permits, licences <sup>a</sup>	..	..	..	..	..
Policies	..	..	..	..	..
Enforceable planning instruments	..	..	..	..	..

<sup>a</sup> Also includes conditions on leases or registrations. <sup>b</sup> Approval from the state government where relevant.

<sup>c</sup> No sunset clause applies however the *Local Government Act 2009* requires that a LG must regularly review the provisions of its local laws (including anti-competitive provisions, for example) with a view to ensuring the local laws are relevant to the public interest. <sup>c</sup> Local Orders Policies are not required to be lodged. Local Approvals Policies are only required to be lodged where they provide an exemption from approval. <sup>e</sup> Public Interest Test. <sup>f</sup> Certain classes of planning policies must be lodged with the Western Australian Planning Commission (WAPC). <sup>g</sup> Local planning schemes. <sup>h</sup> South Australian Parliament. <sup>i</sup> A local law expires on 1 January of the year following the year in which the 7<sup>th</sup> anniversary of the day on which the local law is made falls. <sup>j</sup> The LG Act requires that a LG avoid restricting competition to any significant degree unless it is satisfied that there is evidence that the benefits of restriction to the community outweigh the costs of restriction, and that the objectives of the local law can only be reasonably achieved by restriction.

<sup>k</sup> *Development Act 1993* (s. 30) requires that a LG prepare a Strategic Directions Report at least every five years which addresses appropriate amendments to its development plan. <sup>l</sup> Regulatory Impact Statement.

<sup>m</sup> Small minority. .. Not applicable.

Source: Productivity Commission survey of state governments (2011-12, unpublished).

The appropriate extent of external scrutiny of local regulations by state and the Northern Territory governments, beyond developing reporting and review framework, is not clear cut. In the making of local laws, LGs have a statutory mandate (determined by the state parliament) to act autonomously in the interest of their local community and are directly accountable to their local constituents. Statutory requirements for all regulations to be reviewed by state and Northern Territory governments, and potentially disallowable, could deny LG, at least in part, their democratic mandate and potentially lead to additional costs to LG.

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***Currently, all states require LGs to subject local laws to consultation during their development. Tasmania requires the same RIS process for LG regulations as applies at the state level. Notwithstanding Tasmania's approach, the Commission sees impact assessment commensurate with the potential impact of regulation as appropriate. An alternative would be an expanded use of model laws which have undergone regulatory impact assessment at the state or territory level (section 3.3).***

#### LEADING PRACTICE 3.7

*It is leading practice for local governments to conduct impact analysis for proposed local laws at a level commensurate with the likely size of impact of the proposals. While full regulation impact analysis or quantitative cost benefit analysis will often not be justified, some level of consultation with and opportunity for interested parties to consider and comment on proposals is almost always appropriate.*

In their submission to this study, the LG Association of South Australia says that RISs are not necessary, as local laws in South Australia, 'do not have a heavy regulatory impact on business' (LGASA, sub. DR55, p. 2) and this impact is generally related to activities on LG land and permits, such as for outdoor cafes. LGs across Australia spend more time implementing state and territory laws than their own laws (see chapter 4) so this may well be the case in other jurisdictions too.

The Queensland Government further notes that:

Most local governments would not currently have the ability or capacity to conduct such assessments. The development of tools to enable local government to conduct simple assessments would be essential. (sub. DR51, p. 2)

The Civil Contractors Federation, on the other hand, supports RISs being made mandatory for LG laws, as a way of strengthening LG reporting processes and reducing legislative duplication (sub. DR50, pp. 11–12).

***While all state governments, to varying degrees, have measures in place to scrutinise local laws, quasi-regulatory instruments generally undergo little or none of the same scrutiny. Given that the impact and effect of these instruments is variable, a leading practice would be to subject them to proportionate and periodic state oversight.***

#### LEADING PRACTICE 3.8

*Developing tools to help local governments undertake simple impact assessments would improve regulatory outcomes.*

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## Restricting competition

LGs are not permitted to enact anti-competitive regulation under the *Competition Principles Agreement* (COAG 1995). State governments use a variety of processes to monitor LGs to ensure that they are not restricting competition. These include annual (and other) reporting requirements, reviews and investigations.

Table 3.15 summarises the legislative provisions in LG Acts constraining the ability of LG to create laws that restrict competition. Victoria, Queensland, South Australia, Tasmania and the Northern Territory have express provisions in their LG Acts which prohibit LGs from creating local laws that restrict competition, except where that restriction satisfies a public interest test. New South Wales uses State guidelines to embed competition principles in LG quasi-law making.

**Table 3.15 Competition provisions in the local government Acts**

Refer to table 3.16 for competition requirements outside of LG Acts

LG Act reference		Comments
NSW		The LG Act does not address anti-competitive provisions in local orders and approvals policies. The LG Act and regulations do, however, contain tendering provisions which encourage competition and a level playing field between LG and private tenderers.
Vic	schedule 8	Laws cannot restrict competition except if a public interest test is satisfied.
Qld	ss. 29A, 29B, 38	LGs must not make laws with anti-competitive provisions except in accordance with procedure set out in regulation ( <i>Local Government (Beneficial Enterprises and Business Activities) Regulation 2010</i> ). The LG Act requires LGs to undertake a public interest test for each Local Law, which could also include a competition assessment. Finally, a restriction on competition must be notified when the law is notified.
WA		The LG Act does not address anti-competitive provisions in local laws.
SA	s. 247	Laws cannot restrict competition except if a public interest test is satisfied.
Tas	s. 150 (1)(da)	Laws cannot restrict competition except if a public interest test is satisfied. Competitive effects must be considered in the RIS process (LG Act s. 156A).
NT	s. 189(2)(c)	Laws cannot restrict competition except if a public interest test is satisfied.

Sources: LG Acts; Productivity Commission survey of state governments (2011-12, unpublished).

***Legislative provisions are not the only way of ensuring that competition related principles are applied in LG regulation and activities, and other processes and requirements put in place by state governments are summarised in table 3.16. However, given the importance of competition policy to the economy, the Commission supports legislative enactment of competition requirements, as well as enforcement of these requirements.***

## LEADING PRACTICE 3.9

*Consistent with the Competition Principles Agreement, local laws are assessed for anti-competitive effects and, if found to be anti-competitive, are subjected to an agreed public interest test in Queensland, Victoria, South Australia, Tasmania and the Northern Territory, under the relevant local government Acts. Similar assessments for quasi-regulation would further reduce potential adverse impacts of regulation on competition.*

**Table 3.16 Additional competition requirements**

Refer to table 3.15 for the competition requirements in LG Acts

NSW	<p>Policy Guidance: Guidelines outlining process for LG to comply with in regard to determining business activities and the required reporting: Pricing and Costing for Council Businesses — A Guide to Competitive Neutrality.</p> <p>Review: The Division of LG reviews any complaints received regarding LGs and their implementation of national competition policy, where that policy applies.</p> <p>Reporting: Legislative financial reporting requirements for LG activities which are deemed to be business activities.</p>
Vic	<p>Victorian LGs are required to submit, either through their Annual Report or to the Executive Director of Local Government Victoria, an annual certification of compliance with the National Competition Principles in line with the reporting guidelines set out by the Executive Director of Local Government Victoria.</p>
Qld	<p>Requirements are in the LG Act, table 3.16</p>
WA	<p>A confirmation certificate is to accompany a new local law when it is submitted to Parliament, and the Joint Standing Committee on delegated legislation scrutinises all regulations, local laws and subsidiary legislation subject to disallowance on behalf of the Parliament of Western Australia (Premier's Circular 2007/14 as amended 20/09/09).</p> <p>Investigations: The Department of Local Government is required to investigate all complaints made against LGs in respect to National Competition Policy matters.</p>
SA	<p>Each LG is required to include in its annual report information in relation to:</p> <ul style="list-style-type: none"> <li>• the commencement or cessation of significant business activities controlled by the agency</li> <li>• the competitive neutrality measure applied to each significant business activity controlled by the agency</li> <li>• the review and reform of local laws which restrict competition, including proposals for new local laws</li> <li>• complaints received alleging a breach of competitive neutrality principles by the agency</li> <li>• the structural reform of public monopolies.</li> </ul> <p>LG receive reports on compliance with the National Competition Principles before making local laws (sub. DR55, p. 2).</p>
Tas	<p>The Office of the Tasmanian Economic Regulator is responsible for conducting investigations and reviews into the pricing policies and practices of LG bodies that are monopoly, or near monopoly, suppliers of goods and services in Tasmania.</p>
NT	<p>Requirements are in the LG Act, table 3.15.</p>

Source: Productivity Commission survey of state governments (2011-12, unpublished).

Despite checks and balances in place, the Commission is aware of numerous instances where LG regulations have an anti-competitive effect. For example, at

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least some LGs in every state prohibit mobile food vans from trading within a certain distance of competing food businesses. These restrictions tend to be in permits and policies rather than local laws, which undergo more scrutiny. It is unclear whether these anti-competitive rules were subject to a public interest test at the time of their creation.

In some cases LGs have responsibility both to provide services and to regulate private providers providing the same services. This dual responsibility can cause a conflict of objectives and lead to anti-competitive behaviour. Examples include:

- mobile telecommunications carriers consider that LGs are not able to impartially fulfil the dual roles of (1) the consent or responsible planning authority for proposed development at a site and (2) the public land manager or owner of the land (MCF, sub. 14)
- both providing waste collection facilities and regulating those provided by the private sector
- both providing caravan parks and regulating those provided by the private sector
- LGs creating rules to stop mobile food vans competing with food kiosks which rent LG land
- rezoning and other planning decisions relating to LG land.

In some cases, these conflicting roles/objectives for LG are provided in state laws — for example, it is a state law that requires the LG to be the consent authority for mobile telecommunications infrastructure on LG land. In other cases, they are provided through local laws and quasi-regulations — for example, the local regulation of mobile food vans and caravan parks.

Some LGs engage independent planning consultants to assess development proposals where the LG has a property interest, such as Armidale Dumaresq Council in the mobile telecommunications example above (sub. DR49), which the Commission considers leading practice (chapter 12).

#### LEADING PRACTICE 3.10

*Where local governments have regulatory roles that may conflict with their own interests and it is impractical to resolve these conflicts, there is the potential for compromised decision-making and the neglect of competitive neutrality requirements. Arrangements designed to meet the specific circumstances can address risks and deliver appropriate transparency, conflict resolution and probity.*



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## Competitive Neutrality

At the Commonwealth level, the risk of anti-competitive behaviour as a result of dual and conflicting roles is reduced by the Competitive Neutrality Complaints Office, which investigates allegations that Australian Government businesses have competitive advantages over their private sector competitors. Similar arrangements exist at the state level to reduce anti-competitive behaviour in cases where it is not practical for the conflict to be resolved by removing one of the two conflicting objectives. Table 3.17 shows that only Victoria, Queensland, South Australia and Tasmania have enacted competitive neutrality principles in legislation.

**Table 3.17 Legislative competitive neutrality requirements for LG**

NSW	The Division of Local Government administers state policy and manages complaints and investigations. Competitive neutrality guidelines are available on the web.  There are also legislative financial reporting requirements for LG activities which are deemed to be business activities.
Vic	The Victorian Competition and Efficiency Commission (VCEC) has a competitive neutrality unit to investigate complaints, established under the <i>State Owned Enterprises (State body — Victorian Competition and Efficiency Commission) Order 2004</i> .
Qld	The competitive neutrality principle must be applied to significant business activities (LG Act, s. 47); LG authorities must establish a complaints mechanism (LG Act, s. 48); reporting of competitive neutrality complaints under <i>Local Government (Finance, Plans and Reporting) Regulation 2010</i> s. 119. <i>Local Government (Beneficial Enterprises and Business Activities) Regulation 2010</i> , Chapter 4 is about the code of competitive conduct for section 47 of the Act.
WA	Competitive neutrality requirements are not in the LG Act. Some details can be found in the Local Government Clause 7 Competition Policy Statement: application of the competition principles agreement to LG activities and functions under the national competition policy package.
SA	Competitive neutrality principles are set out in the <i>Government Business Enterprises (Competition) Act 1996</i> . Each council is required to include in its annual report information in relation to the commencement or cessation of significant business activities controlled by the agency and the competitive neutrality measure applied to each significant business activity controlled by the agency.
Tas	Enterprise powers must be exercised following the competitive neutrality principles in the national agreement; competitive neutrality costs must be reported in council financial statements (LG Act, ss. 21, 36, 84).
NT	Competitive neutrality requirements are not in the LG Act given the limited activities that LGs regulate.

*Sources:* LG Acts; NSW Government (pers. comm., 19 March 2012); Victorian Government (pers. comm., 21 March 2012); WA Government (pers. comm., 16 March 2012); NT Government (pers. comm., 20 March 2012).

Competitive neutrality policies aim to promote efficient competition between public and private businesses by seeking to ensure that government businesses do not enjoy competitive advantages over their private sector competitors simply by virtue of their public sector ownership (COAG 1995). Competitive neutrality principles

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can be found in the *Competition Principles Agreement 1995* between the Commonwealth and States. According to this agreement (section 7):

The principles set out in this Agreement will apply to local government, even though local governments are not Parties to this Agreement. Each State and Territory Party is responsible for applying those principles to local government.

### 3.7 Reviewing the stock of local government regulation

Even laws that are well designed may need review as they can: have unintended consequences; be amended to the point that they are difficult to understand; or become less effective or irrelevant given changes in technology and economic and social conditions. Laws that are difficult to understand and apply increase the regulatory burden on business through uncertainty which can increase compliance and litigation costs.

Table 3.18 provides information on the types of reviews of LG regulatory instruments conducted by state and Northern Territory governments.

**Table 3.18 State and territory review of local laws**

	<i>NSW<sup>a</sup></i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>
Red tape reduction programs	✓	✓	✓	✗	✓	✗	✗
Performance audits	✓	✓	✗	✗	✗	✓	✗
State or territory-initiated review or inquiry	✓	✓	✓	✓	✓	✓	✗

<sup>a</sup> Review of other regulatory instruments is considered in table 3.13.

Source: Productivity Commission survey of state governments (2011-12, unpublished).

One difficulty faced in a federal system is the interaction of laws made by different levels of government. Previously, the Commission has indicated that, ‘broad stocktakes provide one of the few mechanisms with potential to identify where the interaction of regulations (across agencies, sectors and jurisdictions) imposes particular regulatory burdens’ (PC 2011a, p. xxvii). However, even within a single level of government, inconsistency can be introduced by laws designed to deal with a specific problem when they interact with other laws in ways that were not fully considered.

... new legislation does not always consider all other existing legislation which may directly or indirectly impact the intended outcome. For example, a 2010 review of legislation affecting student rental accommodation in Brisbane identified inconsistencies between fire regulations, rental regulations and boarding house regulations, all of which were introduced at different times and to address different objectives. (Brisbane City Council, sub. 26, p. 7)

Systematic review processes are a complement to rigorous ex ante scrutiny of new proposals. Across the jurisdictions, up until recently, most regulatory reviews or red tape reduction programs have been focused on state regulation; while reviews of LG have focused on the efficiency of the LG itself, rather than the impact of regulations on businesses and others and how those regulations could be streamlined, which is the focus of this report. Recent regulatory reviews undertaken across the jurisdictions are listed in table 3.19.

**Table 3.19 Recent regulatory reviews**

NSW	IPART 2006, <i>Investigation into the Burden of Regulation in NSW and Improving Regulatory Efficiency</i> — one recommendation relates to LG.
Vic	Victorian Competition and Efficiency Commission (VCEC) 2010, <i>Local Government for a Better Victoria: An Inquiry into Streamlining Local Government Regulation</i> , Draft Report. VCEC 2011, <i>An inquiry into Victoria's Regulatory Framework: Part 2 — Priorities for Regulatory Reform</i> , Draft Report.
Qld	Department of Infrastructure and Planning 2011, <i>Review of Local Government Statutes</i> . Department of Environment and Resource Management 2012, A Greentape Reduction project to provide a streamlined regulatory process for environmental approvals (LGAQ, sub. 6).
WA	Red Tape Reduction Group 2009, <i>Reducing the Burden</i> , final report — one chapter dedicated to LG issues.
SA	Department of the Premier and Cabinet 2009, pilot program to extend the State government's red tape reduction program to a pilot program for LG.
Tas	Review into councillor numbers 2012. Review of valuations and local government rating 2011-12. Sustainability objectives and indicators project 2011-12. Financial analysis of the voluntary merger of the Glamorgan Spring Bay Council and Break O'Day Council 2009-10.
NT	None.

Source: PC (2011a).

Notably, South Australia has a pilot program including LG in its state government red tape reduction program (Economic Development Board SA 2012). LGs involved in the pilot are sharing information on current initiatives and being given the opportunity to develop feasibility studies and implementation strategies for new red tape reduction programs. A key focus area has been greater use of online technology for applications and payments to reduce the need for paper based processing.

Adelaide City Council (sub. DR43) is part of this pilot program and has conducted other internal reviews, leading to several initiatives including:

- a trial of a new and easy application process to allow business to test an idea (the Splash Adelaide program, box 3.5)
- a single point of contact and case management for businesses that have to deal with multiple areas of council, in recognition of the difficulty businesses

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sometimes face in accessing and using information (this is still in planning stages)

- surveys, focus groups and feedback from business customers to investigate a council service, including regulatory services (for example, development assessments or food inspections) and improve it.

#### **Box 3.5      Cutting red tape to facilitate business innovation**

Adelaide City Council has trialled a program, 'Splash Adelaide', to cut red tape and allow businesses to test new ideas. Key elements of the program include:

- one-page permit forms
- no fee associated with the permit
- response to the permit application in 2–3 business days
- council delegation of decision-making authority to the CEO, thus bypassing both council and internal processes, but allowing proper health and safety checks to be made.

Experiments under the program have included:

- extended outdoor dining areas or footpath lounges
- encouraging food carts in new locations around the city
- street parties and road closures to create more people space
- plazas popping up in underused spaces, streets and squares
- new ways to experience the streets — deck chairs, table tennis tables, outdoor cinemas, markets and more.

*Source:* Adelaide City Council (sub. DR43).

Victoria is the only jurisdiction in which a study particularly focused on streamlining LG regulations has been undertaken. The draft report for this study, *Local Government for a Better Victoria*, covers regulations administered by LG on business, and inconsistencies between LGs in regulation and in practices for their administration and options for streamlining and harmonising between LGs (VCEC 2010). While VCEC presented its final report to Government in August 2010, it is yet to be released publicly.

The Red Tape Reduction Group report (2010) contained a chapter on LG issues. A key finding in that report was that the regulatory burden of quasi-regulation exceeded that of black letter law primarily as a result of the lack of transparency surrounding how it is created, administered and reviewed.

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None of the jurisdictions have a legislative requirement for an independent post-implementation review of all local laws, or any independent (arms-length) review for LG regulations generally.

***Until recently, most of the jurisdictions' red tape reduction programs have been focused on state regulation. South Australia has extended these programs to LG regulation in a pilot program and the Commission considers this to be leading practice.***

#### LEADING PRACTICE 3.11

*Local government reporting requirements and periodic reviews of regulation undertaken for state or territory governments can help to ensure that: local rules and regulations do not cause unintended consequences and do not overlap with other regulation; and, at a minimum, the benefits created outweigh the costs imposed, including costs to business. Examples include the Victorian Competition and Efficiency Commission's review of local government regulation and Western Australia's inclusion of local government in its state-wide red tape review.*

#### LEADING PRACTICE 3.12

*Until recently, most of the jurisdictions' red tape reduction programs have been focused on state regulation. South Australia has recently piloted the extension of these programs to local government regulation and assessing the case for this wider coverage may find significant benefits.*

## Sunsetting

Sunsetting, whereby laws are deemed to lapse after a certain period of time unless they are renewed, usually requires a review before the law can be re-enacted. Many regulations have a 'use by date' when they are no longer needed or require significant modification (PC 2011a). Table 3.20 provides information on the extent and nature of sunseting provisions across the jurisdictions.

While sunseting provisions can perform a useful function, the Commission understands that they could have the potential to substantially increase workloads for LG. In particular, for sunseting to be effective and where LGs do not want the regulation to lapse, laws must be remade; and, in general, it must meet the same procedural requirements as new laws. In addition, businesses and other stakeholders require sufficient warning of sunseting legislation and review to coordinate their efforts and participate effectively in consultation processes. If LGs have substantial numbers of local laws, there is a risk that regulation could be remade without adequate scrutiny.

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**Table 3.20 Sunsetting of local laws**

	<i>Reviewer</i>	<i>Comments</i>
NSW	No sunset	
Vic	LG	Local laws have a 10 year sunset under the LG Act.
Qld	No sunset	LGs subject to amalgamation in 2008 were required to review local laws by the end of 2011.
WA	No sunset	LGs are required to review their own laws (LG Act s. 3.16).
SA	LG	Local laws are reviewed by each LG and put out to public consultation. The LG monitors expiry rather than the State government.
Tas	LG	If LGs don't re-enact a reviewed local law, the local law expires after ten years automatically. LG policies sunset after five years.
NT	No sunset	

*Source:* Productivity Commission survey of state governments (2011-12, unpublished).

Sunset requirements are one way to address concerns about redundant or increasingly inappropriate regulation, provided that LGs have the resources and capacity to remake local laws while giving businesses and other stakeholders sufficient warning to coordinate their efforts and participate effectively in consultation processes.

#### LEADING PRACTICE 3.13

*Keeping a watching brief on the aggregate number and content of local laws and licensing/registration requirements would enable state and territory governments to regularly assess, say every ten years, whether existing instruments are relevant and to identify a subset that warrants further review.*

## 3.8 Complaints and appeals

Under the regulatory powers delegated by state or territory government, LGs can impose requirements, restrictions, conditions, fees and penalties on businesses, or even prevent a business from operating. In the event that administrators inadvertently or incorrectly impose costs on business, it is important that businesses have access to well-defined dispute handling processes that allow complaints and grievances to be considered in an objective and timely manner. Complaints and appeals mechanisms can also be constructive for LG as they provide opportunities to review decision making procedures and identify areas for improvement.

### Formal judicial appeals

Most LG Acts contain provisions relating to appeals paths for LG decisions. Administrative decisions made by LG — such as the decision to grant a licence,

approve a development or impose a penalty — can be appealed in the courts under administrative law. In responses to the Commission’s survey of state governments, the states and Northern Territory have indicated the forums available to challenge a LG administrative decision and these are provided in table 3.21.

**Table 3.21 Appeal paths available**  
As indicated by state and territory governments

	<i>Internal review</i>	<i>Mediation</i>	<i>Independent merits review</i>	<i>Judicial review<sup>a</sup></i>
NSW	✓	Court may order	<ul style="list-style-type: none"> <li>• Land and Environment Court</li> <li>• Minister</li> <li>• Office of the Information Commissioner</li> <li>• Administrative Decisions Tribunal</li> </ul>	Land and Environment Court NSW Supreme Court
Vic	✗	Court may order	<ul style="list-style-type: none"> <li>• Minister</li> <li>• Victorian Civil and Administrative Tribunal</li> </ul>	Supreme Court of Victoria
Qld	✓	Court may order	<ul style="list-style-type: none"> <li>• Minister may revoke unsound decisions</li> <li>• Planning and Environment Court</li> </ul>	Supreme Court
WA	✓ <sup>b</sup>	Court may order	<ul style="list-style-type: none"> <li>• WA Planning Commission</li> <li>• Minister</li> <li>• State Administrative Tribunal</li> </ul>	Supreme Court of Western Australia
SA	✓	Compulsory	<ul style="list-style-type: none"> <li>• Environment, Resources and Development Court</li> <li>• Development Assessment Commission</li> </ul>	Supreme Court of South Australia
Tas	✓	Compulsory	<ul style="list-style-type: none"> <li>• Resource Management and Planning Appeal Tribunal</li> <li>• Building Appeal Board</li> <li>• Tasmanian Planning Commission</li> <li>• Building Appeal Board</li> </ul>	Supreme Court of Tasmania
NT <sup>c</sup>	✓	Court may order	<ul style="list-style-type: none"> <li>• LG Tribunal</li> </ul>	Supreme Court of the Northern Territory

<sup>a</sup> No merits review available: applicant can only appeal on procedural fairness or a question of law.

<sup>b</sup> Independent Planning Reviewer has review and advice powers only; Decisions on subdivision applications may be reviewed internally. <sup>c</sup> LGs in the Northern Territory do not have any regulatory responsibilities with regards to planning approvals, which is the most significant subject of appeals in other jurisdictions. In 2010-11, there were only 8 cases involving LGs heard in courts or tribunals in the Northern Territory, compared to thousands in some jurisdictions.

Source: Productivity Commission survey of state governments (2011-12, unpublished).

External judicial appeals processes allow a dispute regarding a regulatory decision to be lodged with, and resolved by, an independent body. However, these can be highly formal and expensive for all parties and the resolution timeframes can be considerable. Even tribunals like VCAT, which try to be more accessible, have a judicial basis and generally function like a lower-tier court. In addition, judicial appeals can only really be effective in dealing with errors in final decisions

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(whether of procedure or substance) rather than misconduct relating to actions arising prior to the final decision being made.

## **Complaints and non-judicial appeals**

***As an alternative to external dispute resolution, internal reviews can provide a less formal, cheaper and faster dispute handling process for LG and business.***

LG internal reviews are already part of the appeals path in most jurisdictions. Internal reviews are generally conducted by another, often more senior, administrative officer. The Commission is of the view that this can be an effective approach for resolving business concerns that their case was not considered properly.

In Brisbane City Council, informal appeals to a more senior officer, or formal internal appeal under legislated processes are available. Additionally, Brisbane City Council has advisory panels made up of council officers and industry representatives, which can review and provide qualitative advice on complex or controversial matters referred to them by either the assessing officer or original decision maker.

There is often a misperception by certain businesses that particular advisory panels are in essence a de-facto decision making body, and as such attempt to consult and deal directly with advisory panel members in relation to an existing or proposed matter. By by-passing the normal assessment and decision making process, businesses believed they could expedite and obtain a decision in a more timely and cost effective manner. This circumvention of the normal process actually resulted in additional, and sometimes unnecessary, costs being incurred by Council, which is not always recovered through fees and charges. (Brisbane City Council, pers. comm., 2 June 2012)

***Internal review processes could be extended to include an automatic internal review in certain cases.*** One suggestion put to the Commission by Greg Hoffman (LG Association of Queensland) was that decisions not made within a certain timeframe could be referred to another individual or group within council. This would provide an alternative to deemed decisions, automatic referral to less flexible forums such as state tribunals, or the establishment of new appeal bodies.

Avoiding disputes is often a lower cost option than resolving them after they arise, and sometimes only requires appropriate and timely information on the progress of an application or other matter. For example, LG could tell applicants where a delay may be caused by circumstances outside LG control (such as referrals to other regulators). This has recently been implemented in Adelaide City Council, where automated emails are sent when a development application passes each stage of the



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approval process (sub. DR43, p. 4). Providing appropriate and timely information on the progress of an application or other matter is likely to reduce complaints and disputes regarding timeliness. For example, LG could explain the cause of delay to the business when a development application has been referred to another agency and not returned on time.

Over the course of this study, businesses have raised concerns about compliance costs associated with LG actions which extend beyond the actual decision made to delays and other matters which occur during the process of obtaining a decision. Most review mechanisms, formal and informal, are not available for problems that arise in the process as they require a decision before they will hear an appeal.

In their submission to this study, the Small Business Development Corporation (SBDC) stated:

The SBDC Advocacy Service frequently deals with complaints from small business operators who have encountered what they perceive as poor customer service or a general anti-business approach by local governments to processes, timeliness of service and communication. Small businesses often report finding local governments inflexible and having an attitude of strict compliance rather than assistance ... These concerns echo the RTRG [Red Tape Reduction Group] reports' finding that the performance of government agencies was generally not conducive to supporting the growth and development of small business in Western Australia...

Lack of flexibility and the pedantic bloody-mindedness of some local governments have the potential to stifle small business growth and cost prospective business operators significant amounts of money. (sub. 29, p. 12)

As an illustrative example, the SBDC provided a case study of unfair LG actions and procedures and this is replicated in box 3.6.

In other submissions to this study, businesses raised concerns about the implications for the relationship between a business and the LG if the business pursues external appeals or internal review mechanisms or lodges a formal complaint about LG processes. In this context the NSW Small Business Commissioner stated:

A significant concern for business is that if an applicant appeals a decision or seeks to make a formal complaint there is fear of retribution and that future applications will not be fairly treated. There is not currently an effective mechanism through which applicants feel they can receive a fair hearing about the assessment of their application. If local councils knew that a third party could actively review their decision-making processes, this may provide an incentive to council assessors to ensure that assessment processes are in fact fair and equitable. (sub. 18, pp. 2–3)

Outside of the courts, external review mechanisms currently available to businesses to review LG decisions and/or matters of procedural fairness include: the State and Northern Territory Ombudsmen; Small Business Commissioners; and in some

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regulatory areas, more specialised agencies, such as Queensland's Building and Development Dispute Resolution Committee.

**Box 3.6 Case study of unfair LG actions and procedures**

In their submission to this study, the Small Business Development Corporation provided the following case study:

The Small Business Development Corporation Advocacy Service assisted a client who wanted to start a daytime kennel for dogs. According to the client, all required paperwork was submitted to the local council in the correct format and manner. The local government advised the client informally that the council had reservations about the business, but assessed the application as per the standard procedures.

However, the client's application was refused in the first instance as the local government required noise and waste surveys. In line with this, the client engaged specialist consultants to conduct the surveys and provided full reports on re-submission of the application. The client also provided examples from similar businesses in Western Australia and across Australia.

The business application was refused on a second occasion, this time due to a lack of parking at the premises. In reply, the client made modifications to the physical layout of the business to address the local government's requirement regarding parking.

The application was then refused a third time, the reason cited being a lack of suitable landscaping. While the proposed business site was a vacant lot, the local government required landscaping improvements (including specifying the inclusion of mature tree planting) at a cost of \$20 000.

Unfortunately, due to the hurdles encountered, and lack of common-sense demonstrated by the local government, and despite the assistance of the SBDC Advisory Service, the client withdrew the business application, citing the large financial outlay and amount of time already spent on the whole process as dooming the business proposal before it even got off the ground.

*Source:* Small Business Development Corporation (sub. 29, p. 13).

## **State Ombudsman**

Each state has an Ombudsman with jurisdiction to investigate the legality and reasonableness of administrative actions of LG.

Ombudsman can both address a broader range of matters, including those relating to procedural fairness, and provide timely and less expensive resolutions. However, they cannot place themselves in the shoes of the original decision maker and assess the merits of a decision. In most jurisdictions, the Ombudsman would prefer complaints to have been raised directly with LG and will make preliminary inquiries with LG prior to initiating a full investigation.

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## Small Business Commissioners

Internal appeals are very useful, however, businesses sometimes require an independent arbiter to address systemic issues or claims of unfairness. Allowing Small Business Commissioners (SBCs) to fill this role would avoid the creation of a new agency in most cases. While they should not become a new path of appeal for any LG decision, SBCs can play an important role in changing LG culture through providing information on business perspectives to LG, and identifying regulatory pressure points through pursuing complaints (NSW Small Business Commissioner, sub. DR44). They can also help small business understand and navigate LG. If effective, SBCs can reduce the cost to business of regulation. Case studies of SBC functions are provided in box 3.7.

In the last two years, each jurisdiction except Tasmania and the Northern Territory has appointed a Small Business or Business Commissioner (table 3.23). The Australian Government has recently indicated its intention to do so in the second half of 2012 (J. Gillard (Prime Minister) 2012).

Across the jurisdictions, SBCs have been appointed for a variety of purposes. In New South Wales, Western Australia and South Australia, SBCs do not provide a review of the merits of LG decisions, but rather mediate between small businesses and LGs to address business concerns with how they have been treated and whether the processes and laws are fair and appropriate, both in regard to the case at hand and more generally. In contrast, the Victorian SBC focuses on mediating between businesses (a very small percentage of its work is mediating between business and LG), and the Queensland Business Commissioner is not involved in mediation but liaises between business and government on red tape.

One element of the success of SBCs is that they can act on behalf of a group of businesses so that individual businesses remain anonymous in the mediation process. This can allay the concerns of business that making a complaint will jeopardize their relationship with the LG.

In Western Australia, the SBC is also the chief executive officer of the SBDC which is an independent statutory agency established to facilitate the development and growth of businesses and liaise between government and business. In its submission to this study, the SBDC noted:

Anecdotally, it has been reported back to the SBDC that local governments appear to expedite matters after the SBDC Advisory Service becomes involved and advocated on behalf of a particular small business operator. (sub. 29, p. 13)

In Western Australia, the SBC does not have formal powers to compel attendance which may make it difficult to engage with the large number of LGs in Western

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### Box 3.7      **Small Business Commissioner case studies**

#### **Case Study 1: Informal resolution of a complaint about a LG**

A small business owner wanted to place a small A-frame advertising sign on the footpath outside his shopfront; however, the Council approval process for signage was unnecessarily complex and required the small business owner to submit a complete Development Application.

The SBC contacted the Council on behalf of the small business owner to discuss the matter and the implications on small businesses in the local area. The General Manager was very concerned to hear that council processes were placing additional burdens on small businesses, and immediately agreed to review the process.

#### **Case Study 2: Formal mediation of a dispute between LG and a small business**

A small business owner was experiencing ongoing difficulties with a local council due to systemic, unresolved issues which were being exacerbated by both parties.

The SBC contacted the local council to investigate the complaint and to obtain further information about the dispute. It was evident that while both parties wanted to reach an outcome that would finally resolve the ongoing issues, it was impossible for them to come to such an arrangement without the assistance of an independent body to facilitate their discussions.

Both parties agreed to participate in formal mediation undertaken by an experienced mediator. This process resulted in a formal, written agreement being reached by both parties which resolved the dispute.

#### **Case Study 3: Advocacy support for complaints about state and LG regulation**

A small business owner contacted the SBC about regulations for mobile food vendors which were imposing significant costs and limiting growth.

The SBC is now working closely with the NSW Food Authority to try to minimise the burden on small business operators. The SBC also provides formal feedback on behalf of small businesses through my role as a member of the Food Regulation Forum, convened by the NSW Food Authority.

That small business operator is now a member of the Retail and Food Advisory Group, also convened by the NSW Food Authority, which allows industry and LG to discuss issues in a consultative way.

*Source:* NSW Small Business Commissioner (sub. DR44).

Australia; however, this was a deliberate choice to preserve simplicity of approach and minimise overlap with the formal judicial system. Unlike VCAT, the Western Australian State Administrative Tribunal does not have jurisdiction to hear complaints of business against LG, so the SBC has an important role filling this gap.

*Most SBCs have only been established recently so it is difficult to gauge the effectiveness of their legislation (table 3.22). However the Commission considers SBCs to be a cost-effective way of improving LG rules and processes that affect business, thus reducing the regulatory burden.*

*Some SBC Acts include legal powers to compel information or assistance (Victoria and South Australia) but none has gone as far as requiring attendance and good faith engagement of parties. Such powers, if available, are likely to be used only as a last resort, as has been the case so far for compelling information; however, their mere presence can encourage cooperation.*

**Table 3.22 Small Business Commissioner legislation**

	<i>Legislation</i>	<i>Comment</i>
NSW	currently being drafted	It is intended that this legislation will include the necessary authority to assist small businesses when they are dealt with unfairly by other businesses or government agencies.
Vic	<i>Small Business Commissioner Act 2003</i>	Victoria's SBC Act is the oldest and formed the basis of legislation in other jurisdictions. Functions include mediation between businesses, and providing information, helping government agencies serve small businesses better through guiding and monitoring the creation and implementation of small business service charters, but do not include an appeals or mediation role between small business and government (s. 5). The SBC has power to request assistance or information from any public entity (s. 10), but not power to compel.
Qld	none	The Business Commissioner is focused on identifying red tape constraining business and liaising between government and business. It does not have a dispute resolution role.
WA	<i>Small Business Development Corporation Act 1983</i> as recently amended	Alternative dispute resolution is a key function of the SBC. Other roles include investigating complaints against other businesses or government agencies, representing small businesses and advising the minister (s. 14A). The role is supported by the SBDC. Alternative dispute resolution is confidential unless relating to unlawful conduct (s. 15I); lawyers may attend but the facilitator can talk to parties without them (s. 15H). The SBC does not have powers to compel attendance or access to information.
SA	<i>Small Business Commissioner Act 2011</i>	The key difference in South Australia is that the SBC can request the Minister to declare mandatory industry codes with enforceable penalties. However, at this point there have been no codes declared or enforced. Functions of the SBC include assisting small business with complaints, mediation and information (s. 5). The SBC has the power to require information (s. 12). The confidentiality of that information is preserved except during later legal proceedings (s. 13).

Sources: SBC legislation; Small Business Commissioner NSW (2011); Nolan (Media Release, June 15, 2011).

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One incentive used in Victoria to encourage attendance and engagement with mediation processes is that refusal to attend could lead to the costs of the case being awarded to the other side should the matter proceed to VCAT. However, this does not prevent a significant number of applications to the SBC failing to generate engagement from the respondent. Since 2003, 80 per cent of disputes that have proceeded to mediation have been resolved (Office of the Victorian Small Business Commissioner, 2011).

LEADING PRACTICE 3.14

*Having a graduated review and appeal system available for matters relating to local government decisions and procedures provides a way for affected parties to obtain ‘natural justice’ (procedural fairness) and a merits review (a review of the outcome of the decision), while also reducing costs and formalities.*

*Augmenting appeal paths with internal review mechanisms, such as are already in place for local government decisions in most jurisdictions, is likely to reduce costs for business.*

LEADING PRACTICE 3.15

*Enabling Small Business Commissioners to:*

- *have a mediating role between local government and businesses, as they do in New South Wales, South Australia and Western Australia*
- *investigate systemic issues raised through complaints*

*would provide business with a path of redress that is less formal, time-consuming and expensive than judicial appeals but more independent than an internal review.*

## **3.9 Subsidiarity**

This study has highlighted the substantial number of state Acts and associated legislation which require LGs to undertake regulatory responsibilities on their behalf. In the delegation of these responsibilities, and in LG law making, a key issue is which level of government is likely to be the most effective and efficient regulator.

Subsidiarity is generally defined as the principle that decisions should be made by the lowest level of government capable of properly doing so (PC 2011b). The subsidiarity principle would suggest that smaller LGs have specific knowledge and expertise relevant to regulatory activities, such as development approvals, and can

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use that knowledge to assess the competing interests at stake at a lower cost, thus maximising the net welfare of the local community.

A decision becomes unsuited to local determination (and more suitable for, say, state determination) when the effects of the decision are felt outside the area governed by that particular body. In these cases, the local body tends to act in the interest of its constituents even when negative consequences for other parties are ‘over-produced’ or positive outcomes are ‘under-produced’. For example, they may allow housing development to place additional stress on public transport, reducing the facilities available to communities elsewhere or resist an airport being built to reduce noise levels for the local community while not taking into account the broader benefits to the whole city.

In addition, the costs associated with a regulatory activity may extend over a different area (or group of residents) than the benefits derived from a project (such as in the case of a waste disposal facility or public access to a beach). Alternatively, the costs of regulation activities may be so high that their effective delivery by LG is compromised or inefficient. This is likely to be the case for compliance and monitoring activities which extend to remote areas with small populations; or involve sophisticated technical expertise that is only utilised infrequently (for example, to inspect the safety of complex resources processing developments).

In practice, a workable option is for state governments to consider the spread of the costs and benefits for the issue or project in question and then determine which level of government is best positioned to make inclusive and objective assessments. In some cases, it may be appropriate for state governments to create separate regional bodies with regulatory responsibilities which cross LG boundaries. Box 3.8 provides a case study of the benefits to regional management of water catchments. In other cases, groupings or coordination of existing LGs may be appropriate, such as Regional Organisation of Councils in New South Wales. These issues are examined further in chapter 5.

### Box 3.8 Management of water catchments

A classic example where subsidiarity is a central issue is management of water catchments. Activities in catchment areas, such as the use of pesticides in farming or development leading to soil erosion, affect drinking water, but the full costs and benefits are not incurred in the same geographic area. For example, rural communities may bear the cost of ensuring unpolluted and undisturbed runoff areas, while city areas receive the benefit of clean water. The benefit to the city more than outweighs the cost to the rural community, but unless there is some forum or mechanism for a transfer of that benefit, it would not be in the interest of the rural community to maintain the catchment area. The difficulty of finding a private solution is a result of a combination of several things:

- *Externalities*: decisions relating to catchment land are not controlled by the people who are affected by those decisions.
- *Transaction costs*: it is difficult to organise such a large number of beneficiaries to contribute a very small payment each and then distribute that payment fairly (which does not mean equally, but according to effort required and undertaken) to those in charge of catchment land (the fee could be levied on water use to address the contribution issue, but not distribution issue).
- *Free riding*: the benefit is shared equally and it is difficult to exclude those who don't contribute from benefiting, thus creating an incentive not to pay (in this case, the fee could be levied on water use to solve this problem).
- *Asymmetry of information*: there is no market for the open distribution of information about the cost of water management strategies on particular areas of land.

The most commonly used solution is to create state funded catchment management authorities to be responsible for an entire catchment area, and this has occurred in most states, for example New South Wales.

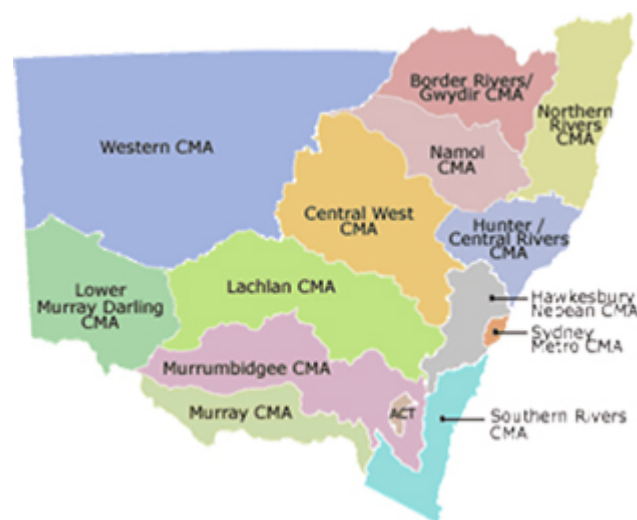


Image source: Catchment Management Authorities NSW (2012).



*While the principle of subsidiarity suggests that local government is likely to be the most effective and efficient regulation maker for local issues, when impacts extend beyond the local government area, higher-level decision making — such as by a state, territory or regional body — is more likely to deliver an overall net benefit to the community.*

*It may be appropriate for state or territory governments to use separate regional bodies with well-defined regulatory responsibilities which cross local government boundaries. Planning panels, inter-council coordination organisations and catchment management authorities provide examples with differing degrees of effectiveness across the jurisdictions.*

### **3.10 Harmonisation**

In the delegation of local law making powers to LG, a tension exists between the benefits of allowing LG to flexibly tailor regulatory responses to the needs and circumstances of local communities — as long as impacts can be confined to the local area — and the compliance costs to businesses associated with variations both across and within jurisdictions. Significant differences in the content and enforcement of regulations can impose high transaction and compliance costs on industries which typically operate in multiple geographic locations, such as property developments.

Participants to this study have highlighted advantages and disadvantages both to variation and harmonisation of local laws across LGs. Examples of costly differences were provided by the Civil Contractors Federation:

- Anecdotally, over 60 different general conditions of contract
- Again anecdotally more than 100 different profiles for kerbs and channel construction
- Councils requiring higher levels of materials or construction than that contained in a relevant Australian standard
- Different standards of construction for roadworks in like foundation conditions
- Differing levels of allocation of risk to the contractor across the sector for like projects. (sub. DR50, p. 12)

The New South Wales Farmers Association has provided the following arguments against providing LGs in that jurisdiction with a regulation making power:

The cost implication upon local government should it have regulation making power.

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It can have adverse implications for farm productivity and efficiency, due to duplication of regulation.

The likely increased antagonistic tension between local government and rate payers caused by local regulation.

A commensurate reduction in the concentration of local government upon core responsibilities of efficiently providing services to the local rate paying community. (sub. 23, p. 2)

Alternatively, the Local Government Association of Queensland has warned against a ‘one-size-fits-all’ approach in harmonising LG regulations stating that:

While consistency in local laws would be desirable for businesses operating state-wide, this might result in over-regulation in some situations if a standard model law was applied. (sub. 6, p. 4)

Adelaide City Council have indicated a view that harmonising state laws would be more effective given that most of the regulatory effort of LG is in enforcing state and territory laws rather than local laws (sub. DR43).

The Victorian (box 3.9) and New South Wales Governments have advised the Commission of programs to improve the consistency of food regulation by LGs.

The NSW Food Authority has established a dedicated Local Government Unit to support these functions and since 2007 has provided over 300 training sessions and regional meetings to local government EHOs across NSW. These regular meetings and training workshops have significantly improved consistency in areas of enforcement, inspection activities, fee setting and other food related activities. (NSW Food Authority, pers. comm., 21 March 2012)

The NSW Food Authority is also in the process of trialling standardised food safety inspection reports, designed to improve the consistency of food safety outcomes.

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### Box 3.9 Policies for food safety co-operation in Victoria

In Victoria, *Food Act 1984* amendments that came into effect in July 2010 provide that the role of LG include:

- cooperating with other LGs and the Department of Health about the administration of the Food Act
- ensuring, to the extent appropriate, that the administration of the Act by the council is consistent with the administration of the Act throughout Victoria by other LG
- participating in the state-wide system for the single notification or registration of temporary food premises, mobile food premises or food vending machines.

The role of the Victorian Department of Health includes promoting the objectives of the Food Act and its consistent administration by providing information and guidance to LGs, authorised officers and food safety auditors.

The Department of Health has advised that this amendment is intended to enable a state-wide body to provide formal guidance to LGs to promote consistency and co-operation, and to require LGs to have regard to these objectives. This guidance would ensure that over time LGs have a greater appreciation about their role in the overall regulatory framework for food safety, do not act in isolation, and better recognise that a consistent interpretation of legislation is important to ensure that regulation is coherent, effective and reasonable.

*Source:* Victorian Department of Health (pers. comm., 21 March 2012).

The costs and benefits of variations and inconsistencies in regulation, and the ways that they are administered, are outlined generally in box 3.10.

The extent to which the benefits of variations in local regulation exceed the costs (including compliance costs to businesses) will depend on the nature of the activity being regulated; and these should be considered on a case by case basis. Box 3.2 provides a case study on local laws for commercial filming and photography. In this example, differences in local laws do not appear to be related to variations in local circumstances and, hence, there appears to be a case for greater harmonisation. Indeed, as noted earlier, the approach of the NSW Government has been to enact state legislation to remove LG discretion and create consistency for some charges. Aside from resorting to state regulation, other ways to achieve harmonisation could be through mutual recognition schemes (such as the UK's Primary Authority scheme); or through model legislation.

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### Box 3.10 The costs and benefits of regulatory inconsistencies

In the *Inquiry into Streamlining Local Government* draft report VCEC (2010), identified at least six sources of potential costs from differences between jurisdictions in their regulations or the way they administer them:

- *increased administrative burden* — for example, when there is significant overlap between mandatory Commonwealth and state government environmental reporting requirements and scope to reduce the costs without undermining benefits
- *increased compliance costs* — if LG imposes different obligations, firms that operate across jurisdictions will need to create systems, training programs and so on that enable them to comply with all sets of obligations
- *reduced respect for the law* — inexplicable inconsistencies between regulations can undermine respect for those regulations and compliance with them
- *regulatory arbitrage* — when regulations impose different costs, those who are regulated have an incentive to migrate to the regulations or regulators with lower costs and this can undermine the effectiveness of the regulations. For example, movement of some businesses to a municipality that enforces food safety regulation less rigorously could undermine health outcomes
- *reduced innovation* — if coping with regulations diverts managers from their core tasks, or reduces opportunities for trade, it may reduce their capacity to introduce new products or processes
- *market distortions* — inconsistent enforcement can distort the competitive position of different firms.

VCEC also identified benefits when jurisdictions adopt different approaches to enforcing and administering regulation:

- *a less prescriptive approach can encourage innovation* — state government prescription of how LG should administer regulations may discourage LGs from searching for better ways to achieve outcomes
- *different approaches may suit local needs* — for example, stricter local laws or enforcement strategies may be supported in more densely populated areas where local nuisance impacts affect more people
- *reducing the capacity of regulators to impose excessive burden* — regulatory arbitrage can reduce the capacity for regulators to abuse their monopoly position (for example, if LGs are concerned that businesses will move and this will reduce their rate base).

The Municipal Association of Victoria has considered both the advantages and disadvantages of state and local regulations and provided examples of measures which can mitigate the disadvantages associated with both approaches. These are listed in table 3.23.

**Table 3.23 Local versus state-wide regulations**

<i>Type of law</i>	<i>Benefits</i>	<i>Disadvantages</i>	<i>Ways to mitigate disadvantages</i>
State-wide law	<ul style="list-style-type: none"> <li>• Consistency across the state.</li> <li>• Equity of treatment of affected businesses &amp; organisations.</li> <li>• Potential for consistency with other state laws.</li> <li>• All Victorians given same options for smoke-free environments.</li> </ul>	<ul style="list-style-type: none"> <li>• One size does not always fit all situations.</li> <li>• Difficult to adjust for unintended consequences.</li> <li>• Compliance enforcement costs borne by state government.</li> </ul>	<ul style="list-style-type: none"> <li>• Develop principles to govern rationale for state laws being considered.</li> <li>• Involve stakeholders in the development of laws to maximize avoidance of unintended or adverse consequences.</li> </ul>
Local law	<ul style="list-style-type: none"> <li>• Allows individual communities to decide what is best for them.</li> <li>• Flexibility to tailor to local needs.</li> </ul>	<ul style="list-style-type: none"> <li>• Different treatment of similar spaces in different locations.</li> <li>• Confusing for visitors and/or residents from neighbouring municipalities with different laws.</li> <li>• Can lead to inequity of treatment for like businesses &amp; organisations operating in different municipalities.</li> <li>• Compliance enforcement costs borne by local ratepayers.</li> </ul>	<ul style="list-style-type: none"> <li>• Community consultation processes can assist to develop local support.</li> <li>• Ongoing monitoring can lead to individual adjustments over time.</li> <li>• LGs work with neighbouring LGs to develop similar laws.</li> </ul>

Source: MAV (2011c).

In line with its general analytical framework, the Commission considers that there will be a case for harmonisation when the costs of inconsistencies exceed their benefits; and the transition costs involved in removing inconsistencies are lower than the resulting gains.

#### LEADING PRACTICE 3.17

*There is a case for state, territory and local governments to assess the mechanisms available to harmonise or coordinate local regulatory activities where the costs of variations in local regulation exceed the benefits.*

Chapters 2 and 5 consider institutions and mechanisms that can be used by state, territory and local governments to harmonise and/or coordinate LG regulatory activities.



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## 4 Capacities of local governments as regulators

### Key points

- Australia-wide, regulatory activities take up around 11 per cent of local government time and around 3 per cent of their expenditure, although this varies markedly.
- While many local governments have the capacity to undertake their regulatory functions, many others lack the resources to undertake these functions effectively.
  - There appears to be high vacancy rates in local governments for town planners, building inspectors and environmental health officers and there is evidence that workloads for existing staff in these occupations are high.
  - Urban metropolitan, urban fringe and urban regional local governments consistently showed the highest vacancy rates in key regulatory staff.
- State governments have an important role to play in building and maintaining local government regulatory capacity. Before delegating new regulatory functions, state governments should ensure that local governments are suitably resourced to handle these additional responsibilities.
  - It is particularly important for state governments to consult with local governments before devolving additional regulatory responsibilities to them, and provide them support with undertaking these responsibilities.
- Evidence of local governments employing effective cost recovery processes appears mixed. Correcting this is likely to benefit local government regulatory practices.
- Examples of leading practices from state governments include:
  - Victoria's *Guidelines for Local Laws Manual* and its accompanying documentation in assisting local governments to make local laws
  - state-administered 'Flying Squads' similar to the planning flying squad of experts used in Victoria
  - wide-ranging reviews of local government capacity, such as those currently used in New South Wales, to identify areas in which the regulatory capacity of local governments can be improved.
- A compliance code with best practice principles for regulators to improve the quality and consistency of local government regulatory enforcement and inspection as used in the United Kingdom appears to be leading practice.
- Publication of fee setting guidelines for local governments — as currently done in New Zealand — is also considered by the Commission to be leading practice.

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A local government's (LG's) capacity to regulate is a significant determinant of the extent its regulatory activity unnecessarily burdens business. It is greatly influenced by the availability of financial resources and, more importantly, whether the LG has sufficient appropriately trained staff to undertake their regulatory functions. Both of these will, in part, be a reflection of the support state governments give to LGs.

This chapter examines LGs regulatory capacity with particular emphasis on:

- their financial capacity (section 4.1)
- their workforce (section 4.2)
- the role of the states and the Northern Territory in supporting the regulatory functions of LGs (section 4.3).

The chapter draws heavily on the Commission's LG and state surveys to examine the regulatory capacities of LG. The particulars of these surveys, including copies of the questions asked, are available on the Commission's website. A list of all responding agencies is provided in Appendix A of this report.

## **4.1 Local government perceptions about their capacity to regulate**

In addition to prioritising some regulatory areas over others, LGs without sufficient resources may implement and enforce regulations haphazardly or inconsistently. *Evidence presented to this study — in the form of both submissions and survey input — suggests that many LGs do not have sufficient resources to effectively undertake their regulatory functions.* This may, in part, be due to state governments devolving additional regulatory responsibilities to LGs without first ensuring they have sufficient resources — both in terms of finances and appropriately skilled staff — to administer them.

As discussed in chapter 2, the quantum of responsibilities devolved to LGs from the state governments has increased markedly over the previous thirty years, but it appears that these additional roles have not been accompanied by appropriate increases in resourcing. For example, the Local Government Association of Queensland stated:

Local government has in the past expressed concerns in relation to the delegation of responsibilities to councils without full consideration of the costs imposed and resource considerations. (sub. 6, p. 6)

This issue clearly extends beyond Queensland. Mildura Rural City Council presented similar concerns to the Victorian Competition and Efficiency



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Commission's (VCEC) study of *Regulation and Regional Victoria: Challenges and Opportunities* (2005):

The flow on of State Legislation to LG authority is of growing concern. It is often the requirement of local government to implement or regulate State Government Regulation without any financial or resource allocation to enable them to do so. (p. 1)

It also seems to be of concern to Australia's largest LG, Brisbane City Council, which noted:

BCC experience of State government consideration of resources of local government is that it varies across agencies, resulting in poor consideration of resource implications in some instances ... Often regulatory responsibility is delegated without sufficient consideration of resourcing or implementation requirements. (sub. 26, p. 7)

Table 4.1 shows the percentage of LG survey respondents that indicated that they did not have sufficient resources to undertake all of their required regulatory functions. The variance by jurisdiction is pronounced — in some states, roughly half of survey respondents felt they had insufficient resources, while in the Northern Territory — where LGs have the smallest range of regulatory responsibilities — no respondents indicated that they did not have enough resources to undertake their regulatory roles.<sup>1</sup> On a classifications basis, urban regional and rural council types had the highest proportion of respondents who reported as having insufficient resources to undertake all of their regulatory functions.

When confronted with resource constraints, LG will prioritise some of their regulatory functions over others. Of those LGs which identified as having insufficient resources, most indicated that a risk analysis played at least some role in determining what regulatory activities should have precedence over others. However, some LGs indicated that other procedures assisted their planning, including:

- using complaints as a basis for determining regulatory priorities
- giving priority to regulatory functions devolved to LGs by the states (as opposed to focusing on local by-laws)
- coordinating priorities with other LGs
- drawing on input from the community (such as through a community survey) as to what regulatory areas should have priority.

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<sup>1</sup> Only a small number of Northern Territory local governments responded to the Commission's survey. A full list of responding agencies is outlined in Appendix A.

**Table 4.1 Per cent of local governments who responded as having insufficient resources to undertake their regulatory roles<sup>a</sup>**

<i>By jurisdiction</i>	<i>Per cent</i>
Queensland	50
New South Wales	49
Victoria	40
South Australia	32
Western Australia	18
Tasmania	17
Northern Territory	0
<i>By local government type</i>	<i>Per cent</i>
Urban Regional	50
Rural	40
Urban Metropolitan	31
Urban Fringe	30
Remote	17
Capital City	0

<sup>a</sup> Resources refers to finances and sufficiently qualified employees.

Source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

Over one-third of LG survey respondents indicated that the adequacy of the resources available to them to undertake their regulatory roles had deteriorated over the previous five years. By jurisdiction, this perception was especially pronounced in Queensland and New South Wales, and, by category, among remote and urban fringe LGs (table 4.2). No respondents in Tasmania and the Northern Territory, and only a small proportion of respondents from South Australia indicated that their resources have worsened over the previous five years. While there is potentially many reasons for this, it may be because Tasmania and Northern Territory LGs at present receive more federal funds per person than other states, while South Australian LGs are less reliant on grants than LGs in all other jurisdictions. Further information on the composition of LG revenue is available in chapter 2 and appendix D.

**Table 4.2 Respondents' perceptions about whether their regulatory resources have changed over the last five years<sup>a</sup>**

<i>By jurisdiction</i>	<i>Per cent who said resources had not changed</i>	<i>Per cent who said resources have improved</i>	<i>Per cent who said resources have worsened</i>	<i>Per cent who did not answer question</i>
New South Wales	18	31	42	9
Victoria	33	27	33	7
Queensland	0	19	69	13
Western Australia	36	14	32	18
South Australia	54	23	14	9
Tasmania	50	33	0	17
Northern Territory	66	33	0	0
<i>By LG type</i>	<i>Per cent who said resources had not changed</i>	<i>Per cent who said resources have improved</i>	<i>Per cent who said resources have worsened</i>	<i>Per cent who did not answer question</i>
Capital City	20	40	20	20
Urban Metropolitan	38	21	38	3
Urban Fringe	13	27	47	13
Urban Regional	31	28	31	9
Rural	31	21	31	17
Remote	17	33	50	0

<sup>a</sup> Based on 129 valid survey responses. Resources refers to finances and sufficiently qualified employees.

Source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

In order to encourage regulation to be administered effectively, efficiently and with minimal burden on business, good practice from state governments involves ensuring that LGs have sufficient resources to administer a regulation prior to devolving responsibility to them. One way to achieve this is to include an assessment of LG capacity as part of the Regulatory Impact Analysis process for any regulation that envisages a role for local government.

#### LEADING PRACTICE 4.1

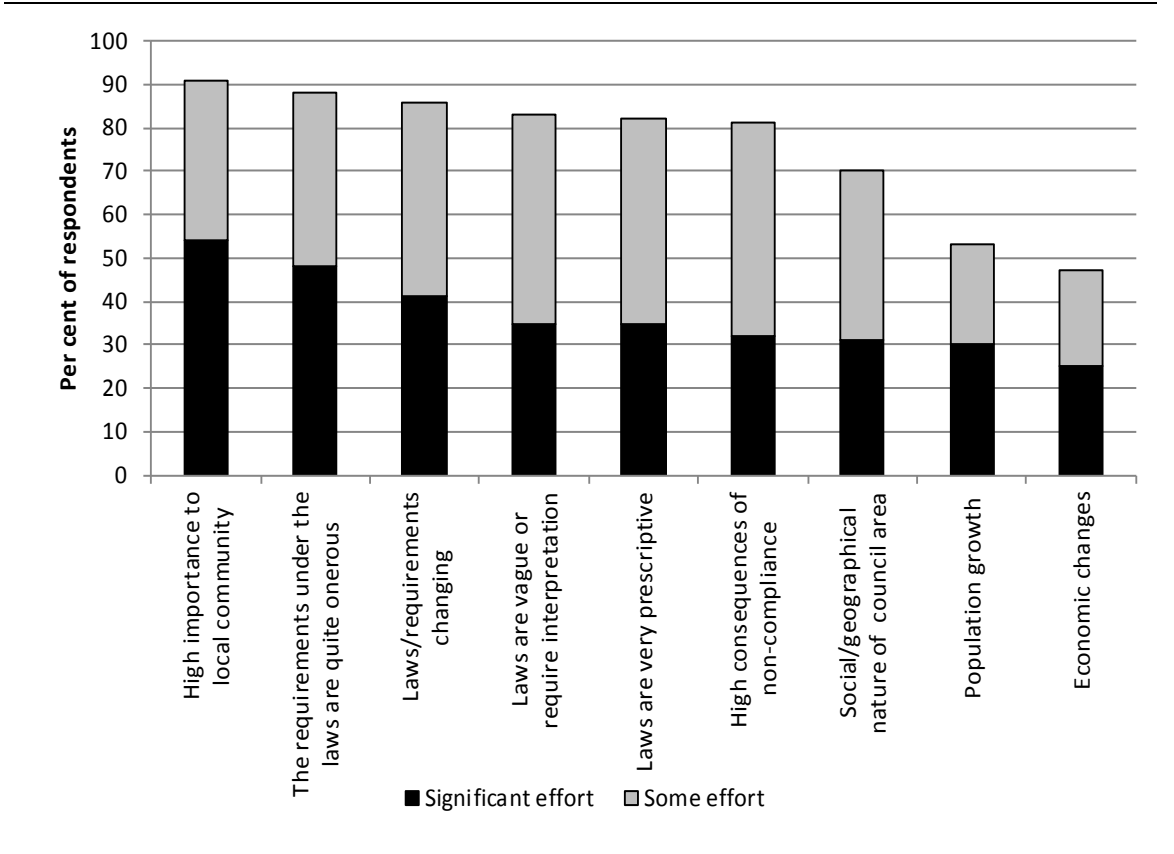
*State governments, by ensuring local governments have adequate finances, skills and guidance to undertake new regulatory roles, can reduce the potential for regulations to be administered inefficiently, inconsistently or haphazardly. This could be achieved by including an assessment of local government capacities as part of the regulatory impact analysis for any regulation that envisages a role for local government.*

A range of factors can contribute to variations in the regulatory burdens faced by LGs. These include the nature and extent of regulatory functions performed by LG as well as social and economic factors that can affect the number of businesses or people subject to regulation as well as the complexity of regulatory activities — for

example, population growth may be associated with more multi-storey buildings being built, which can be more complex to zone and certify.

Based on responses to the Commission’s survey of LGs, figure 4.1 provides an indication of some of the most relevant factors identified by LGs as contributing to LG regulatory burdens.

**Figure 4.1 Factors contributing to regulatory burdens on LGs**



*Data source:* Productivity Commission survey of local governments — general survey (2011-12, unpublished).

The main factors identified by LGs as contributing the highest burden were that laws have high importance to the local community (57 per cent respondents indicated it had a significant effect), laws and requirements were too onerous (48 per cent respondents indicated it had a significant effect), and laws were subject to constant change (41 per cent of respondents indicated it had a significant effect). In contrast, the factors contributing the least burden were population growth and economic changes.

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## 4.2 Financial capacities

LGs can draw revenue from a variety of sources, including through rates on properties, user fees and charges, statutory charges and fines, developer contributions, interest on investments, state and Commonwealth grants, the provision of goods and services and the sale of assets. In 2010-11, Australian LGs collectively raised \$33.5b of revenue between them (ABS 2012b).

### State influences on LG fiscal capacity

#### *Capacity to collect rates*

Rates on property remain the most important source of LG revenue with their contribution exceeding one-third of total LG revenue in 2010-11 (ABS 2012b). The amount of revenue that LGs collect as rates is essentially a function of:

- the aggregate value of rateable properties which, in itself, depends on the valuation method used
- the actual taxation rate that is levied — that is, the amount of money LGs collect per dollar of the property's value.

State governments have the ability to influence these parameters through legislated restrictions on how LGs can levy rates. All states and the Northern Territory prescribe land valuation methods and impose rating exemptions, concessions and rebates. A rate pegging arrangement is also imposed on LGs in New South Wales (PC 2008a, various state government regulations).<sup>2</sup> The Commission's 2008 study into local government revenue raising found that — with the exception of New South Wales — the effects of these restrictions on rating revenue was generally small (PC 2008a).

#### *Capacity to collect fees, charges and contributions*

LGs provide goods and services (including regulatory services) to their communities and receive fees and charges in return. In most cases, LGs have the capacity to set their own fees, however, states often regulate the maximum fee that is able to be charged, either in dollar or cost recovery terms (table 4.3). LG fee setting also generally needs to be compatible with the competitive neutrality principles associated with the National Competition Policy (NCP).

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<sup>2</sup> Under current arrangements in NSW, LGs can apply to the Independent Pricing and Regulatory Tribunal (IPART) to seek a rate increase above the pegged amount.

*Legislated restrictions on the fees LGs can charge for the provision of goods and services (including regulatory services) have the potential to hinder the revenue raising capabilities of LG. In particular, the revenue raising capacity of LGs may be more restricted if state governments set prices on goods and services which LGs are required to provide (either because they have a legislative responsibility to do so, or because of widespread community expectations that they be provided), especially if the price set is at a level which results in the cost of providing these services not being able to be fully recovered (PC 2008a).*

Table 4.3 **Local government regulatory fees<sup>a</sup>**

■ Maximum fee not capped ■ Maximum fee capped by the state government in dollar terms □ Maximum fee capped by the state government in cost recovery terms

Regulatory activity	NSW	Vic	Qld	WA	SA	Tas
Planning scheme amendments / rezoning fees	■	■	□ <sup>b</sup>	□ <sup>c</sup>	■	■
Assessment of development application fees	■	■	□ <sup>b</sup>	■ <sup>d</sup>	■	■
Infrastructure charges	■	■	■	■	■	■
Building certification fees <sup>e</sup>	■	■	■ <sup>b</sup>	■ <sup>f</sup>	■ <sup>g</sup>	■
Food safety inspection fees	■	■	□ <sup>b</sup>	■	■	■

<sup>a</sup> LGs in the Northern Territory do not perform any of the functions identified in this table and therefore have not been included. <sup>b</sup> There is a general requirement that fees do not exceed the cost of providing the service. <sup>c</sup> For scheme amendments and structure plans requested by applicants, the regulations set the quantum and formulas to be used to calculate the fees. <sup>d</sup> Maximum dollars set is based on cost recovery. <sup>e</sup> For building certification fees, there is a general requirement that fees not exceed the costs of providing the service in all jurisdictions except Tasmania. This is explored further in chapter 7. <sup>f</sup> Maximum fee is determined as a proportion of property value. <sup>g</sup> Maximum fee is determined through the use of a formula.

Sources: Various state legislation, personal communications with state departments.

### *Capacity to levy developer contributions*

Developer contributions are levied by LGs to provide the extra public amenities and services that will be required as a result of development. Such infrastructure may include the provision of roads and traffic management measures, open space and recreation facilities and community facilities (such as community halls or childcare facilities). Development contributions are levied in advance of their use (such as during construction) and held until needed.

Developer contributions are utilised in all states and territories for basic infrastructure, however, the types of community infrastructure against which charges can be levied vary between jurisdictions (as shown in table 4.4).

State governments also have the potential to limit or ‘cap’ the maximum contribution LGs can levy on developers. Currently, developer contribution caps

apply in New South Wales<sup>3</sup> (\$30 000 per property for greenfield developments and \$20 000 per property for other developments — IPART 2011) and Queensland (\$28 000 for a three or four bedroom property and \$20 000 for a one or two bedroom property — LGAQ 2011). Victoria also caps the Community Infrastructure Levy — which is used to provide community facilities and recreation areas — to \$900 per dwelling (PC 2011b).

**Table 4.4 Community infrastructure eligible for mandatory contributions (excluding basic infrastructure)**

	<i>NSW</i>	<i>Vic<sup>a</sup></i>	<i>Qld<sup>b</sup></i>	<i>WA</i>	<i>SA<sup>a</sup></i>	<i>Tas<sup>a</sup></i>	<i>NT</i>
Child care centres	✓	✓	✗	✓	✗	✗	✗
Community centres	✓	✓	✓	✓	✗	✗	✗
Education	✓	✗	✗	✓	✗	✗	✗
Libraries	✓	✓	✓	✓	✗	✗	✗
Parks	✓	✓	✓	✓	✓	✓	✗
Public transport <sup>c</sup>	✓	✓	✓	✓	✗	✗	✗
Recreation facilities <sup>d</sup>	✓	✓	✓	✓	✓	✗	✗
Sports grounds	✓	✓	✓	✓	✗	✗	✗

<sup>a</sup> In some circumstances, developers may be able to negotiate their contributions in these jurisdictions and so any negotiated contribution may cover a broader or narrower range of matters than those listed in this table.

<sup>b</sup> Developer contributions for community centres and libraries are limited to cost of land and associated cost of clearing. Infrastructure charges for public transport are limited to dedicated public transport corridors and associated infrastructure. <sup>c</sup> In some jurisdictions, such as Victoria, public transport is regarded as development infrastructure rather than community infrastructure. <sup>d</sup> Including areas of open space.

Source: PC (2011b).

### *Evidence of cost shifting*

Cost shifting occurs when LGs are required to undertake responsibilities by another sphere of government with little or no additional financial support. Cost shifting can be manifested in a number of ways:

- LGs may be required to provide services, including regulatory services, that have previously been provided by other spheres of government
- services are formally referred to or are assigned to LGs through legislative and other state or federal instruments without corresponding funding
- government policies are imposed that require LGs to undertake costly compliance activity

<sup>3</sup> Under current arrangements in NSW, local governments can apply to the Independent Pricing and Regulatory Tribunal (IPART) to seek a developer contribution above the capped amounts.

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- the fees and charges that LGs are permitted to apply, for services prescribed under state legislation or regulation, are not indexed or do not cover the costs of administration (House of Representatives Standing Committee on Economics, Finance and Public Administration 2003; VCEC 2010).

The issue of cost shifting onto LG was examined in detail by the House of Representatives Standing Committee on Economics, Finance and Public Administration in 2003, which found evidence of cost shifting occurring:

The large volume of evidence to the Committee clearly shows that cost shifting onto local government by the States has occurred over many years (p. 30).

The review continues on to suggest that ‘cost shifting is, ultimately, a symptom of what has become dysfunctional governance and funding arrangements’ (p. 139). As a result of the Standing Committee’s review, the Australian Government, the governments of the states and territories and the Australian Local Government Association (ALGA) formed the *Inter-governmental Agreement Establishing Principles Guiding Inter-governmental Relations on Local Government Matters* which aimed to, among other things, improve consultation with LGs and promote greater transparency in the financial arrangements between the three spheres of government in relation to LG services and functions (box 4.1). Since 2006, similar agreements have been formed in each jurisdiction between the state and local governments.

Cost shifting was considered by VCEC in its draft report into streamlining local government regulation, which found that there is evidence of cost shifting in Victoria, although quantifying the magnitude of this cost shifting is difficult:

The problem of cost shifting from higher tiers of government to councils in Australia is widely recognised and has been investigated by several official inquiries. However, it is difficult to gather reliable estimates of the magnitude of the problem. Quite apart from the definitional and data problems associated with the phenomenon, these difficulties have been compounded by the fact that very few attempts have been made to measure the impact of specific instances of cost shifting in Victoria (VCEC 2010, p. 256).

The Productivity Commission has encountered similar issues while undertaking this study. *The Commission has been provided with examples of cost shifting occurring, especially by the states, across a number of regulatory areas. It is also apparent that robust processes to assess the resourcing implications of devolving new responsibilities to LGs are also lacking.*



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**Box 4.1      Key elements of the intergovernmental agreement on local government matters relating to cost shifting**

**Principle 3:**

'The Parties agree in principle that where local government is asked or required by the Commonwealth Government or a State or Territory Government to provide a service or function to the people of Australia, any consequential financial impact is considered within the context of the capacity of local government.'

**Principle 8:**

'Where the Commonwealth or a State or Territory seeks through non-regulatory means, the provision by local government of a service or function they shall:

- i)      respect the right of local governing bodies to decide whether they will accept the responsibility for the delivery of a service or function on behalf of another sphere of government
- ii)     negotiate on service delivery standards, financial arrangements and implementation with the relevant local governing bodies, or the relevant peak local government representative body
- iii)    be responsible for developing their own programmes, where appropriate, including the responsibility for programme design, determination of policy objectives, service delivery standards and funding
- iv)    where possible reach agreement with the relevant local government bodies or peak local government representative body on the terms and conditions.'

**Principle 10:**

'Where the Commonwealth or a State or Territory intends to impose a legislative or regulatory requirement specifically on local government for the provision of a service or function, subject to exceptional circumstances, it shall consult with the relevant peak local government representative body and ensure the financial implications and other impacts for local government are taken into account.'

*Source:* Australian Government (2006).

However, while there is little doubt that the range of regulatory responsibilities that LGs undertake has increased over the previous thirty years, determining the extent that this represents cost shifting is difficult for the reasons VCEC has given, and is further clouded by the fact that LGs have generally been relieved of responsibilities in other areas — such as the provision of water and sewerage. Nonetheless, leading practice would arguably look to mitigate the likelihood of cost shifting occurring. One mechanism to do this, as identified by the House of Representatives Standing Committee on Economics, Finance and Public Administration, is to incorporate local government impact statements into the Regulatory Impact Analysis process of any state regulation or legislation which impacts on LGs. This is reflected in leading practice 4.1.

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## Regulatory expenditure and revenue

The Commission's LG survey indicates that around 3 per cent of all LG expenditure is dedicated to undertaking regulatory functions relating to business. That said, as table 4.5 shows, the amount that LGs spend on business regulation functions varies considerably, with one council identifying that this constituted two-thirds of their total expenditure. Median expenditure on business regulation functions (as a proportion of total expenditure) was highest in Queensland and Victoria, and among urban metropolitan and remote LGs (table 4.5).

**Table 4.5 Per cent of LG expenditure attributed to regulatory activities relating to business**

<i>By jurisdiction</i>	<i>Median</i>	<i>Highest</i>
New South Wales	3	50
Victoria	8	47
Queensland	10	20
Western Australia	5	67
South Australia	2	35
Tasmania	6	8
Northern Territory	5	5
<i>By local government type</i>		
Capital City	5	5
Urban Metro	8	67
Urban Fringe	2	5
Urban Regional	5	50
Rural	2	36
Remote	9	20

*Source:* Productivity Commission survey of local governments — general survey (2011-12, unpublished).

LGs may collect user charges and fees, statutory charges and fines while exercising their regulatory functions. This gives LGs the opportunity to recover the costs of providing these regulatory services. Cost recovery includes fees and specific purpose levies used by government agencies to recoup some or all of the costs of particular government activities or products.

In 2001, the Commission undertook a comprehensive study of cost recovery by Commonwealth agencies. Many of the key findings of this study have relevance for LGs (box 4.2).

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#### **Box 4.2      Cost Recovery by Government Agencies**

In 2001, the Commission undertook an inquiry into cost recovery processes used by Commonwealth agencies. Some of the key findings of the report that have relevance to local governments include:

- Cost recovery has important implications for efficiency and equity.
- There is a general lack of clear policy guidelines governing the implementation of cost recovery.
- There is little published information on cost recovery by regulatory and information agencies.
- The effects of cost recovery may be more pronounced where consumption is discretionary, but may also affect resource allocation in regulated industries.
- Generally, the administrative costs of undertaking regulatory activities should be recovered.
- Cost recovery should not be implemented where:
  - it is not cost effective
  - it would be inconsistent with policy objectives
  - it would unduly stifle competition and innovation.
- Cost recovery should not be used to finance unrelated government activities.
- The presence of market failure — and the government's chosen response to it — can have implications for whether cost recovery should be applied and in what way.

*Source:* PC (2001).

In general, it is efficient for LGs to recoup from businesses the costs of regulating them. This is because where businesses are the source of risks that require regulation, regulating them is part of the cost of production. Depending on market characteristics, some or all of this cost will then be passed onto businesses' customers so that the user pays (PC 2001).

That said, the strength of the case for implementing full cost recovery from a regulatory activity is, in part, dependent on whether spillovers or externalities are generated. Where regulation confers benefits exclusively on businesses, full cost recovery should be pursued. As such, registration, monitoring compliance and issuing of exclusive rights should be assessed for full recovery. However, where spillovers exist, they may influence the extent to which cost recovery is implemented (PC 2001). In particular, where a regulation delivers significant positive spillovers — that is, the regulation confers benefits to the wider community as well as those in the market being regulated — it may be appropriate to finance part of the enforcement of this regulation from general taxation revenue. Similarly,

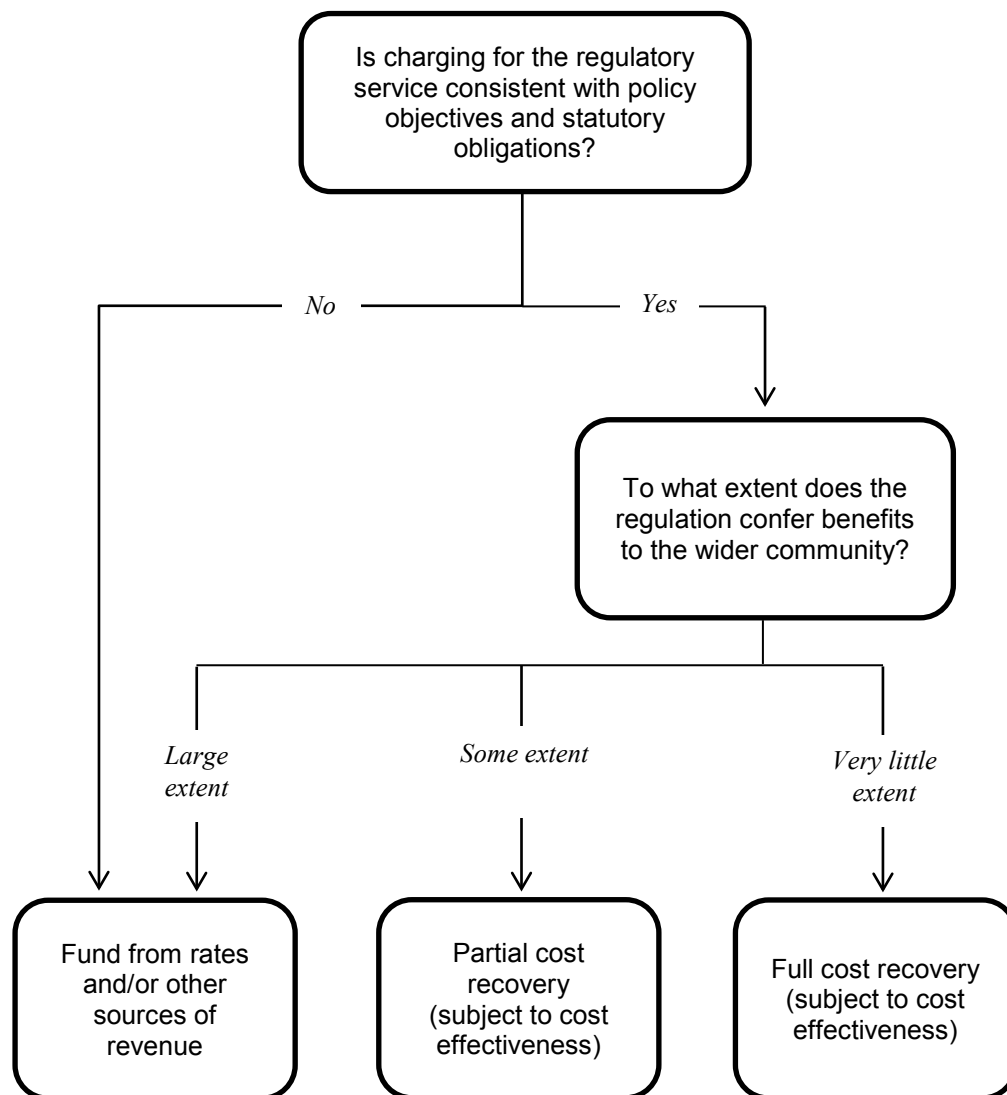
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setting a price above full cost recovery may be appropriate in instances where governments regulate to address negative spillovers.

Figure 4.2 provides a process that LGs could employ to determine the circumstances in which cost recovery should be pursued.

**Figure 4.2 Cost recovery flowchart**

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Source: Based on PC (2001).

Leading practice avoids charging a fee for a regulatory service that exceeds the full cost of providing this service (unless it can be substantiated that this is the best means to deal with negative spillovers).

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Used appropriately, cost recovery can improve economic efficiency and equity by ensuring that those who benefit from the regulatory service, pay for it. However, LGs should ensure not only that they have the required legal authority to set fees at such a level but also that it would be a cost effective approach given the additional administrative costs that may be involved.

The Commission — through its LG survey — asked LGs to identify the dollar amount of revenue they received from businesses from providing regulatory services, with a view to comparing this to LG regulatory expenditure on a jurisdictional level. However, the financial data that the Commission received from LG was of varying quality and incomplete. This suggests that the financial reporting systems of many LGs are not set up to provide such information.

The data do, however, show that on an Australia-wide level, LGs generally spend more on their regulatory functions than the revenue they collect, with the median amount of regulatory costs being recovered by LGs from regulatory revenue being around 65 per cent. However, given the concerns about the quality of the financial information provided to the Commission by LGs, this figure should be treated with some care.<sup>4</sup>

Throughout the course of this study, the Commission has been informed of specific instances of regulatory services where the principles of cost recovery have generally been upheld. In the provision of building and construction services for example, roughly one quarter of LG respondents were fully recovering costs while 50 per cent of all other respondents were recovering at least half of their outlays. That said, as the stylised examples of building application fees in chapter 7 and appendix K show, there exists significant variation in building application fees both within and across jurisdictions. This may suggest that some LGs are over-recovering costs and cross-subsidising either other building and construction regulatory activities or other completely unrelated expenditures. A move to time based-charging, as outlined in chapter 7, is likely to provide a more efficient pricing model for building inspections and approvals. Development assessment fees are also subject to considerable variation between jurisdictions.

***Further guidance from the state governments in regard to the circumstances they expect LGs to undertake cost recovery is likely to be beneficial. Current arrangements in New Zealand provide an example of leading practice in this area, where the New Zealand Controller and Auditor-General has released guidelines for cost recovery by public agencies that includes local governments.***

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<sup>4</sup> Based on 41 survey observations, with regulatory revenue including user fees and charges, statutory charges and fines but not rates levied against businesses.

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These guidelines outline in detail the expectations on public entities by the central government in the setting of fees for goods and services. Box 4.3 outlines some of the key elements of these guidelines that have relevance for Australian jurisdictions.

**Box 4.3      Elements of New Zealand’s good practice guide for charging fees for public sector goods and services**

- ‘A fee should be set at no more than the amount necessary to recover costs, unless the entity is expressly authorised to do otherwise.’
- ‘[An] entity needs to clearly identify and understand the scope and any constraints or limitations of the empowering provision before taking any steps to decide how much to charge.’
- ‘Any cross-subsidising must be clearly authorised and transparent, and the reasons for doing so clearly documented.’
- ‘Because costs are not static, it is important that fees are reviewed regularly to ensure that they remain appropriate and that the assumptions on which they are based remain valid and relevant.’
- ‘We would usually expect a public entity to disclose its costs and charging practices to give the public an opportunity to comment on and question them. This imposes a discipline on the entity not to pass on inefficient costs to consumers. It also helps the consumers to understand and accept the charging practices.’

*Source:* New Zealand Controller and Auditor-General (2008).

These guidelines compliment a more general requirement under the Local Government Act 2002 of New Zealand. When a piece of empowering legislation is silent on the subject on the area of cost recovery, under section 150(4) of the Local Government Act, New Zealand LGs ‘must not ... recover more than the reasonable costs incurred by the local authority for the matter for which the fee is charged.’ (New Zealand Department of Internal Affairs, pers. comm., April 2012).

**LEADING PRACTICE 4.2**

*The practice of publishing fee-setting guidelines and expectations for local governments, as currently done in New Zealand, assists local governments to set efficient charges for their regulatory activities.*

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#### LEADING PRACTICE 4.3

*In general, if local governments set fees and levies to fully recover, but not exceed, the costs of providing regulatory services from the business being regulated, this will improve efficiency. There are possible exceptions: it may not be efficient to fully recover costs where public benefits are involved; and it may be efficient to charge more than the administrative costs where this would lead to businesses taking account of external costs imposed on the community. In addition, in order for it to be efficient to not just recover costs, it would need to be determined that fees charged to business are the best way to address these market failures.*

#### LEADING PRACTICE 4.4

*If state governments established systems and procedures to accurately measure the costs of providing regulatory services, and did not cap local government regulatory fees, this would assist local governments to accurately recover regulatory administrative costs.*

### 4.3 Workforce capacities

The LG workforce in Australia is diverse and performs a wide range of tasks. As well as undertaking regulatory roles, LG employees are also responsible for and devote more of their time to the upkeep of infrastructure and public works, providing council operated community services, the collection of rates and addressing constituent queries and complaints.

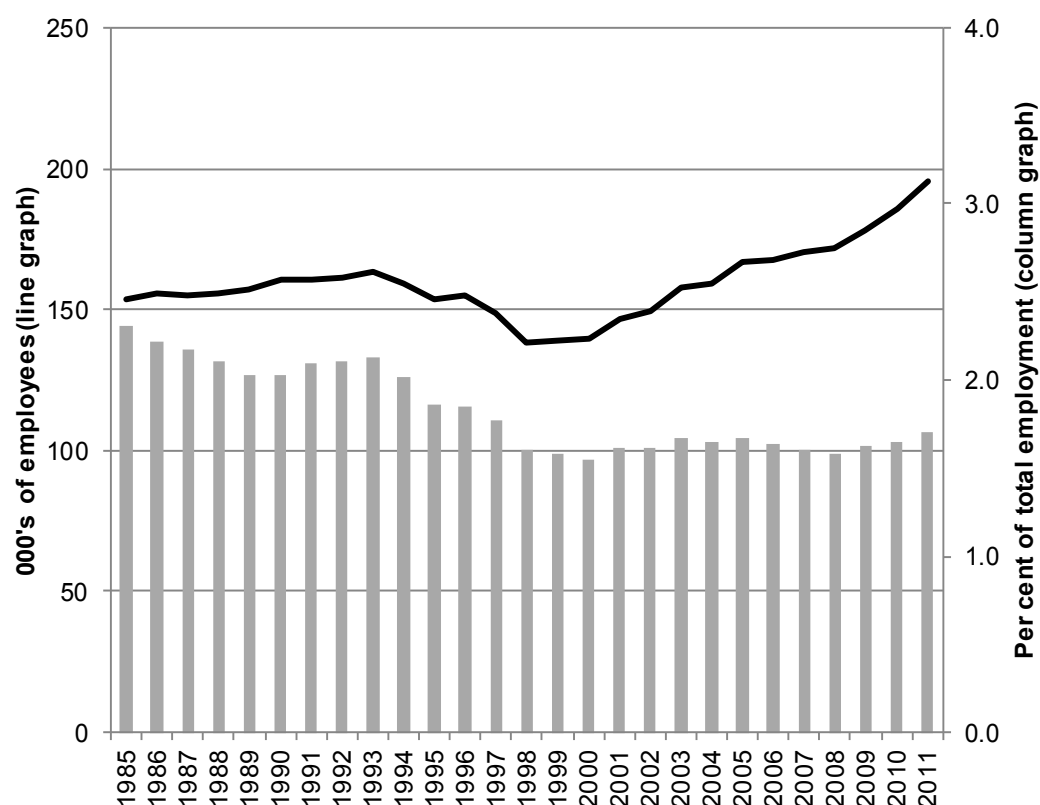
#### General workforce

As of June 2011, Australia's LGs employed approximately 195 000 people, which represents about 10 per cent of all public sector employees (ABS 2011). The LG workforce has grown steadily since 2000, with growth rates averaging over 2.5 per cent per annum (figure 4.3). This is in contrast to the 1990s where the number of people working in LG fell, in part due to the decreasing responsibilities of LGs regarding the provision of water and other utilities. In 2011, LGs constituted over 1.7 per cent of total economy-wide employment.

The size of LG workforces varies markedly. Brisbane City Council — the largest LG in Australia by population — employs over 9000 people (which represents nearly 1 per cent of the LG area population) while some smaller LGs have workforces that consist of fewer than 20 FTE employees. This diversity in the workforce size is reflected in tables 4.6 and 4.7. Generally, rural and remote LGs

have the smallest workforces in absolute terms, but have more workers per 1000 population than urban councils.

Figure 4.3 **Size of the Australian local government workforce**



Data sources: ABS (*Labour Force, Australia* May 2012, Cat. no. 6202.0); ABS (*Employment and Earnings, Public Sector, Australia, 2010-11*, Cat. no. 6248.0.55.002); ABS (*Wage and Salary Earners, Public Sector, Australia, June 2007*, Cat no. 6248.0.55.002).

Table 4.6 **Local government full time equivalent employees**

By LG classification

	<i>Capital City</i>	<i>Urban Metro</i>	<i>Urban Fringe</i>	<i>Urban Regional</i>	<i>Rural</i>	<i>Remote</i>
<b>Number of FTE employees</b>						
Median	721	454	433	315	52	105
Highest	9 693	2 630	918	1 665	196	149
Lowest	118	41	92	24	15	26
<b>Per 1 000 population</b>						
Median	8.0	4.8	4.3	7.9	13.8	38.2
Highest	36.3	8.4	9.1	12.4	31.0	119.9
Lowest	1.2	3.5	3.0	4.1	1.1	9.1

Source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).



**Table 4.7 Local government full time equivalent employees**  
By jurisdiction

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>
<b>Number of FTE employees</b>							
Median	323	466	750	45	120	60	150
Highest	1 767	1 143	9 693	695	721	137	334
Lowest	49	118	70	16	15	19	22
<b>Per 1 000 population</b>							
Median	8.2	6.1	9.1	9.1	5.3	6.0	4.3
Highest	25.0	14.5	119.8	31.0	36.3	21.1	5.4
Lowest	3.0	1.2	5.0	4.0	3.5	4.1	1.1

Source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

Strong competition for workers from other levels of government as well as the private sector has meant that LGs are often subject to a shortage of suitable workers. As a result, vacancy rates in the LG workforce can be high as shown respectively in Tables 4.8 and 4.9 in data for LG type and jurisdiction. While vacancies were persistent across all LG types, median vacancy rates were highest among capital city LGs, and lowest among rural LGs. When examined on a jurisdictional level, vacancies were most pronounced in New South Wales, Victoria and Queensland, with South Australia, Tasmania and Western Australia reporting low vacancy rates.

**Table 4.8 Local government full time equivalent vacancies**  
By local government classification

	<i>Capital City</i>	<i>Urban Metro</i>	<i>Urban Fringe</i>	<i>Urban Regional</i>	<i>Rural</i>	<i>Remote</i>
<b>Number of FTE vacancies</b>						
Median	41	15	20	21	1	2
Highest	165	324	128	224	6	7
Lowest	11	0	0	0	0	0
<b>Per cent of FTE workforce</b>						
Median	9.5	4.1	4.1	5.8	1.3	2.5
Highest	42.3	14.6	18.4	15.7	21.1	5.8
Lowest	1.5	0.0	0.0	0.0	0.0	0.0

Source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

**Table 4.9 Local government full time equivalent vacancies**  
By jurisdiction

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>
<b>Number of FTE vacancies</b>							
Median	22	18	16	2	1	0	5
Highest	165	107	324	128	42	5	32
Lowest	0	0	2	0	0	0	1
<b>Per cent of FTE workforce</b>							
Median	4.2	5.1	4.9	3.0	1.3	0.0	4.5
Highest	15.6	42.4	15.7	18.4	10.2	21.0	9.6
Lowest	0.0	0.0	2.0	0.0	0.0	0.0	3.3

Source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

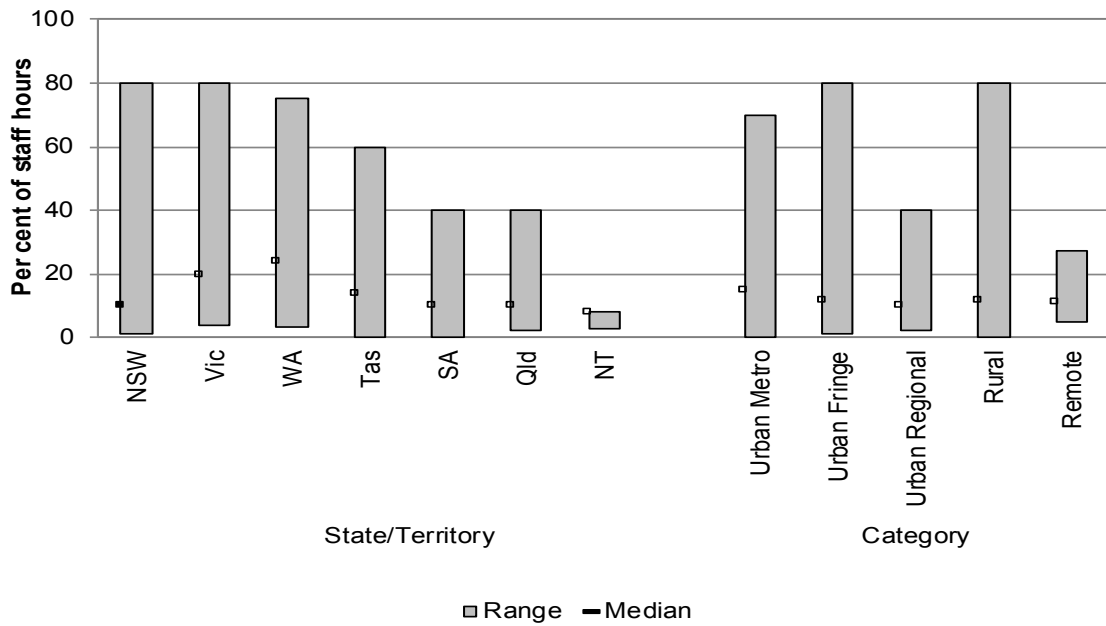
## Regulatory workforce

The regulatory workforce is responsible for administering and enforcing local laws and a range of state government regulations. As such, the regulatory workforce that has a significant direct impact on business include town planners, building surveyors and environmental health officers (EHOs).

Regulatory activities take approximately 11 per cent of total LG staff time. However, as figure 4.4 shows, the range of time spent on regulatory activities varies markedly between individual LGs even in the same jurisdiction or LG classification. For example, in New South Wales alone, LG respondents indicated as little as 1 per cent and as much as 80 per cent of their time was spent on undertaking their regulatory roles.

Figure 4.5 provides an indication of the staff hours required to provide regulatory functions across specific areas of regulation. Of those regulatory areas which have a direct impact on business, the majority of staff time was spent on regulatory functions relating to development assessment, building and construction and planning and land use.

Figure 4.4 Percentage of staff hours spent on regulatory activities<sup>a</sup>

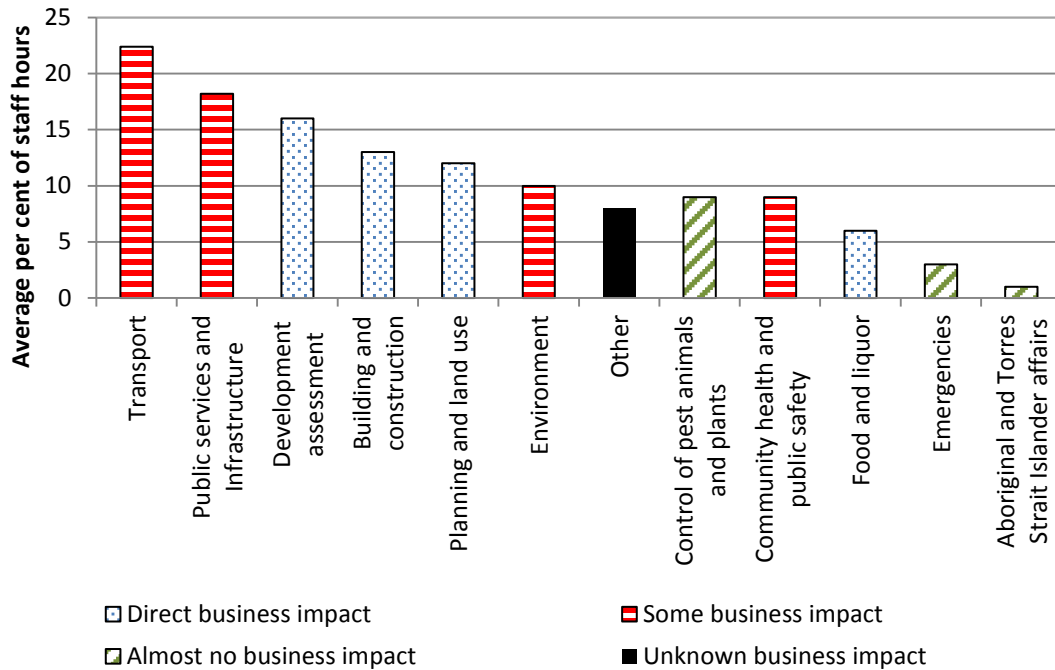


<sup>a</sup> Capital city observations not represented as a result of too few observations.

Data source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

Figure 4.5 Staff hours spent on regulatory areas

Average for responding LGs



Data source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

The number of FTE employees with a regulatory role as a percentage of total employees tends to be higher in urban areas — this is not surprising given that urban areas also have more businesses to be regulated. When examined on a jurisdictional level, the Northern Territory, on average, has the highest proportion of LG staff with a regulatory role with Queensland having the lowest (tables 4.10 and 4.11).

**Table 4.10 Number of full-time equivalent employees with a regulatory role**  
By LG classification

	<i>Capital City</i>	<i>Urban Metro</i>	<i>Urban Fringe</i>	<i>Urban Regional</i>	<i>Rural</i>	<i>Remote</i>
<b>Number of FTE employees with a regulatory role</b>						
Median	93	39	31	21	3	2
Highest	526	176	82	105	10	11
Lowest	24	5	13	1	0	1
<b>As a percentage of total workforce</b>						
Median	6.8	9.0	8.1	6.2	4.6	3.7
Highest	9.0	13.1	14.1	17.3	13.6	7.7
Lowest	3.4	3.8	4.1	2.1	0.0	1.3

Source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

**Table 4.11 Number of full-time equivalent employees with a regulatory role**  
By jurisdiction

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>
<b>Number of FTE employees with a regulatory role</b>							
Median	22	40	29	6	9	6	11
Highest	159	78	526	45	32	13	27
Lowest	1	8	1	0	1	1	2
<b>As a percentage of total workforce</b>							
Median	6.3	7.7	4.7	7.7	6.7	7.1	8.1
Highest	13.1	9.5	10.6	13.4	17.4	14.1	9.1
Lowest	2.0	3.8	1.0	0.0	2.1	4.4	7.3

Source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

While the number of employees with a primarily regulatory function can provide a broad indication of the amount of resources available to LGs, the relationship between staffing levels and regulatory outcomes is more tenuous. For example, more staff might indicate additional levels of bureaucracy businesses must interact with, and therefore may not necessarily coincide with better regulatory outcomes. Furthermore, regulatory outcomes are not dependent on staff numbers alone, with the quality of staff (in terms of skills, qualifications, experience and effective

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leadership) integral to determining how effectively LGs undertake their regulatory functions.

### *Town planners*

Town planners have many responsibilities in LGs. On a strategic level, town planners are tasked with designing cities and towns that function well and are environmentally sustainable and highly liveable with a suitable allocation of land uses. On an operational level, town planners are responsible for establishing, modifying and enforcing land zonings, developing and implementing land use and planning schemes and considering development applications. Their interaction with business is considerable, particularly when an enterprise is starting up or extending its operations.

Some basic information on the LG planning workforce is outlined in table 4.12. Reflecting the planning and zoning issues relevant to cities and fast growing towns, unsurprisingly urban LGs employ more town planners than rural and remote councils — both in terms of absolute numbers and as a percentage of the total workforce. In contrast, some rural and remote LGs employ less than one FTE town planner.

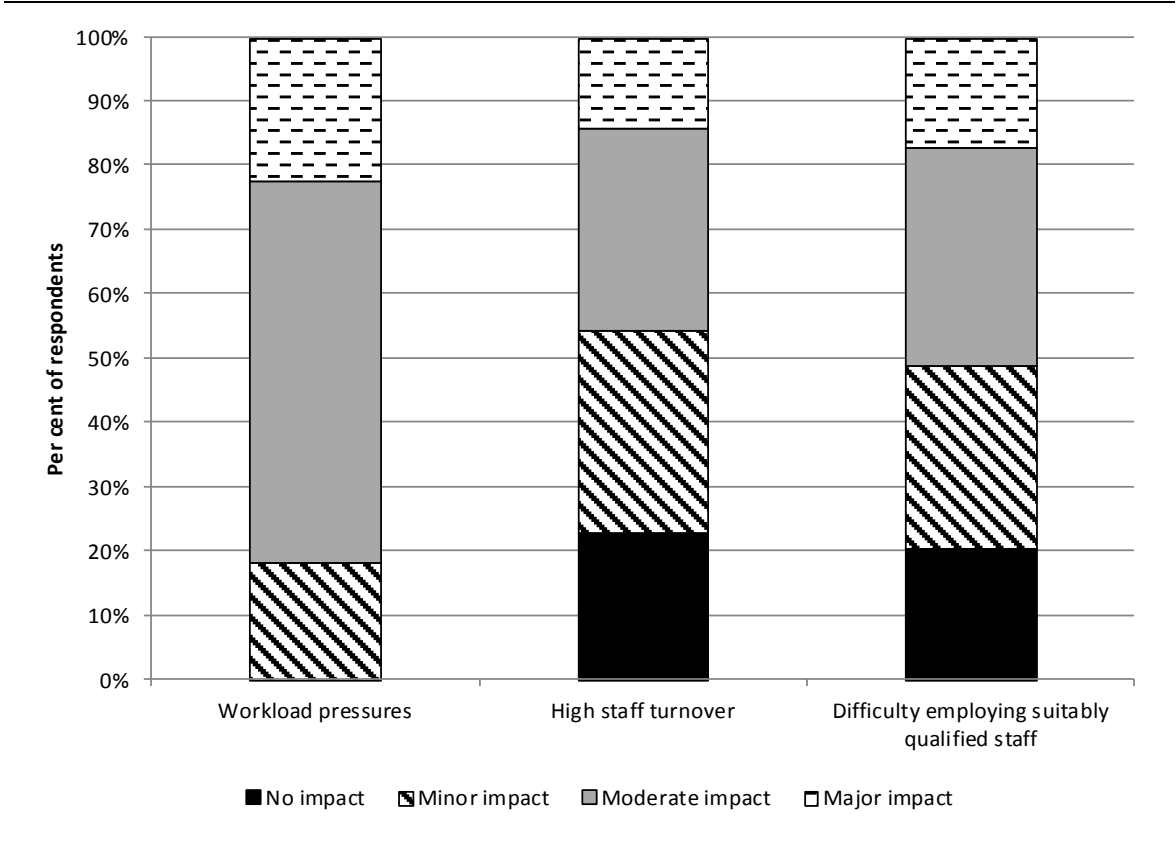
The town planners who work for LGs tend to be well qualified with over 90 per cent having a university qualification. However, many LGs have vacancies in their planning workforces — in particular, urban LGs and those in Victoria, Queensland and New South Wales seem to have difficulty in attracting their desired number of planning staff.

The Commission also received, via submissions to this study, additional evidence of planning staff shortages in some jurisdictions. The Local Government Association of Queensland (sub. 6) referred to research undertaken in 2007 that found 60 per cent of Queensland LGs faced shortages of development assessment planners, and 49 per cent had a shortage of strategic planners (Local Government Career Taskforce 2007). The NSW Small Business Commissioner (sub. 18) also identified a lack of planning resources and appropriately skilled staff as a source of delays in assessing development applications. Furthermore, urban and regional planners remain on the Department of Education, Employment and Workplace Relations' skills shortage list for all jurisdictions apart from South Australia and the Northern Territory (Australian Government 2011a).

Workloads of current town planners are also high. Over 80 per cent of respondents to the Commission's planning and zoning survey module (undertaken in both 2010 and 2011-12) indicated that workload pressures were having a moderate or major

effect on their ability to assess development applications — one of the core duties of planning and zoning staff. Just under 50 per cent of respondents also cited employee turnover and just over 50 per cent of respondents cited difficulty finding suitably qualified staff as impeding their ability to assess building approvals in a moderate or major way (figure 4.6).

Figure 4.6     **Workforce factors impacting on the ability of local governments to assess development applications**  
 Per cent of planning, zoning and development assessment module respondents



Data sources: Productivity Commission survey of local governments — planning and land use survey (2011-12, unpublished); Productivity Commission survey of local governments (2010, unpublished).

*On this basis, evidence suggests that while LG planners are generally well qualified, some LGs are failing to attract sufficient staff, and as a result, may be unable to undertake all of their delegated planning functions effectively.*

Table 4.12 Characteristics of the local government planning workforce

	NSW	Vic	Qld	WA	SA	Tas	NT	Capital City	Urban Metro	Urban Fringe	Urban Regional	Rural	Remote
<b>Number of FTE planners</b>													
Median	6.0	20.0	11.0	2.0	5.0	2.0	1.0	22.0	14.0	9.0	7.0	1.0	0.5
Highest	90.0	32.0	211.0	14.0	12.0	5.0	1.0	211.0	35.0	36.0	32.0	5.0	4.0
Lowest	0.4	2.0	0.0	0.0	0.0	0.0	1.0	1.0	1.0	4.0	1.0	0.0	0.0
<b>Per cent of workforce that are planners</b>													
Median	2.1	3.3	1.3	2.3	2.1	1.7	0.5	2.2	2.6	2.8	1.9	1.1	0.4
Highest	6.0	18.3	3.3	4.5	6.7	6.8	0.7	18.3	6.0	5.3	6.7	6.8	2.7
Lowest	0.5	0.9	0.0	0.0	0.0	0.0	0.3	0.3	1.1	0.9	0.6	0.0	0.0
<b>Staff turnover last year as a per cent of planning staff</b>													
Median	14.0	15.0	10.0	17.0	12.0	ne	0.0	17.0	17.0	14.0	11.0	0.0	0.0
Highest	40.0	54.0	33.0	51.0	100.0	ne	0.0	28.0	54.0	54.0	50.0	100.0	0.0
<b>Per cent of respondents who reported at least one vacancy</b>	40.0	47.0	43.0	5.0	30.0	0.0	0.0	20.0	44.0	53.0	50.0	3.0	0.0
<b>Per cent of planners with university qualifications</b>													
Median	100.0	100.0	100.0	100.0	100.0	88.0	100.0	ne	100.0	100.0	100.0	100.0	100.0
Highest	100.0	100.0	100.0	100.0	100.0	100.0	100.0	ne	100.0	100.0	100.0	100.0	100.0
Lowest	50.0	50.0	0.0	50.0	50.0	57.0	100.0	ne	56.0	56.0	50.0	50.0	0.0
<b>Average starting salary for planners with university qualifications (\$'000s)</b>													
Median	57.2	55.0	58.0	58.8	56.2	47.7	57.5	60.0	57.0	56.4	56.0	55.0	95.0
Highest	76.4	67.0	100.0	95.0	78.5	51.4	60.0	62.3	78.5	76.4	71.6	67.0	100.0
Lowest	35.3	50.6	50.0	54.8	51.6	47.2	55.0	57.2	35.3	48.3	50.0	47.2	65.0

ne Not estimated due to insufficient responses.

Source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

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One option available to LGs to increase their capacity to deliver planning services is to contract out some of their planning functions — such as development assessments — to a private organisation. As the Western Australia Systemic Sustainability Study Panel (2008) outline, contracting out planning functions has the potential to deliver a number of benefits to LG including:

- it allows LG to commission work as it is required, rather than maintaining permanent staff when there is insufficient work to support them
- it allows LG access to planning expertise and services even when LG cannot attract appropriately qualified personnel
- it may allow LG to access planners with greater skills and experience than they can afford to employ on a full time basis.

These benefits need to be assessed against the potential disadvantages of outsourcing planning functions. These include contracted firms not understanding local issues and planning requirements and the loss of LG intellectual property regarding planning strategies and policies (WALGA 2008). Nonetheless, for small LGs that typically face simple planning issues or only need to exercise their planning functions intermittently, contracting out planning functions is an effective way to maintain regulatory capability in this area.

### *Building inspectors and surveyors*

Building inspectors and surveyors are responsible for inspecting buildings to ensure they conform to safety standards. This extends to all stages of building development — from the lodgement of an application to build, to inspecting sites during construction, to auditing completed and existing buildings.

The number of building inspectors and surveyors employed by LGs vary markedly — many rural and remote local councils have fewer than one FTE building inspector, while the median number employed by capital city councils was 31 (table 4.13).

When compared to the planning workforce, fewer LG building inspectors have university qualifications — in all jurisdictions, the median number of LG inspectors with university qualifications was 55 per cent or below.

***Vacancies for LG building inspectors and surveyors are more concentrated in urban centres. Jurisdictionally, vacancies are highest in Victoria and New South Wales where nearly half of survey respondents indicated that they have at least one vacancy for building inspectors.*** As with planners, shortages of appropriately



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qualified building inspector staff have been recognised by the Australian Government with surveyors or structural engineers (or both) being listed in the Skills Shortage List for all states and territories (Australian Government 2011a). Finding appropriately qualified building inspectors may also grow increasingly difficult in the near future — for example, in Queensland, 90 per cent of current building surveyors will be eligible for retirement in 2014 (Local Government Career Taskforce 2009).

The workloads of LG building inspectors and surveyors are high — of the LGs which completed the Commission's LG building and construction survey, over 80 per cent reported that workload pressures were having either a major or moderate impact on their ability to effectively administer building and construction regulation (figure 4.7). This suggests that without employing additional staff, the capacity of LGs to absorb additional building and construction regulatory functions is generally limited.

Difficulty in employing suitably qualified staff was also identified as having a major or moderate impact on the ability of LGs to administer building and construction regulation in roughly half of survey respondents. The effects of high staff turnover rates were less pronounced — 70 per cent of respondents indicated that turnover was having either a minor effect or no effect on their ability to administer building or construction regulation.

In most state jurisdictions, building certification can be undertaken by the private sector as well as by LG, however the extent that private certification is used varies — for example in Victoria, 86 per cent of building permits in 2010-11 were issued by private surveyors, while in Western Australia, the use of private certification was not permitted until the start of 2012 (as discussed in further detail in chapter 7).

Table 4.13 Characteristics of the local government building inspector workforce

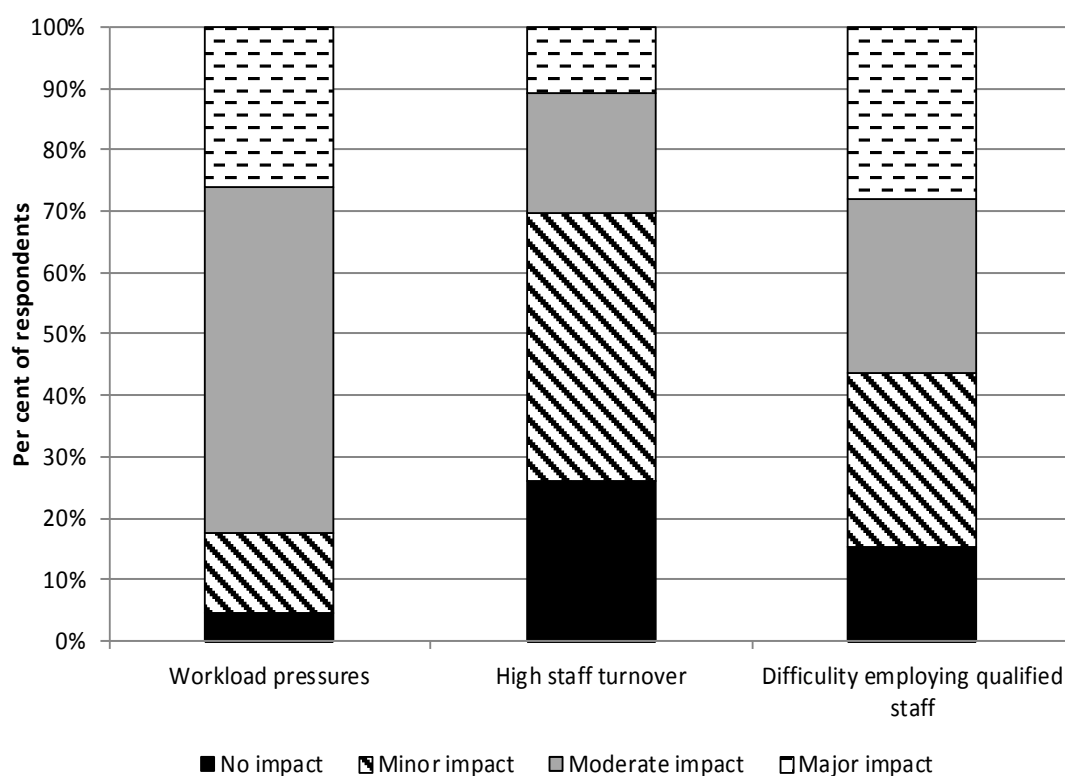
	NSW	Vic	Qld	WA	SA	Tas	NT	Capital City	Urban Metro	Urban Fringe	Urban Regional	Rural	Remote
<b>Number of FTE inspectors</b>													
Median	5.0	3.0	3.0	1.0	3.0	1.0	0.0	31.0	5.0	6.0	5.0	1.0	0.5
Highest	49.0	15.0	73.0	12.0	6.0	2.0	0.0	73.0	30.0	24.0	27.0	3.0	2.0
Lowest	0.3	1.0	0.0	0.0	0.0	0.0	0.0	6.0	1.0	2.0	1.0	0.0	0.0
<b>Per cent of workforce that are inspectors</b>													
Median	1.6	0.9	0.4	1.9	1.4	1.9	ne	1.8	1.6	1.3	1.5	1.3	0.4
Highest	4.0	10.9	1.9	3.4	5.0	2.2	ne	10.9	3.4	4.0	2.9	5.0	1.9
Lowest	0.4	0.5	0.0	0.0	0.0	0.0	ne	0.8	0.5	0.6	0.2	0.0	0.0
<b>Staff turnover last year as a per cent of inspector staff</b>													
Median	0.0	4.0	7.0	0.0	0.0	na	ne	5.0	4.0	6.0	9.0	0.0	0.0
Highest	200.0	67.0	50.0	67.0	50.0	na	ne	16.0	100.0	67.0	100.0	200.0	100.0
<b>Per cent of respondents who reported at least one vacancy</b>	45.0	47.0	36.0	29.0	10.0	0.0	ne	33.0	45.0	40.0	41.0	8.0	0.0
<b>Per cent of inspectors with university qualifications</b>													
Median	50.0	50.0	55.0	13.0	50.0	0.0	ne	ne	45.0	50.0	50.0	50.0	100.0
Highest	100.0	100.0	100.0	100.0	100.0	100.0	ne	ne	100.0	100.0	100.0	100.0	100.0
Lowest	0.0	0.0	0.0	0.0	0.0	0.0	ne	ne	0.0	33.0	0.0	0.0	0.0
<b>Average starting salary for inspectors with university qualifications (\$'000s)</b>													
Median	59.4	59.0	58.0	60.1	57.4	47.6	ne	62.3	57.0	59.0	57.0	57.4	95.0
Highest	76.4	69.4	80.0	115.0	80.0	47.2	ne	65.3	67.0	80.0	70.0	80.0	115.0
Lowest	35.3	50.6	53.9	54.8	51.6	50.8	ne	57.2	35.3	48.3	51.4	47.2	80.0

ne Not estimated due to insufficient responses.

Source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

**Figure 4.7 Workforce factors impacting on the ability of local governments to administer building regulation**

Per cent of building and construction survey module respondents



*Data source:* Productivity Commission survey of local governments — building and construction survey (2011-12, unpublished).

As discussed in chapter 7, the existence of private building certification may result in lower compliance costs for businesses. However, it may also have implications for LGs — most notably, provided that there are adequate procedures to verify the quality of the certification undertaken by the private sector, LGs that operate in areas where the use of private certification is high may be able to provide less certification services themselves and alleviate workload pressures on current staff.

### *Environmental health officers*

LG environmental health officers (EHOs) undertake many different roles, not all related to regulating businesses, including:

- monitoring and controlling water, air and noise pollution and checking the health of the general environment

- 
- inspecting food vendors to ensure they comply with health regulations and investigating complaints about food safety
  - initiating and conducting environment health impact or risk assessments
  - managing immunisation campaigns
  - inspecting and licensing businesses that require LG approval such as tattooists, acupuncturists and hairdressers
  - assessing building development applications to ensure that they comply with environmental and health and safety standards (Australian Government 2011b).

EHOs interact with many types of businesses — for example, they ensure that swimming pools are safe to swim in, food vendors sell food that has been hygienically prepared and is safe to eat, tattooists and acupuncturists do not spread diseases communicable via blood and that hairdressing salons do not spread lice. Mostly, this involves EHOs inspecting the businesses to ensure they are compliant with the appropriate health and safety standards.

Table 4.14 outlines some information about the EHO workforce employed by LGs. Urban LGs tend to employ a greater number of EHOs than rural and remote councils, however EHOs as a percentage of total workforce remains fairly constant across all LG types. There is more variation on a jurisdictional level — the median percentage of the LG workforce who were EHOs was 1.9 per cent in Western Australia, but only 0.8 per cent in New South Wales and Queensland.

The EHOs who work for LGs tend to be well qualified Australia-wide, with over 80 per cent of LG EHOs having university qualifications. This is not surprising given the breadth and depth of the tasks that EHOs are often expected to undertake. As of 2011, the Tasmanian Government requires that all EHOs hold a relevant bachelor's degree before acting as a LG officer (DEEWR 2007).

Many LGs are experiencing vacancies in their EHO workforce. While vacancies are persistent across all jurisdictions, they were highest in Queensland, where over half of responding councils indicated they have at least one EHO vacancy. Over one-third of the urban fringe and urban metropolitan LGs who responded to the Commission's survey also reported having at least one vacancy.

Table 4.14 Characteristics of the local government environmental health officer workforce

	NSW	Vic	Qld	WA	SA	Tas	NT	Capital City	Urban Metro	Urban Fringe	Urban Regional	Rural Remote
<b>Number of FTE EHOs</b>												
Median	3.0	6.0	5.0	2.0	3.0	1.0	0.0	17.0	6.0	5.0	3.0	1.0
Highest	21.0	15.0	68.0	13.0	8.0	3.0	0.0	68.0	50.0	15.0	17.0	2.0
Lowest	0.0	1.0	0.1	0.0	0.0	0.0	0.0	5.0	1.0	1.0	1.0	0.1
<b>Per cent of workforce that are EHOs</b>												
Median	0.8	1.0	0.8	1.9	1.3	1.8	ne	1.0	1.3	1.2	0.8	0.7
Highest	2.1	11.0	2.1	3.4	2.1	5.3	ne	11.0	2.4	3.2	2.1	5.3
Lowest	0.0	0.5	0.1	0.0	0.0	0.0	ne	0.7	0.6	0.3	0.4	0.0
<b>Staff turnover last year as a per cent of EHO staff</b>												
Median	0.0	7.0	12.0	15.0	17.0	ne	ne	15.0	11.0	20.0	0.0	0.0
Highest	100.0	50.0	100.0	200.0	150.0	ne	ne	19.0	200.0	50.0	100.0	200.0
<b>Per cent of respondents who reported at least one vacancy</b>	21.0	20.0	57.0	30.0	19.0	33.0	ne	25.0	38.0	40.0	31.0	11.0
<b>Per cent of EHOs with university qualifications</b>												
Median	100.0	100.0	100.0	100.0	100.0	100.0	ne	na	100.0	100.0	100.0	100.0
Highest	100.0	100.0	100.0	100.0	100.0	100.0	ne	na	100.0	100.0	100.0	100.0
Lowest	0.0	76.0	0.0	0.0	67.0	55.0	ne	na	22.0	50.0	0.0	0.0
<b>Average starting salary for EHOs with university qualifications (\$'000s)</b>												
Median	57.5	61.9	58.0	59.7	57.4	49.6	ne	62.3	58.3	58.7	57.5	55.0
Highest	76.4	67.0	80.0	115.0	70.0	65.0	ne	65.3	68.7	76.4	64.5	76.4
Lowest	35.3	50.6	52.0	50.0	51.6	47.2	ne	57.2	35.3	48.3	40.4	47.2

ne Not estimated due to insufficient responses.

Source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

There is evidence that the prevalence of EHO vacancies is having an adverse effect on the ability of LG to administer regulation. The Commission surveyed the capacity of LGs to enforce food safety regulation — a core duty of EHOs — as part of the Commission’s 2009 *Benchmarking Business Regulation: Food Safety* study. Forty per cent of respondents considered that they were not able to enforce all of their food safety regulation and almost three quarters reported that limited availability of food safety staff (who are typically EHOs) was having a medium or high effect on their ability to enforce national and state food safety regulation (table 4.15).

**Table 4.15 Degree to which insufficient availability of food safety staff was constraining LGs’ ability to enforce food safety regulation**  
2009

<i>Degree of constraint</i>	<i>Per cent of LG survey respondents</i>
Low	26
Medium	39
High	35

*Source:* Productivity Commission survey of local governments (2009, unpublished).

The salary profile of new EHO university graduates indicates that some LGs are finding it difficult to secure appropriate EHO staff, particularly in non-urban areas. For example, the Commission’s survey shows that the median starting salary for an EHO with university qualification was over \$14 000 more in remote councils than in urban metropolitan LGs — indicating that many remote LGs may need to offer higher wages in order to attract suitable EHO staff. Difficulties in attracting EHOs to remote areas have also been identified by other bodies such as the Western Australian Government (2011a), which found that 75 per cent of enforcement agencies (primarily local governments) were experiencing difficulties in recruiting EHOs in the Kimberley and Pilbara regions.

*This evidence, on balance, indicates while many LGs have the capacity to undertake their food safety, public health and environmental health regulatory functions, many others — particularly in high growth urban and in remote areas — lack the resources to undertake these functions effectively.*

## 4.4 Capacities to enforce regulation

The manner in which LGs enforce regulations has large impacts on business compliance costs. As outlined in the Hampton Review to the UK Government:

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The enforcement of regulations affects businesses at least as much as the policy of the regulation itself. Efficient enforcement can support compliance across the whole range of businesses, delivering targeted, effective interventions without unreasonable administrative cost to business. (Hampton 2005, p. 1)

A discussion of what constitutes good regulatory enforcement practices is contained in appendix I of this report and includes the use of risk analysis and escalating enforcement principles. This section explores to what extent these have been embraced by LG.

### *Strategies toward enforcement*

The enforcement strategy of a regulator refers to the broad approach used to implement and administer regulation. This can be examined across a number of dimensions including:

- the degree that regulation is enforced proactively as opposed to reactively
- the degree to which enforcement is discretionary as opposed to prescriptive
- the degree to which a ‘tough’ (punishment orientated) approach is pursued as opposed to a ‘soft’ (persuasion orientated) approach (PC 2009a).

There is no universally accepted ‘best’ enforcement strategy — rather, the optimal enforcement strategy depends on the nature of the regulation being enforced (and the magnitude of the ramifications if they are breached) as well as the behaviour of those being regulated.

Information presented to this study suggests that LGs employ both reactive and proactive approaches towards regulatory enforcement. In many cases, such as in the regulation of noise levels or waste disposal, LG enforcement practices tend to be reactionary, with enforcement generally only initiated in response to complaints. In contrast, LG enforcement approaches to food safety encompass both reactive and proactive behaviour, maintaining the practice of investigating food safety complaints, but typically complimenting this with periodic inspections of businesses even if no complaint has been lodged against them. This is discussed in more detail in chapter 9.

Brisbane City Council has also introduced ‘strategic advisory groups’ which the Commission sees as good practice in the area of proactive regulation enforcement. These groups — which may consist of LG officers, industry representatives and large businesses — consult to develop regulatory guidance material and discuss challenges in meeting regulatory requirements. The partnership is viewed as a low cost, targeted way of encouraging compliance without sacrificing regulatory

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objectives and gives Council a valuable opportunity to seek feedback on how they are undertaking their regulatory functions.

Many LGs which indicated in the Commission's LG survey that they did not have sufficient resources to undertake all of their regulatory functions indicated that a reactionary, complaints orientated approach was the methodology they used to determine regulatory priorities.

LGs, generally speaking, have a considerable amount of discretion when exercising their regulatory functions. Examples of where LG have considerable discretion include the issuing of sanctions for food safety breaches and in the inspection of swimming pools. LGs also have considerable discretion in their implementation and enforcement of their planning functions, although this is often moderated somewhat by the need to comply with regional planning strategies.

While the discretionary enforcement of regulations offers advantages — most notably, it allows regulators to be flexible and adopt 'common sense' approaches to remedy regulatory breaches — it does raise the challenge of consistency in enforcement. Evidence presented to this study has suggested that in some areas of enforcement, LGs are failing to deliver consistent regulatory outcomes. This seems particularly relevant to building and construction regulation, in which the enforcement conduct of LG varies markedly even by LGs in the same state jurisdiction, although there is evidence of it occurring in other regulatory areas as well.

LGs have many enforcement tools available to them. These include both 'soft' tools such as suasion, inspections and verbal and written warnings, and 'hard' tools such as fines, licensing cancellations and ultimately prosecution. Leading practice in the area of regulatory enforcement looks to combine the use of these tools under the concept of 'escalating enforcement'.

Escalating enforcement — also known as responsive regulation — is a model of regulation enforcement that recommends that a regulator should have an enforcement policy that uses an escalation of sanctions (Ayres and Braithwaite 1992). Central to the idea of escalating enforcement is the notion of the Braithwaite (enforcement) pyramid. A generic Braithwaite pyramid is outlined in appendix I.

The use of escalating enforcement is beneficial in the sense that it allows for a 'tit for tat' strategy where a regulator is initially cooperative and adopts a soft approach to encourage business compliance. However, if a business remains uncompliant, the regulator can adopt tougher regulatory options. As such, a regulator can be both confrontational and forgiving and, with a mix of regulatory options, can apply a



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variety of enforcement tools and approaches to promote compliance and deter non-compliance (PC 2010).

***There is some evidence that some LGs have adopted escalating enforcement in their enforcement behaviour.*** In New South Wales and Western Australia for example, the use of escalating enforcement in food safety seems well developed, with warnings and improvement notices constituting over 80 per cent of enforcement measures in these jurisdictions and tougher options (infringement and penalty notices, seizures, prohibition orders and legal undertakings) used sparingly. However, whether escalating enforcement is being utilised by LG in other enforcement areas is less clear.

#### ***Use of a risk-based approach to enforcement***

Risk-based approaches to regulatory enforcement sees regulators focusing their enforcement activities on businesses where the risk of non-compliance is highest or where non-compliance carries the greatest risk of harm (PC 2010). A risk-based approach to enforcement is considered to be a leading practice because, if done effectively, it assists regulators to focus on activities that deliver the greatest net benefit to the community, and reduces the regulatory burden on businesses that have a high level of compliance. Further information about risk-based enforcement is contained in appendix I of this report.

***The use of risk-based enforcement approaches by LGs appears to be mixed.*** In the area of food safety, the Commission has received evidence that some LGs determine inspection fees, the frequency of inspections and the duration of inspections on the basis of the risk profile of the business they are regulating. The development of ‘track’ based development assessment systems in all states has also allowed LGs to better align the scrutiny of assessment undertaken with the perceived risk of the assessment, however, less than half of respondents to the Commission’s LG survey indicated that they were using such systems. The use of risk-based frameworks for building and construction, parking and transport and environment regulation appears minimal. States may also play an important role in encouraging LGs to implement risk-based approaches to regulatory enforcement and compliance, as is the case with the *Risk-based Compliance* (2008) guide produced by the New South Wales Better Regulation Office.

Of the respondents to the Commission’s LG survey who indicated that they lacked sufficient resources to undertake all of their regulatory functions, well over half explicitly identified that relative risk influenced which regulatory areas were given priority, indicating most use this important practice to help allocate scarce

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regulatory resources to areas which will maximise the net benefit to their communities.

## **4.5 The role of the state and territory governments in building the capacity of local governments**

State governments and the Northern Territory government have an important role to play in building LG regulatory capacities. In addition to resources, they provide LG with training, support and guidance on how to regulate in the context of each jurisdiction's constitutional and governance framework.

There are many ways by which state governments and the Northern Territory government can assist LGs to build their regulatory capabilities. These include:

- providing guidance on local law making and enforcement
- providing training to the LG workforce
- providing accreditation of the LG workforce
- developing initiatives to increase the size and skills of the LG workforce
- undertaking reviews of LG regulatory capacities.

### *Guidance on local law making and enforcement*

LGs in Australia can make local laws (also called by-laws)<sup>5</sup>. To assist, most state governments have prepared guidelines or manuals on the procedures LGs are required to undertake when making and enacting local laws (box 4.4).

The extent of this guidance varies between jurisdictions. The information paper produced by the Northern Territory government is six pages long and provides a broad overview of how local laws should be made. In contrast, the local laws manual produced by the Victorian government is over 150 pages long and was developed as part of wider strategy recognising that LGs often lack guidance on best practice regulation making practices.

There is a strong case for state governments to provide a high level of guidance to LGs on making by-laws to ensure LG laws augment those made by the states and

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<sup>5</sup> NSW local governments cannot make by-laws per se, but they can make local orders and approvals policies, which are similar to local laws, although the scope of topics they can cover is narrower.

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territories and to assist LGs to make laws that embody best practice regulation principles.

**Box 4.4      Local law guidelines from state governments**

**Victoria**

- *Guidelines for Local Laws Manual* (2010)
- *Guidelines for Local Laws Resource Book* (2010)

**Queensland**

- *Guidelines for Drafting Local Laws* (2010)
- *Information paper on local laws* (2010)

**Western Australia**

- *Local Government Operational Guidelines — Local laws* (2006)
- *National Competition Policy (NCP) Reviews — Competitive Neutrality and Local Laws* (1997)

**Tasmania**

- *Making by-laws: Good practice Guidelines* (2010)

**Northern Territory**

- *Council by-laws in the Northern Territory* (2009)

Helpful local law guidelines:

- cover all stages of a local law, from conception to drafting to enactment to enforcement to review
- guide LGs on risk management approaches to regulation and the regulatory and non-regulatory options available to them
- are written using ‘plain English’ language so that any requirements or restrictions placed on LGs when making local laws are clear
- use examples and case studies to guide best practice law making
- provide advice and templates to assist LGs with undertaking RIA
- are reviewed regularly to ensure the information contained is current and complete.

Victoria’s *Guidelines for Local Laws Manual* and its accompanying documentation encompasses these principles and is considered by the Commission to be leading practice in this area. Box 4.5 provides a brief outline of the manual.

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#### Box 4.5      **The Victorian *Guidelines for Local Laws Manual* — an example of leading practice**

The *Guidelines for Local Laws Manual* (2010a) is produced by the Victorian Department of Planning and Community Development and is available to be downloaded from their website. It provides LGs with detailed information on:

- the context of local laws, both internal to and external to LGs
- how to draft local laws, including the requirements for local laws and how to review them
- communicating and consulting on draft local laws
- how to implement local laws
- making local laws accessible and how to communicate them
- how to enforce local laws
- review and sunseting requirements, including on amending or renewing local laws.

As well as providing information on the legal specifics of LG law making and enforcement in Victoria, the manual adopts an ‘outcome orientated’ approach that specifies the desired characteristics of local laws and the steps that LGs should undertake to ensure these outcomes are met. An example of an acceptable Community Impact Statement is provided in the guidelines, along with a template LGs can use to assist with constructing their own.

The information contained in the manual is augmented by the *Guidelines for Local Laws Resource Book* (2010b). The resource book provides information on best practice regulation principles that LGs should incorporate into their laws, such as risk management, plain English wording and the accessibility of local laws. The book uses examples and case studies to demonstrate these principles.

These documents were produced under the *Better Practice Local Laws Strategy* (2008) that identified limitations in the law making capacities of Victorian LGs and recommended actions to raise their capacities to make and enforce local laws.

Sources: Victorian Government (2008, 2010a, 2010b).

#### LEADING PRACTICE 4.5

*Guidance for local governments on local law and policy making is useful, with Victoria’s Guidelines for Local Laws Manual providing an example of this. The usefulness of such guidance is maximised when:*

- *it applies to both regulation development and review*
- *it is based on best-practice principles*
- *it includes not only written material but also training and ad hoc support.*

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*In undertaking this study, the Commission has identified that guidance from the states and territories to LG is, generally speaking, deficient in the area of regulatory enforcement.* The importance of good enforcement practices is not to be understated, given that the enforcement behaviour of regulators can have as pronounced an impact on business compliance costs as the regulations themselves.

As identified in chapter 2, the absence of any clear best practice principles in the area of enforcement or inspection activities, represents a gap in the current regulatory framework. A possible remedy for this is the development of a Regulatory Compliance Code similar to that adopted in the United Kingdom (box 4.6).

#### **Box 4.6      The Regulators' Compliance Code**

The Regulators' Compliance Code is a statutory code utilised in the United Kingdom based on the principles outlined in the Hampton Review. The Code specifies that, when developing their policies or principles, or in setting standards and giving guidance, regulators must give due weight to the provisions outlined in the code.

The Code asks regulators to consider:

- supporting economic progress — performing regulatory duties in such a way that does not impede business productivity
- risk assessment — undertaking a risk assessment of all their activities
- information and advice — providing information and advice in a way that enables businesses to clearly understand what is required by law
- inspections — only performing inspections following a risk assessment, so resources are focused on those least likely to comply
- data requirements — collaborating with other regulators to share data and minimise demand on businesses
- compliance and enforcement actions — how formal enforcement actions, including sanctions and penalties, should be applied following the Macrory principles on penalties (the Macrory principles are outlined in appendix E)
- accountability — increasing the transparency of regulatory organisations by asking them to report on the outcomes, costs and perceptions of their enforcement approach.

These principles — and the implications they have for regulators — are then expanded out further in handbook form.

The Code aspires to facilitate a risk-based approach to the exercise of regulatory activity, resulting in highly compliant businesses facing less of a burden and regulators targeting rogue and higher risk businesses.

*Sources:* BIS UK (2011b); BERR UK (2007).

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While this code — which the Commission considers to be leading practice — was developed to be compatible with the governance framework of the United Kingdom, the basic principles of the code have relevance to Australia, and have the capacity to be implemented on an Australia-wide or state-wide level.

The Commission notes that some principles of best practice enforcement, such as the use of risk profiling, is already exercised by some LGs in certain areas (for example, food safety). However, the implementation of a regulators' compliance code would assist formalising these principles across all LGs, thereby assisting LGs to allocate their enforcement resources more effectively and reducing the burden on highly compliant or low risk businesses. The use of enforcement priorities (similar to the National Enforcement Priorities used in the United Kingdom and discussed in Appendix E of this report) may also assist LG to undertake their regulatory functions by explicitly outlining which enforcement activities state governments expect LGs to pursue most vigorously. The development of a clear list of agreed priorities for LG regulatory services was also recommended by VCEC in its draft report into streamlining LG regulation (VCEC 2010).

#### LEADING PRACTICE 4.6

*The use of a regulators' compliance code, such as that currently in operation in the United Kingdom based on the Hampton principles, would provide guidance for local governments in the areas of regulatory administration and enforcement. Key elements of any guide would include regulatory administration and enforcement strategies based on risk management and responsive regulation.*

#### *Training of the local government workforce*

State governments have an important role in maintaining an appropriately trained LG workforce. Table 4.16 outlines the nature of the training provided to LG from the state and the Northern Territory governments. While all jurisdictions indicated that training was provided to LG in the area of regulatory administration, training in the areas of regulation making (both in the making of local laws and writing conditions into licences, leases, permits and registration requirements) is less common.

**Table 4.16 Areas in which the state governments provide training to LGs**

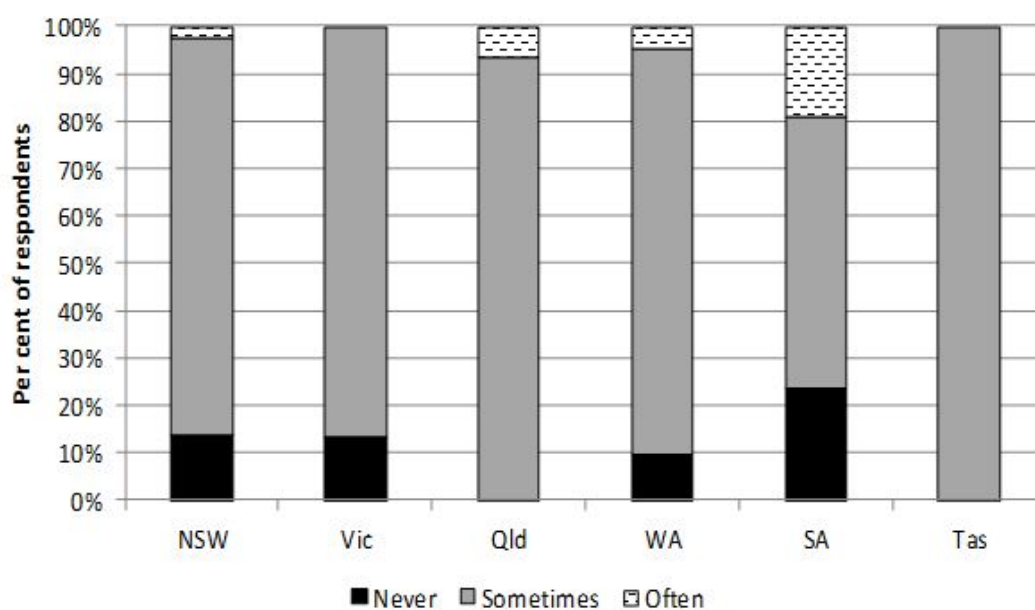
	<i>Administration of regulations</i>	<i>Making of local laws</i>	<i>Writing conditions into licenses, leases, permits and registration requirements</i>
New South Wales	✓	.. <sup>a</sup>	✗
Victoria	✓	✗	✓
Queensland	✓	✓	✓
Western Australia	✓	✓	✗
South Australia	✓	✗	✓
Tasmania	✓	✓	✗
Northern Territory	✓	✓	.. <sup>b</sup>

<sup>a</sup> LGs in New South Wales do not have the authority to make local laws however, they can make local orders and approvals policies, which are similar to local laws, although the scope of topics they can cover is narrower. <sup>b</sup> LGs in the Northern Territory do not have the capacity to write licenses, leases, permits and registration requirements. .. Not applicable.

Source: Productivity Commission survey of state governments (2011-12, unpublished).

Most LGs indicated state governments did provide training to assist them in undertaking their regulatory functions, although the frequency of this training varies. Only a small proportion of respondents to the Commission's LG survey — roughly seven per cent — indicated that they perceived that training was 'often' provided by the states and territories. Figure 4.8 provides a breakdown of responses by jurisdiction.

**Figure 4.8 Frequency of training provided by state governments to help LGs undertake their regulatory roles**



Data source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

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Training of LG officers is particularly important when the responsibilities devolved to LGs are changed or supplemented. In this regard, helpful training:

- is given to LG officers before the new regulations take effect
- is targeted towards LGs and outlines, in practical terms, the implication of the changes for LGs and their enforcement officers
- adopts a holistic approach to training, extending beyond just educating LG officers about the changes, but also the rationale behind them and how they should be enforced by LG officers
- is accessible for all LGs. Multiple training sessions in multiple locations should be offered wherever possible.

While conducting this study, the Commission has heard anecdotal examples of new regulatory responsibilities being conferred on LG with no training on how they should be implemented or enforced. That said, the Commission is also aware of instances where the leading practice principles described above have been embodied. The training program that accompanied Victoria's *Public Health and Wellbeing Act 2008* is an example of this (box 4.7).

**Box 4.7      The implementation of Victoria's *Public Health and Wellbeing Act 2008* — an example of leading practice**

In 2008, the Victorian government introduced the Public Health and Wellbeing Act. The Act, and its associated regulations, saw changes to several LG responsibilities relating to health and wellbeing, including their powers to enter premises and changes to nuisance provisions.

As part of a number of measures to assist LG in understanding the implications of the Act, the Victorian Department of Health, in cooperation with the Municipal Association of Victoria, invited LGs to attend one of thirteen training sessions. These sessions, of which many were held in regional and rural Victoria, aimed to educate and train LG authorised officers in the 'priority matters' for local government, prior to the new regulations taking effect on 1 January 2010.

*Sources:* MAV (2009); Victorian Department of Health (2010a).

**LEADING PRACTICE 4.7**

*Training for local government officers from relevant state government departments develops their capacity to administer and enforce regulations and assists with delivering good regulatory outcomes. The training associated with changes to the Victorian Public Health and Wellbeing Act 2008 is an example of leading practice in this area.*



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The Commission acknowledges that state governments represent only one source of training for LG. The LG associations in each jurisdiction offer a diverse range of training programs for their members, including programs on governance, policy writing, professional development, the use of information technology and financial management. Likewise, Government Skills Australia — an Industry Skills Council, established and funded by the Australian Government — offers an extensive range of courses and qualifications, including Certificate III, Certificate IV and Diploma level qualifications in LG regulatory services, LG planning, LG health and environment activities and in LG administration.

There is also scope for LGs to undertake training internally, or through the use of an external training provider.

### *Accreditation of local government officers*

Accreditation is a mechanism by which the states and the Northern Territory can maintain the skill levels of the LG regulatory workforce. This normally requires LG employees to register with a relevant state department prior to undertaking regulatory or enforcement functions. It is typically accompanied by an assessment of the suitability of an applicant's skills or qualifications.

Several jurisdictions accredit LG regulatory officers (Productivity Commission survey of state governments — 2012 unpublished):

- in Victoria, LG building surveyors must be registered with the Victorian Building Commission
- in New South Wales, LG building certifiers must be accredited under the Building Professionals Board prior to undertaking certification work on behalf of council
- in Western Australia, LG building surveyors must be registered with the Building Commission. Also in Western Australia, the Executive Director of Public Health approves the qualifications of all individuals LG wish to appoint as EHOs
- in Tasmania, building surveyors and assistant building surveyors are accredited under the *Building Act 2000*. Plumbing inspectors are also typically required to be licensed under the *Occupational Licensing Act 2005*.

Accrediting LG regulatory staff does have the potential to improve the capacity of LG to regulate effectively:

- it helps to ensure that LG officers are suitably qualified and skilled for the regulatory roles they are expected to perform

- 
- it allows state governments to keep track of the number and qualifications of LG officers, which in turn facilitates more effective workforce planning
  - it grants state governments more direct enforcement options in the event of misconduct or underperformance from LG officers
  - it can serve as a platform to deliver further training and development to LG officers. This may be especially useful when the regulatory responsibilities they are expected to perform change
  - it facilitates workers moving between public and private sectors and thereby enhances the attractiveness of regulatory occupations.

That said, as discussed in section 4.2, the LG workforce is subject to widespread vacancies, and excessively rigorous accreditation requirements are a barrier to having these vacancies fulfilled. As a result, state governments need to ensure that there is a strong nexus between the criteria used to accredit LG officers and the roles and responsibilities they will be undertaking.

#### LEADING PRACTICE 4.8

*Accreditation of local government officers ensures that the local government workforce is suitably qualified to undertake all of their regulatory functions, although, there is a need to ensure the accreditation criteria used reflect the roles the officers are expected to perform.*

#### *Initiatives to address workforce deficiencies*

As discussed earlier in this chapter, many LGs are finding it difficult to secure appropriately trained staff. As a result, there is scope for state governments to build LG regulatory capacity by addressing and moderating the effects of these shortages.

The Commission, as part of its survey of state and Northern Territory governments, requested information on any initiatives undertaken by the states to address skills shortages in their LGs. While most state governments indicated they did facilitate LG general workforce planning, the Commission was also presented with instances of more targeted programs to address LG workforce deficiencies. Victoria, for example, has undertaken several initiatives to alleviate the effects of skills shortages in the area of planning (box 4.8).

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**Box 4.8 Victorian initiatives to address planning shortages**

- The PLANET (PLAnning NETwork) Professional Development Program is a professional development and training program designed for planning professionals and other users of Victoria's planning system. It offers over 50 day long courses on areas such as planning system operations, strategic planning and urban design that aims to — among other things — improve practitioner skills and promote best practices in the operation and effectiveness of the planning system.
- The Rural Planning Flying Squad — a small group of planners that provides short term planning assistance to rural and regional councils in times of need. Further information about the Flying Squad can be found in box 4.9.
- Planning Institute of Australia (PIA) Planning internships and traineeships —the LG internship provides 10 places per year to students in PIA accredited courses to undertake six weeks of paid work in LG planning departments, and the traineeship provides 10 places per year for administrative or technical staff from LG planning departments to attend an intensive course to allow them to undertake some functions otherwise undertaken by qualified town planners. The Victorian Government provides financial assistance to maintain these programs.
- The development of a Certificate IV course in LG planning and a dual Certificate IV course in government statutory compliance and investigation to improve the skills of planning and enforcement officers. The government also assists in the marketing of these courses.

*Source:* Productivity Commission survey of state governments (2011-12, unpublished).

These programs should assist with overcoming planning shortages in the medium to long term. The Rural Planning Flying Squad, in particular, is a valuable initiative to address planning deficiencies in non-urban LGs and appears to be leading practice in this area. Additional information about the Flying Squad is contained in box 4.9.

As well as moderating the effects of skill shortages, the Flying Squad can facilitate the transfer of knowledge, skills and processes across council areas and encourage consistent decision making between different LGs. The concept of a 'Flying Squad' is also compatible with other areas of skills shortages, such as EHOs or building surveyors, and can easily be adopted in other jurisdictions.

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#### Box 4.9      **The Victorian Rural Planning Flying Squad**

The Rural Planning Flying Squad is an initiative by the Victorian Government that provides support to local councils to undertake its regulatory functions relating to planning. Types of assistance the Flying Squad provides include:

- assisting with advice, discussions and assessments regarding major projected development proposals and applications
- providing targeted advice and/or assistance with long term land use issues and plans with the municipality
- providing specialist assistance on wind farm applications
- helping councils to process planning scheme amendments and authorisation requests in peak periods or when council planning officers are not available
- providing occasional assistance to help process planning permit applications to enable councils to meet 60 day statutory time frames in peak periods or when council planning officers are not available
- preparing drafting submissions/presentations to VCAT or Planning Panels Victoria.

Source: VIC DPCD (2010b).

#### LEADING PRACTICE 4.9

*The use of flying squads, such as the Rural Planning Flying Squad established in Victoria, moderates the effects of local government skills shortages.*

Another example of a state government initiative that has the potential to address workforce deficiencies in LG has come through changes to Western Australia's *Building Act 2011* that permits the establishment of 'special permit authorities'. These authorities, created at the discretion of LGs, allow councils to group building approval services and centralise them at one locality (Western Australia Government 2011b). This offers two basic advantages:

- it nullifies the need for LGs to maintain their own building inspection workforce
- it reduces the burden on developers and builders, in particular where they operate across multiple LG jurisdictions.

#### LEADING PRACTICE 4.10

*By making the optimal use of various forms of cooperation and coordination, local governments are able to achieve economies of scope and scale in resources and skills. Provisions under Western Australia's Building Act 2011 that allow local governments to share building approval services provide an example of this.*

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A further workforce initiative introduced by the Tasmanian government focuses on assistance for critical surveyor positions prior to full time employment. In particular, the Tasmanian government funds positions for cadet building surveyors with assistance from the Australian Institute of Building Surveyors.

### *State government reviews of LG capacities*

Reviews of LG capacities provide a means for state governments to ‘take stock’ of the ability of LGs to undertake their regulatory functions efficiently and effectively. These might examine LG workforces, their use of technology and their relationships with key state departments.

The Victorian Competition and Efficiency Commission (VCEC) examined the institutional arrangements of LG in Victoria in its draft report *Local Government for a Better Victoria: An Inquiry into Streamlining Local Government Regulation*. It found that the regulatory performance of LGs would likely improve if:

- the Victorian Government developed a clear list of agreed priorities for regulatory services that councils administer on its behalf
- the Victorian Guide to Regulation was re-written so that it covers regulation implementation and enforcement, as well as regulation development. Councils should be consulted in developing these principles and a training program developed to assist councils in applying them
- Victorian Government departments were required to consult with LGs prior to LGs being appointed to administer or enforce new primary legislation.

The Commission sees considerable merit in these recommendations and believes that these principles if adopted — both in Victoria and in other jurisdictions — will improve the capacity of LGs to act as regulators.

The New South Wales Government, in association with the Local Government and Shires Associations, the Local Government Managers Australia and the Australian Centre for Excellence for Local Government, have developed a final Action Plan as part of their *Destination 2036* program that aims to assist LGs with meeting their future challenges. The Action Plan was released in June 2012, and recommended many activities that have the potential to build the capacity of LGs to regulate. These include:

- greater emphasis on Regional Organisations of Councils to both provide certain LG services and to strengthen collaboration on a regional level

- 
- developing a program for sharing specialist professional, technical and other staff between councils in rural areas, on a regional basis and between urban and rural councils
  - developing a program for partnering and mentoring between large/small and urban/rural councils
  - helping to ensure that councils take advantage of the National Digital Economy Strategy and the National Strategy and the National Broadband Network to improve capacity and service delivery
  - more clearly defining the functions, roles and responsibilities of the state and LGs
  - improving access to state agency information and data (NSW Division of Local Government 2011b).

The NSW Division of Local Government also undertakes reviews of LGs on an individual basis through its *Promoting Better Practice Review* program. Under this program, individual LGs are examined across a range of areas including their:

- overall strategic position
- governance
- planning and regulatory practices
- asset and financial management
- community, communication and consultation practices
- workforce relations (NSW Division of Local Government 2011a).

Within each of these categories, the review identifies areas of ‘better practice’ and areas of ‘noteworthy practice’ as well as ‘areas for improvement’ — which are typically accompanied by recommendations as to how improvement can be achieved. Once completed, LGs are given an opportunity to comment on the review, before it is posted on the NSW Division of Local Government’s website. This is an important step in itself — by posting the report on the website, the transparency of the review process is enhanced and the fact that the report is in the public sphere may act as a further incentive for LGs to act on the recommendations.

Reviews are initiated by the Division of Local Government, however they can be undertaken at the request of an individual LG. The program also offers LGs a range of tools they can use for self-assessment, allowing LGs to audit their practices without the direct involvement of the Division of Local Government.

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Programs that review LG practices on an individual level have a number of advantages:

- for LGs, reviews allow their practices to be examined by an independent party that can identify areas of deficiency and ways these can be addressed. It may also encourage collaboration between LG and the state and thereby benefit both tiers of government
- for state agencies, reviews can help to identify instances of leading practices in LG which can be transferred to other LGs. They can also indicate whether LGs are complying with state requirements and provide a ‘health check’ of a LG’s overall viability.

Reviews of individual LGs seem to be used sparingly in all jurisdictions apart from New South Wales and Tasmania<sup>6</sup>, and those that have been undertaken in other states have typically been in response to allegations of misconduct. However, more holistic reviews — similar to those employed by New South Wales — can be a useful tool to foster leading practices and build capacity in LGs.

#### LEADING PRACTICE 4.11

*There are benefits from state governments reviewing individual local governments as is the case with the Promoting Better Practice Review program in New South Wales. The benefits of such reviews are maximised when:*

- *they extend beyond a purely financial focus to encompass other aspects of local government operation such as governance, workforce and the use of technology*
- *they aim to identify leading and/or noteworthy practices in local governments as well as identify areas for potential improvement*
- *state and territory governments work with local governments to address identified areas for improvement*
- *the reviews are made publically available upon completion to enable other local governments to benefit from the relevant findings.*

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<sup>6</sup> In Tasmania, until 2009, there was a requirement for LGs to be reviewed by the Tasmanian Local Government Board every 8 years. This requirement has since been removed, although reviews are still undertaken on specific matters.





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## 5 Local government coordination and consolidation

### Key points

- In practice, local government coordination and consolidation is more focused on addressing services and infrastructure provision, regional economic development, operational cost savings or advocacy than on regulatory functions.
- Coordination and consolidation of local government regulatory functions has the potential to address the burdens that business face, particularly where there is:
  - regulatory duplication or inconsistency across local government areas
  - inadequate capacity within individual local governments to deliver good regulatory outcomes.
- Such regulatory benefits are most likely to be achieved where coordination and consolidation has the following two features.
  - There is genuine and clear agreement between two or more local governments to promote good quality regulation (including to address regulatory inefficiencies such as duplication and inconsistency in regulation).
  - There are strong incentives from well-designed legislative or assistance arrangements for individual local governments to implement the agreement.
- Incentives provided by state and Northern Territory governments are important in improving the regulatory efficiency of local government as the incentives facing them to voluntarily coordinate to achieve regulatory efficiency are likely to be weak.
  - This is because local government expenditure on regulatory functions is relatively small and, as a result, may not be a priority for local governments to improve regulatory efficiency even though there may be gains for business.
- Coordination and consolidation can be initiated by local governments, or by state and Northern Territory governments. It can include:
  - informal meetings and consultations among local governments
  - the establishment of regional organisations of councils and other groupings
  - joint activities such as resource sharing, joint projects and mutual recognition
  - the creation of joint local government entities delegated to provide functions on their behalf
  - the amalgamation of local governments into a new authority.
- Of the current approaches that involve regulatory functions, the following are examples of leading practice:
  - A new Victorian mutual recognition system of registering temporary food stalls, mobile food premises, food vending machines and water transport vehicles.
  - The South Australian Eastern Health Authority. This joint local governments entity ensures that its five constituent local governments meet their responsibilities under State environmental health and food legislation.
  - Resource sharing among local governments to improve their regulatory capacity, such as the sharing of staff resources between local governments to undertake environmental regulation and management in Western Australia.

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## 5.1 The rationale for coordination and consolidation

The focus of the following chapters is on individual areas of local government (LG) regulation such as public health, parking and road transport, the environment as well as building and construction. Although the Commission identified leading practices in these areas, it also found many instances of regulatory burdens on business.

Effective coordination and consolidation among LGs has the potential to address the sources of these burdens such as poor quality regulation, insufficient capacity of individual LGs to make and administer good quality regulation and regulatory duplication and inconsistency across LG areas.

There has been increasing interest in LG coordination and consolidation by governments at all levels, particularly among LGs and state and Northern Territory governments. There is also an extensive literature surrounding LG structural reform. Much of this has focused on the likely economies of scale and scope in the provision of LG services from LG coordination and consolidation (Byrnes and Dollery 2002; Dollery and Fleming 2006; Dollery and Byrnes 2009; ACELG 2011; Somerville and Gibbs 2012). However, the focus of this chapter is whether LG coordination and consolidation improves regulatory outcomes for business.

LG coordination and consolidation, which can be initiated by LGs or by state and Northern Territory governments, occurs in a number of ways. These are through LGs:

- meeting and consulting with each other on an informal or ad hoc basis
- negotiating agreements such as memoranda of understanding and partnership agreements
- establishing regional organisations of councils, alliances, panels and committees to undertake various activities of common interest, which are often guided by agreed charters or strategic plans
- engaging in joint activities such as sharing resources or undertaking projects together
- establishing organisations under legislation to provide LG functions on their behalf
- amalgamating.

The factors explaining LG-initiated coordination and consolidation include:

- the mounting complexity of functions that they have been required to undertake

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- a lack of, or reduced, capacity to undertake their functions such as shortages of technical or professional staff or inadequate financial resources
  - a desire to achieve efficiencies such as capturing cost savings, as well as economies of scale and scope
  - a desire to improve service delivery to local communities
  - a desire to attract businesses and economic development to a region
  - advocacy on behalf of a region to higher levels of government
  - concerns about the prospect of state government intervention (such as by undertaking resource sharing or establishing a ‘regional organisation of councils’ to pre-empt compulsory amalgamation).

State and Northern Territory governments, in encouraging and initiating LG coordination and consolidation, may also be influenced by many of these factors. For example, the Western Australian Government, which introduced a LG reform agenda in 2009 that included an increased emphasis on voluntary amalgamations and collaboration among LGs, said:

With very small rate bases and declining populations many smaller non-metropolitan local governments are focussed on survival.

Within metropolitan local governments, fragmented and inconsistent decision making often results in lengthy delays for planning approvals and building licenses which adds rental and building costs to families waiting to build new homes.

By merging, local governments can reduce the amount of money spent on administration and funds can be channelled into areas that make a difference — services for the community, such as community centres, libraries, roads and sports facilities.

By combining some contracts and services, local governments can enjoy financial advantages, while others will benefit from working with larger areas to provide the level of service that communities deserve. (WA Department of Local Government 2011f)

In New South Wales, a Local Government Review Panel has been established under the *Destination 2036 Action Plan* to identify reform options to improve the strength and effectiveness of LG in New South Wales and develop recommendations for new models of LG.

In its Local Government Survey, the Commission found that around 70 per cent of the 133 LG respondents currently coordinate with other LGs in respect of their regulatory functions (table 5.1). This coordination is focused on administering, enforcing and monitoring regulation, rather than on making regulation.

Regulatory areas that were subject to LG coordination included planning and land use; the control of pests, animal and plants; waste disposal and management; and development assessment. The main reasons given for LG coordination were ‘strategic’ and ‘achieving cost savings’.

**Table 5.1 Local Government Survey: the nature of LG coordination**

<i>Statement</i>	<i>Response</i>	<i>Statement</i>	<i>Response</i>
	per cent		per cent
<b>LGs that coordinate with other LGs in respect of regulatory functions/areas</b>		Road side parking	8
Proportion that coordinate	70	Other land care	8
<b>Regulatory functions that are the subject of coordination</b>		Reserves and picnic areas	8
Administering regulation	52	Water collection and reuse	8
Enforcing regulation	48	Off street car parking	6
Monitoring regulation	41	Carbon management measures	5
Making regulation	20	Laneways, right-of-ways, and road access	5
<b>Regulatory areas that are the subject of coordination</b>		Bridges	5
Planning and land use	44	Railroad level crossings	2
Control of pests, animals and plants	40	Non-road forms of transport	3
Waste disposal and management	35	Aboriginal and Torres Strait Islander affairs	2
Development assessment	32	Third party infrastructure	4
Food and liquor	29	<b>Main reasons for coordination</b>	
Emergencies	29	Strategic	53
Building and construction	29	Achieving cost savings	39
Biodiversity and vegetation management	25	Mandatory state government requirement	15
Community health and public safety	25	Other <sup>a</sup>	15
Water quality and monitoring	17	<b>How coordination occurs</b>	
Noise and air quality	14	Meetings	46
Stormwater and drainage	13	An agreement	37
Coastal management	11	Shared or rotated staff	20
Traffic management including signage, signals and calming devices	11	A designated body	24
Weight loads of non-standard vehicles	11	Common guidance material	20
Street lighting and footpaths	9	Common regulation	18
Wetlands and inland waterways	9	Other <sup>b</sup>	3

<sup>a</sup> Other reasons nominated by respondents included achieving consistency, government funding for regional approach, providing better services to residents. <sup>b</sup> Other ways nominated by respondents include discussions, electronic communication, and correspondence.

Source: Productivity Commission survey of local governments — general survey (2011-12, unpublished).

LG coordination primarily occurred through meetings and agreements, rather than through a coordinating body or by sharing or rotating staff.

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*LGs are involved in coordinating the administration, enforcement and monitoring of regulations across a number of areas.*

Despite the increased interest of all governments in LG coordination and consolidation, business participants have expressed concerns to the Commission about the number and capacity of small LGs (box 5.1).

**Box 5.1      Businesses say there are too many LGs**

**NSW Business Chamber:**

At a Sydney specific level, maintaining 41 councils and their associated regulatory regimes in the Sydney basin presents real barriers to business growth for NSW. Local differences in regulation can make compliance for business unduly complex and costly. (sub. 11, pp. 1–2)

**National Farmers Federation:**

... Tasmania has a large number of councils (29) covering a relatively small area which means that farmers can be dealing with more than one council for the same property. This emphasises the need for a more consistent application between council bodies. (sub. 30, p. 3)

**Small Business Development Corporation:**

A long-term recommendation, the amalgamation of local government authorities in both metropolitan and regional Western Australia, would provide substantial benefits to small businesses and the wider community. In local government areas with local population catchments, enlarging the pool from which local government appointments can be made is likely to improve skills and experience levels, leading ultimately to better and more consistent decision making. (sub. 29, p. 14)

**Business SA:**

... Local Government amalgamations would enable economies of scale, increase effectiveness and efficiency and reduce the scope for inconsistency in and duplication of regulations. (sub. DR48, p. 1)

These concerns suggest that current coordination and consolidation approaches have not worked as well as they might in addressing the regulatory burdens experienced by business. As a counterpoint to these concerns, there are community grass roots concerns about large LGs (created through amalgamation). These centre primarily about the loss of local identity (or of local democracy). For example, Megarity said:

State governments in the last two decades have forced numerous councils to amalgamate in the name of economic efficiency, discounting other aspects of local government such as social cohesion and civic participation at the local level. The

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attachment which many residents have to their local areas could be seen in strong regional protests prior to the 2008 council amalgamations in Queensland, which reduced the number of councils from 157 to 73 with a minimum of consultation. (2011, p. 5)

## Current approaches to coordination and consolidation

There are four broad, sometimes overlapping, categories of approaches to LG coordination and consolidation.

### *Joint activities between LGs*

These include resource sharing, joint projects and mutual recognition. These arrangements can be mediated through ROCs and other coordinating bodies, under agreements, an exchange of correspondence between LGs, or under legislation. Approaches taken to resource sharing include LGs undertaking joint ownership, reciprocal sharing or a LG hiring out its resources to other LGs. There is no one best approach to resource sharing.

Across Australia there is already a diversity of approaches, although most jurisdictions restrict the options available to councils — in some cases very tightly. Each model has its strengths and weaknesses and councils need to choose carefully (Somerville and Gibb, p. 44, 2012).

The types of resources that are commonly shared are headquarters, libraries, waste management, emergency management, specialised staff, IT, and plant and equipment (see table 5.2).

**Table 5.2 Examples of resource sharing arrangements involving local government regulatory functions**

<i>LGs</i>	<i>Resource sharing arrangement</i>
Conargo, Deniliquin, Murray (NSW)	Under a Memorandum of Understanding for Shared Services (2007), the LGs undertake exchanges of technical expertise, undertake short term staff secondment for specialist projects such as major environmental impact statements and developments, share a heritage advisor, and share ranger/impounding services.
Griffith, Jerilderie, Hay, Narrandera and others (NSW)	Under the (Griffith Region) Food Safety Inspection Agreement, Griffith City Council provides food surveillance services through its environmental health officers to surrounding LGs.
Bruce Rock, Corrigin, Koorda, and others (WA)	The shires are part of the Central Wheatbelt Ranger Scheme, which employs a full-time ranger to provide community education and enforcement of local laws, including caravan and camping, dogs, bushfires, litter and vehicles in off-road areas.

*Sources:* NSW Division of Local Government (2011e); WALGA (nd).

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LGs can also undertake joint projects to achieve particular outputs or outcomes. Undertaking the projects might also involve sharing resources (such as financial and human resources).

There is also the use of mutual recognition. This is an agreement whereby compliance with the requirements of one jurisdiction is deemed to satisfy the regulatory requirements of another jurisdiction. However, in practice, mutual recognition amongst LGs appears to be rarely undertaken. One of few such examples is Victoria's licensing arrangements applying to temporary food premises, mobile food premises and food vending machines.

*Regional organisations of councils (ROCs) and other coordinating bodies of LGs.*

ROCs are voluntary 'partnerships between groups of local government entities that agree to collaborate on matters of common interest' (ALGA 2011b). ROCs vary in size, structure, mandate, activities, geography and population. The type of activities undertaken by ROCs and their management arrangements vary (see box 5.2). The diversity of the ROCs is discussed further in appendix J.

**Box 5.2 Regional Organisations of Councils**

ROCs are voluntary groupings that are usually formed in geographically contiguous areas, often corresponding to commonly identified regions. ROCs undertake a range of functions on behalf of their member LGs and local and regional communities, including providing a regional point of contact, acting as regional forums, facilitating joint activities by LGs, managing regional projects, providing regional advocacy and building strategic partnerships.

ROCs may specialise in one or more of these activities, which are often funded at least in part by state or Australian Government and which can also involve formal inter-governmental partnerships. Some ROCs even have a role in either regional governance arrangements involving state governments or in assisting the delivery of state or Australian Government services.

ROCs also have a range of management models, but typically involve a board comprising selected representatives (usually but not always the mayors) from each LG. General managers may also be involved at the board level, but more commonly form a separate committee to deal with operational matters. Other LG officers may be involved in staff committees or working groups overseeing specific projects.

Some ROCs are unstaffed, with a member LG undertaking secretariat functions, but a significant number have one or more staff members. In terms of governance, most ROCs are incorporated associations, but a small number are registered as corporations.

*Source:* ACELG (2011).

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These arrangements are most prevalent in New South Wales and Western Australia, with over half all ROCs being located in these jurisdictions.

There are also various examples of other regional grouping of LGs including committees, partnerships alliances, panels zones and forums. An example of a regional grouping coordinating on regulatory functions is the Namoi Regional Food Surveillance Group, consisting of the Liverpool Plains, Gunnedah and Narrabri Shire Councils, which provides a food inspector at a reasonable cost to all members and ensures food inspection techniques are uniform across all LG areas.

### *Joint LG entities*

Joint LG entities can be created to undertake the legislative responsibilities of individual LGs. Joint entities differ from other groups of LGs such as ROCS and other regional groupings in that legislation plays an essential role in their establishment, objectives and governance and these entities are delegated with legislative responsibilities by their constituent LGs.

Joint LG entities are usually created to provide services and manage facilities, involving waste management, water, vermin control and land development. Other joint LG entities are involved in regulatory functions. For example, one of the roles of the Eastern Health Authority is to ensure that its constituent LGs meet their legislative responsibilities relating to environmental health. Similarly, the Castlereagh-Macquarie County Council in New South Wales was established to provide effective integrated weed management systems to all its constituent LGs in accordance with the New South Wales *Noxious Weeds Act 1993*.

### *Amalgamations of LGs*

There are two approaches to LG amalgamation — either mandatory (imposed on LGs by state and Northern Territory governments) or voluntary (initiated by LGs and/or encouraged by governments). Although these approaches differ significantly, amalgamation is used by state and Northern Territory governments as a means of achieving structural reform of the LG sector. LG amalgamations have also been widely used in some other countries to achieve structural reform of their LG sectors (see box 5.3).

Most jurisdictions have undertaken major amalgamations in the past two decades, including the mandatory amalgamations undertaken in Victoria in the 1990s and in Queensland in 2008. In contrast, voluntary amalgamations have been proposed in Western Australia and there has been discussion surrounding amalgamation of LGs in southern Tasmania.



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**Box 5.3      Some overseas approaches to LG coordination and consolidation**

As in Australia, many developed countries have sought to improve the operational efficiency of LG by reducing the number of LGs through amalgamation. For example, the United Kingdom and New Zealand have both undertaken significant structural reforms. In the United Kingdom the focus of this reform has been to move away from the 'two tiered' LG system by establishing larger unitary authorities through LG amalgamations. In contrast, New Zealand has moved towards a 'two tiered' system, albeit through large scale LG restructuring which reduced over 800 LGs to 11 regional councils and 67 territorial councils (the United Kingdom and New Zealand reforms are discussed further in chapter 2 and appendix E).

The Canadian experience varies by province as, like Australia, LGs are under the control of the provincial governments. During the 1990s, the eastern provinces undertook extensive amalgamations. Ontario, for example, reduced the number of LGs from over 800 to nearly 450 creating large municipal LGs. However, in 2006 Quebec, following a series of referenda, actually undertook a number of LG de-amalgamations while in British Columbia LG amalgamations remain voluntary.

In other countries, such as the United States and France, community attachment to small local government and a strong sense of local identity has worked against mandatory amalgamation of LGs.

The United States contains a vast array of county, municipal, township and special purpose LGs and there has been no widespread move for amalgamations to improve LG efficiency — as in Australia, the state governments retain control over LG. Reform has focussed on changes in the form of government, the policy agenda of LG and management practices. The number of LG units in the United States has remained relatively stable over the past two decades.

In France, amalgamations or mergers of communes (communes as the primary form of LG range in size from large cities to small villages) has been rare and there has been little change in the number of communes over the last 200 years. This is due to the strong sense of identity residents retain with their commune. Also, the mayor has certain stature under French law which, along with the importance of the commune to the local community as the base level of government, reinforces this sense of local identity.

Nevertheless, some of the smallest communes have merged while others have developed cooperative arrangements or formed 'communal syndicates' to share resources and services. These reforms, both mergers and formalised cooperative arrangements, have been undertaken on a voluntary basis and financial incentives are available to encourage mergers between communes. The French Government has announced that it expects to have a more coherent system of inter-communal cooperation, including the merger of smaller communes, in place by 2013.

*Sources:* Tiley (2010); Lugan (2001); Yeates (2011); Wollman (2012).

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Most LG amalgamations are mandatory rather than voluntary. According to the Commission's Local Government Survey, 15 of the 133 LG respondents were involved in amalgamations in the last ten years. The main reason they gave for amalgamating was mandatory state government requirement.

Further details and various examples of the current approaches to LG coordination and consolidation, including amalgamation, are provided in appendix J.

The remainder of this chapter looks at the following aspects of LG coordination and consolidation:

- the legislative and government assistance arrangements that enable LG coordination and consolidation
- the benefits of reducing regulatory burdens on business from LG coordination and consolidation
- leading practices in LG coordination and consolidation to improve regulatory efficiency.

## **5.2 Legislative and assistance arrangements**

To a varying extent, both local government Acts as well as government assistance arrangements enable LG coordination and consolidation and play a crucial role in shaping the incentives facing LGs to coordinate or consolidate in the first place.

### **Local government Acts**

The state and Northern Territory local government Acts all contain provisions enabling or recognising different approaches to coordination and consolidation among LGs. There is considerable variability in the provisions depending on the approach being contemplated. Where the Acts do not contain provisions enabling a particular approach, there may be similar provisions in other Acts or under regulations.

#### *Joint activities*

Only the New South Wales, Queensland, Western Australian, and Northern Territory Acts expressly provide or recognise joint activities (such as resource sharing arrangements and joint projects) by LGs (appendix J, table J. 1). The Acts give LGs discretion as to whether they undertake joint activities.

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For example, the Queensland *Local Government Act 2009* (Part 1, Chapter 10) provides:

- (1) A local government may exercise its powers by cooperating with 1 or more other local, State or Commonwealth governments to conduct a joint government activity.
- (2) A joint government activity includes providing a service, or operating a facility, that involves the other governments.
- (3) The cooperation with another government may take any form, including for example —
  - (a) entering into an agreement; or
  - (b) creating a joint local government entity, or joint government entity, to oversee the joint government activity.
- (4) A joint government activity may be set up for more than 1 purpose.

The Victorian and South Australian Acts have more limited provisions relating to joint activities. The Tasmanian Act does not have provisions relating to joint activities between LGs. However, it does have provisions relating to the establishment of joint LG entities, which are an alternative avenue for LGs to undertake joint activities.

#### *Regional organisations of councils and other coordinating bodies*

Many of the ROCs and the LG coordinating bodies are specifically referred to under the state and Northern Territory local government Acts (table 2.11), or are enabled by provisions under the Acts applying to joint LG entities.

#### *Joint local government entities*

All local government Acts, apart from the Victorian Act, have provisions enabling the establishment of a joint LG entity that is delegated with the power to undertake legislative responsibilities on behalf of individual LGs (appendix J, table J.2). Under the Queensland, Western Australian, South Australian, Tasmanian and Northern Territory Acts, LGs can initiate the establishment of the joint LG entity subject to Ministerial approval. The New South Wales Act only allows the Minister to initiate establishment of joint LG entities. Table 5.3 sets out the terms used in the Acts to describe joint LG entities as well as specific examples. As noted, joint LG entities may be established under other Acts.

**Table 5.3 Local government Acts: joint LG entities**

<i>Jurisdiction</i>	<i>Description of joint LG entity under the Act</i>	<i>Examples</i>
NSW	County Council.	Castlereagh Macquarie County Council, MidCoast County Council, Richmond River County Council.
Vic	No provisions.	Not applicable.
Qld	Joint local government entity or joint government entity.	Not available.
WA	Regional local government.	Eastern Metropolitan Regional Council, Tamala Park Regional Council, Murchison Regional Vermin Council.
SA	Regional subsidiary.	Gawler River Floodplain Management Authority, Southern and Hills Local Government Association, Eastern Health Authority.
Tas	Joint authority.	Coping Refuse Disposal Site Joint Authority, Dulverton Regional Waste Management Authority, Southern Waste Strategy Authority.
NT	Local government subsidiary.	CouncilBiz.

### *Amalgamations*

All local government Acts have provisions applying to the amalgamation of LGs. Broadly these provisions cover:

- who can initiate the amalgamation proposal
- the establishment of an independent review body to consider the amalgamation proposal
- the process and decision making criteria that the review body must follow in considering the amalgamation proposal
- how any recommendation of the review body is dealt with by the Minister
- the effects of amalgamation on the local laws of the constituent LGs (appendix J, tables J.3–J.5).

The extent to which amalgamation can improve regulatory efficiency and reduce the regulatory burden on business is likely to depend on:

- the existence of provisions or criteria in the legislation requiring the review body to take into account regulatory efficiency in considering amalgamation proposals
- whether or not sunset provision apply in the respective LG Act to the pre-existing local laws of the constituent LGs following amalgamation.

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*Does the legislation take account of regulatory efficiency in LG amalgamation?*

Of the states, the New South Wales, Western Australian and South Australian Acts have a detailed list of factors or principles that the review body is to take into account when considering amalgamation proposals (appendix J, tables J. 4 and J.8). The Victorian and Northern Territory Acts do not set out any decision-making criteria. Criteria for Tasmanian amalgamations have been developed by the Tasmanian Local Government Board.

Many of these jurisdictions have criteria relating to ‘community of interest’, financial impacts on LGs, impacts on the delivery by LGs of services and facilities, and the consideration of alternatives to amalgamations. However, none of the Acts set out criteria relating to the impacts of amalgamation on LG regulatory functions.

*Do sunset provisions apply to pre-existing local laws?*

Most local government Acts allow for pre-existing local laws to continue and apply to the amalgamated LG areas indefinitely, while others have sunset provisions (appendix J, table J.5). Having pre-existing local laws continue is likely to increase the regulatory burden on business due to the increased volume of regulation, greater regulatory uncertainty and possible inconsistencies between these local laws.

The example of the amalgamation of Glenn Innes and Severn Shire Councils in New South Wales in 2004 illustrates how pre-existing local laws can continue. The proclamation for the formation of the new Glen Innes Severn Shire Council in 2004 from the amalgamation of areas of Glenn Innes and Severn and other boundary changes basically grandfathered any approval, order or notice given by a former LG before the proclamation as if it were done by the new LG (provision 9). Moreover, the proclamation provides that local policies for approval and orders of the new LG are, as far as practicable and where applicable to be a composite of the corresponding policies of each of the former LGs (provision 11(1)a). But this provision ceases to have effect when the new LG adopts a new policy under the relevant provisions of the Local Government Act (provision 11(4)). These provisions appear to be standard for proclamations concerning newly created LGs arising from amalgamations and boundary changes.

In contrast, the Queensland, Tasmanian and Victorian Acts have sunset provisions. For example, the Tasmanian Act provides:

151. (1) If a new council is created or a council is created as the result of 2 or more municipal areas or parts of municipal areas being combined, the council so created may resolve by an absolute majority to adopt any by-law previously in force in any of those areas or parts of those areas...

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(5) A by-law which is not adopted by a council under subsection (1) within a period of 14 days after that council is created ceases to have effect from the end of that period.

In Queensland the local laws of LGs subject to the 2008 amalgamations, unless already applied to the amalgamated LG area, automatically lapsed on 31 December 2011 (Queensland Department of Local Government 2011).

## **Government assistance**

Government assistance is often central to progressing LG coordination and consolidation. Although the state, Northern Territory and Australian governments provide assistance to LGs to coordinate or consolidate, the focus of much of this assistance is on improving the financial sustainability of LGs, or enhancing LGs' ability to provide infrastructure or services, through coordination or consolidation.

This assistance can be financial or non-financial (such as in the provision of guidelines, or sponsoring meetings and forums) (appendix J, table J.6). Some examples of the types of assistance provided in Western Australia under the Local Government Structural Reform Program are provided in box 5.4.

However, some assistance has been provided to target specific regulatory responsibilities of LGs. This assistance has often been in the form of guidance or regulatory templates. For example, both the New South Wales and Victorian Governments provided this form of assistance to their LGs to promote consistent food regulation (chapter 9).

## **5.3 Reducing excessive regulatory burdens on business**

The potential benefits of LG coordination and consolidation are wide-ranging and include:

- gains in economic efficiencies arising from economies of scale and scope in local government functions
- gains in regulatory efficiencies — for example, better quality regulation as well as reduced inconsistency and duplication in regulation across LGs
- improved capacity and capability in LGs to carry out their functions, including their regulatory functions
- improved financial sustainability of LGs

- strategic benefits such as greater economic development and investment in LG areas and more funding from higher levels of government.

**Box 5.4 Financial assistance under the Western Australian Local Government Structural Reform Program**

The Department of Local Government (WA) administers the Local Government Structural Reform Program; providing financial assistance to LGs that have resolved to:

- amalgamate
- participate in a regional transition group, consisting of LG authorities who see the need to amalgamate, but who have not been able to formalise agreements with their proposed partners
- participate in a regional collaborative group, consisting of LGs from regional areas (such as the Kimberley, Pilbara, Northern Goldfields and the Murchison), where vast distances mean that amalgamation is not a priority, who seek to examine opportunities for shared service arrangement.

The amount of financial assistance provided to the groups is based on the number of participating LGs, the aggregate population and total expenditure of the group.

LGs who agree to amalgamate can receive financial assistance for the costs of amalgamation, including project management, change management, human resources and industrial relations (for example, redundancy), legal matters, IT and communications systems infrastructure, business process (for example, local laws, policies and governance), branding (logo, uniform, website, and stationery) and office accommodation.

Regional transition groups can receive financial assistance for the costs of undertaking a regional business plan to investigate the costs and benefits of transitioning into a single entity. The regional business plan is to include provision for: governance arrangements of the existing entities and the new entity; integrated strategic planning processes, with appropriate community engagement; analysis of productivity/service improvements; asset management systems; and financial information.

Regional collaborative groups can receive financial assistance for the costs of undertaking a regional business plan for the development and delivery of common systems and services to the region.

*Source:* WA Department of Local Government (2011g).

Of relevance to this study is the potential for LG coordination and consolidation to address excessive regulatory burdens on business. It can do this by:

- reducing regulatory inconsistency or duplication among neighbouring LGs, thereby reducing the compliance costs for businesses who operate in more than one LG area

- 
- improving the capacity and capability of LGs to effectively carry out their regulatory functions, including making more efficient regulation and providing good quality regulatory services to businesses.

Studies that have examined the impacts of LG coordination and consolidation — for example, Deloitte Access Economics (2011), ACELG (2011) and PriceWaterhouseCoopers (2006) — have tended to focus on the financial sustainability and strategic benefits, rather than on regulatory efficiencies. Fewer again have attempted to quantify these impacts.

There is some limited ad hoc evidence of the benefits of addressing regulatory inefficiency, including the regulatory burdens on business, through LG coordination and consolidation.

- The Council of Mayors SEQ is undertaking a project on behalf of its member LGs with the Local Government Association of Queensland to reform development assessment processes for operational works and large subdivisions (DAPR-OWL). The project is intended to achieve a 25 per cent reduction in assessment timeframes for large subdivisions and for the majority of operational works applications. The Council's initial estimates for the project indicate a financial benefit to the development industry of approximately \$17 million per annum through a reduction in holding costs. It also considered that its member LGs would benefit from more efficient assessment processes and operational improvements (Council of Mayors SEQ 2012).
- The Western Australian Department of Local Government (2010a) examined a number of amalgamation case studies. It noted that, within 12 months following the amalgamation of the:
  - City of Geraldton and the Shire of Greenough, there was a single town planning scheme and the removal of duplication for customers, government and industry
  - Town and Shire of Northam, there was a 'forced' examination of procedures, current policies, local laws and delegations as well as a 'distinct' improvement in planning coordination, notwithstanding that the individual town planning schemes were yet to be amalgamated.
- In Victoria, the Growth Areas Authority — a statutory body that coordinates parties involved in planning and development of Melbourne's outer suburban growth areas — and six Growth Area LGs have been working together to create an agreed set of metropolitan engineering standards. The project was found to have several benefits for the private sector, including greater certainty around design and construction requirements and faster approvals. A post-completion evaluation undertaken by Regulatory Impact Solutions found that the estimated



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savings for business could be as much as \$14.3 million annually (D'Costa and Vivian nd).

- A 2009 survey (Morton Consulting Services and Market Facts (Qld) 2009) of the mayors and chief executive officers of 30 amalgamated LGs in Queensland (involving 56 responses overall) found some positive outcomes related to LG regulatory functions flowing from amalgamation.
  - On a scale of 1 (very poor) to 5 (very good), respondents assessed key outcomes of amalgamation to include: stronger, more efficient and effective local governance (3.93); overall performance of the new LG in terms of representation, decision-making and service delivery relative to community needs (3.73); and efficiency of operations in terms of current workforce numbers, skills, and distribution across the LG area (3.43) (p. 5).
  - 71 per cent of respondents believed that new LG boundaries would facilitate better planning and development control (p. 13).
  - 44 per cent of respondents expected a complete set of revised local laws for the amalgamated area by 2010 with a further 35 per cent expecting completion by 2011 (pp. 13–14).

The undertaking of independent good quality studies on the impacts of LG coordination and consolidation in relation to their regulatory functions would better corroborate the in-principle benefits noted above.

## **5.4 Improving regulatory efficiency through local government coordination and consolidation**

### **Local government agreement on regulatory efficiency**

LG coordination or consolidation should involve a genuine and clear agreement to address regulatory efficiency. There are two reasons for this:

- the lack of agreement on, or clarity of, objectives can lead to conflict among LGs and hamper their collective ability to achieve those objectives at as low a cost as possible
- objectives grounded on efficiency reflect community-wide benefits and concerns. For LGs to agree to such objectives reduces the risk that they act together in such a way as to create adverse impacts for LGs and others that are not party to the coordination or consolidation approach.

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In identifying agreements to improve regulatory efficiency as part of LG coordination and consolidation, it is important to distinguish between approaches that involve LG agreement on the provision of regulatory functions from those that involve agreement on addressing regulatory efficiency. It is the latter approaches that are relevant in reducing regulatory burden on business.

Examples of this include:

- the Conargo Shire, Deniliquin Shire and Murray Shire Councils in New South Wales under their Local Councils' Partnership Agreement (2007) agreed to have common development application forms and procedures.
- the City of Albany, the Shire of Augusta — Margaret River, the Shire of Broome, the City of Greater Geraldton and the City of Kalgoorlie — Boulder in Western Australia are undertaking a joint project to develop online building and health permits application software.
- The South Australian Local Government Association has been undertaking a Red Tape Reduction Pilot Project with the South Australian Government to identify opportunities for LGs to reduce red tape for business. The current focus is on identifying opportunities for red tape reduction in the planning and development system, with a particular emphasis on efficiencies through e-solutions
- The recently launched 'CouncilsOnline' portal developed for the LG sector in Western Australia with financial assistance from the Australian Government. This provides a single online portal for the online preparation, lodgement and processing of planning and building applications with LGs. The benefits of this single portal for business include uniform and consistent processes, faster processing of applications and the capacity to track applications across multiple LGs. These arrangements are presently in place for LGs across the Perth metropolitan area and some LGs in the south west of the State.

#### LEADING PRACTICE 5.1

*Local government coordination or consolidation requires a genuine and clear agreement among local governments to achieve regulatory efficiency objectives, particularly to:*

- *reduce regulatory duplication or unwarranted inconsistency among local governments*
- *improve the competency and capacity of local governments to effectively undertake their regulatory functions.*

*The agreement may be stand-alone, or mediated through a coordinating body or under legislation.*

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## Incentives for improving regulatory efficiency

There may be insufficient incentives for LGs that are party to a coordination and consolidation approach to voluntarily implement measures to achieve regulatory efficiency objectives compared with the incentives to address other LG priorities and concerns. The gains from addressing regulatory efficiency objectives are not necessarily felt directly by LGs. This is because LGs' net expenditure on regulatory areas and functions constitute a small proportion of their total net expenditure. Consequently, regulatory efficiency objectives may be overlooked, despite the potential for businesses and others in the community to gain substantially from LG regulatory reform. In such cases, there may be a case for strengthening incentives for LGs to voluntarily coordinate or consolidate.

As D'Costa and Vivien said in the context of collaborative reform between state and local government:

The challenges of multiple institutions coordinating their efforts are considerable, and there are many examples where ambition has far exceeded the actual results, especially with regards to service delivery. ... Similarly, cooperative mechanisms between levels of government premised on 'partnership has also gained favour. There is some debate however whether such an approach enhances local decision making or in practice limits accountability and constrains local policy development, especially in the context of partnership between institutional unequals. ... A conclusion from recent experience is that without the use of additional funding as an incentive for institutions to play a constructive role, there is little prospect of success, and what is achieved can come at a cost elsewhere. (nd, p. 3)

The following considers whether provisions under the state and Northern Territory local government Acts and government assistance arrangements provide sufficient incentives, or impose impediments, to achieve regulatory efficiencies.

### *The impact of local government Acts on undertaking joint activities*

Among the local government Acts, only the New South Wales, Queensland, Western Australian and Northern Territory Acts contain provisions expressly recognising joint activities between or among LGs. On this, it is worth noting VCEC's views concerning strengthening of the Victorian Act.

More cooperation could, for example, enable councils to exploit jointly economies of scale in a particular regulatory service, or enable a council which has limited expertise in regulatory area to improve its service, consequently addressing skill deficiencies .... Cooperation could be strengthened through stronger legal obligations on councils to collaborate and more Victorian Government guidance. (VCEC 2010, pp. 292–3)

None of the Acts above contain express provisions for joint activities to address regulatory efficiency objectives, or on the public reporting of outcomes (apart from

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the Northern Territory) in relation to these joint activities. The absence of such provisions is not surprising and may reflect the complex range of functions that LGs are required to perform. However, the performance of LGs in relation to their regulatory functions can have far-reaching consequences for many businesses. For state governments to include such provisions under the Acts, and to provide administrative guidance on the scope of the provisions, would reinforce the incentive of LGs to address regulatory inefficiencies through this approach to coordination and consolidation.

### *The impact of local government Acts on creating joint local government entities*

All the local government Acts have detailed provisions applying to the establishment and governance structure of joint LG entities. An issue is whether individual LGs have sufficient incentives in the first place to use these provisions to create joint LG entities to undertake regulatory functions and to do so in an efficient manner.

Many joint LG entities established under these provisions tend to be mainly service providers. However, there are exceptions such as the Eastern Health Authority in South Australia (see box 5.5).

#### LEADING PRACTICE 5.2

*Regulatory efficiency can be improved by including express provisions in local government Acts:*

- *to permit joint local government activities to address regulatory efficiency objectives*
- *to enable a joint local government entity to be established to undertake regulatory functions in an efficient manner.*

*In addition, state and Northern Territory governments could provide administrative guidance to clarify the scope of the provisions, including that coordination and consolidation is relevant to more than just service delivery.*

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### Box 5.5      **The South Australian Eastern Health Authority**

The Eastern Health Authority is formed as a regional subsidiary under the South Australian *Local Government Act 1999*. Its objective is to protect people's health and wellbeing.

The Authority provides a range of environmental health services to the community in the eastern and inner northern suburbs of Adelaide. These include the provision of immunisation services, surveillance of food safety, sanitation and disease control, and licensing of supported residential facilities.

The Authority's constituent LGs are the City of Burnside, Campbelltown City Council, the City of Norwood, Payneham and St Peters, the City of Prospect and Walkerville Council. It services a combined population of over 150 000.

It ensures that its constituent LGs meet their legislative responsibilities, which relate to environmental health and that are mandated in the *Public and Environmental Health Act 1987*, *Food Act 2001*, and the *Supported Residential Facilities Act 1992*.

The Authority is governed by a Board of Management comprising of two elected members from each constituent LG. It has a Charter which sets out its purpose, powers and functions, powers of delegation and other matters. The Board is responsible for ensuring the Authority acts according to its Charter.

The Authority is funded by its constituent LGs. The contribution paid by a constituent LG is determined by a calculation based on the proportion of the Authority's overall activities it uses. The contribution is paid in two equal half yearly instalments

*Source:* Eastern Health Authority (nd).

### *Amalgamations and local laws*

The local government Acts, apart from the Northern Territory, all have detailed provisions applying to the amalgamation of LGs into a new single LG. An issue regarding the Acts' provisions applying to amalgamations is how they deal with the local government regulations of the constituent LGs.

As noted above, many of the Acts grandfather or allow these regulations to continue until they are adopted or revised by the new LG. This can lead to a situation where a LG is administering two or more local environmental plans (say), rather than a single plan. Consequently, amalgamation can add to rather than reduce regulatory inefficiencies.

***Applying sunset provisions to the pre-existing local laws of amalgamated local governments in Queensland, Victoria and Tasmania can improve regulatory efficiency and reduce the risk of amalgamation actually increasing regulatory duplication and inefficiencies.***

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### *Are there legal impediments?*

As well as enabling LG coordination and consolidation, the relevant provisions in local government Acts could be unnecessarily onerous, thereby, impeding LGs from coordinating and consolidating in effective ways to address regulatory efficiency. For example, within the context of discussing shared service arrangements in New South Wales, Dollery and Kelly said:

Legal impediments are often obstacles, a point recognised in the *Draft Destination 2036 Action Plan*. For example, in the NSW local government system, local councils face substantial legal costs in establishing county councils, which has served to inhibit the formation of dedicated special purpose vehicles to deliver shared services and thereby may have prevented the formation of numerous shared service entities. The Local Government Act should thus be amended to minimize these impediments. (2012, p. 20)

#### LEADING PRACTICE 5.3

*Legislative provisions that impede local governments from coordinating and consolidating in effective ways run contrary to leading practice.*

### *Government assistance*

As discussed above, government assistance provided in all jurisdictions to LG coordination and consolidation appears to be focused on achieving financial sustainability and/or enhancing infrastructure or service provision.

Accordingly, it is not possible to provide an example of financial assistance being provided for LG coordination and consolidation to address regulatory inefficiencies. However, it is worth drawing attention to the Western Australian approach to providing assistance (box 5.4). Financial assistance provided under the Western Australian Local Government Structural Reform Program to LGs can strengthen the incentives of LGs to jointly explore coordination and consolidation arrangements that they might not otherwise do. If more targeted to addressing regulatory efficiency, this could amount to leading practice.

#### LEADING PRACTICE 5.4

*Suitable state government incentives and support to address regulatory efficiency improve the outcomes from local government coordination and consolidation.*

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## **When should an approach become mandatorily imposed by governments?**

It might transpire that, even with the addition of incentives of the kind described above, LGs might not voluntarily coordinate or consolidate, or if they do, might still not address regulatory efficiency objectives. In that case, there might be a case for state and Northern Territory governments to mandate an approach to ensure that community-wide concerns and benefits are addressed. This has occurred in some jurisdictions in relation to mutual recognition such as Victoria's licensing arrangements applying to temporary food premises and related activities and Victoria's approach to mandatory amalgamations in the early 1990s.

It is necessary that LGs (and the communities they represent) are fully engaged were the state and Northern Territory governments to impose a mandatory approach to coordination and consolidation. Disenfranchisement of LGs and local communities could affect the ultimate success of the approach.

## **Is there one broad approach to LG coordination and consolidation to improve regulatory efficiency?**

The choice of approach, whether it be amalgamation, resource sharing, mutual recognition, or another approach will depend on the circumstances confronting LGs. It may be that, for various reasons — historical precedent, local community attitudes, state government policy, LG priorities and concerns, and prevailing legislation — LGs find one approach to coordination and consolidation more attractive to implement than another. Consequently, it is not possible to say that one approach is superior in all circumstances.

That said, the following are some general observations about specific approaches.

### *Resource sharing*

Resource sharing among LGs can address deficiencies in the capacity of individual LGs to discharge their functions, including regulatory functions. In particular, it can assist in removing delays, enhancing the skills development of LG staff and promoting knowledge dissemination.

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#### LEADING PRACTICE 5.5

*Resource sharing among local governments can address deficiencies in the capacity of individual local governments to discharge their regulatory functions. In particular, sharing staff resources provides individual local governments with access to additional skills and resources which is likely to assist in reducing the delays on business in obtaining local government approvals and permits.*

Examples of this approach to leading practice include the sharing of resources to undertake environmental regulation and management between the City of Canning, the Shire of Collie and the Shire of Northam in Western Australia and the regional alliance of LGs operating under the Goulburn Broken Local Government Biodiversity Reference Group in Victoria (see chapter 11).

#### *Mutual recognition*

Mutual recognition has several advantages compared with alternative approaches. First, it can achieve consistency or harmonisation in LG regulation where agreement on uniform regulation is difficult. This is because businesses can choose with which LG to register or license, and this can induce other LGs to review their own regulation, thereby driving harmonisation. Second, it can reduce the compliance cost of businesses that operate in more than one LG area. And third, it can enable LGs with relatively weak regulatory capacity to rely on the registration or licensing decisions of LGs with stronger capacity. However, a risk with mutual recognition is that businesses might choose LGs that have ‘softer’ regulatory regimes than other LGs thereby leading to a race to the lowest possible standards. For this reason, VCEC (2010) suggested that a mutual recognition arrangement be implemented on a trial basis, in relation to the registration of food premises before extending it to other LG regulatory areas.

#### *Joint LG entities*

Joint LG entities or some other regional coordinating body charged with carrying out regulatory functions on behalf of a number of LGs has the potential to target regulatory efficiency more effectively than overarching coordinating bodies such as ROCs and local government associations.

- A specialised regulatory body is more likely than these other bodies to develop regulatory expertise and capacity.
- Other coordinating bodies are often required to serve other objectives, which might take priority over regulatory efficiency objectives.



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An example of a joint LG entity carrying out regulatory functions on behalf of LGs is the South Australian Eastern Health Authority which provides for its constituent LGs to meet their responsibilities under State environmental health and food legislation.

### *Amalgamation*

Amalgamation is not necessarily the best approach to targeting regulatory inefficiencies when compared with other coordination and consolidation approaches such as the establishment of a joint LG entity with regulatory functions, a joint project between LGs to address a regulatory problem, or a mutual recognition arrangement between LGs.

- Amalgamation is motivated by a wider range of reasons than regulatory efficiency such as achieving the financial sustainability of LGs and improving the quality of services and infrastructure provided to the communities they represent. The criteria used to determine whether amalgamations should proceed or not are often couched in terms of ‘community of interest’, local community acceptance, financial impacts, as well as the population and geographic characteristics of LG areas. Applying these criteria does not necessarily result in better quality regulation by the new body.
- Although amalgamation can lead to an improved capacity in the new LG to make and administer good quality regulation, this is an incidental, rather than a primary, benefit of amalgamation in most cases. Also, unless sunset provisions apply to existing regulation, amalgamation runs the risk of increasing regulatory inefficiency. Consequently, larger LGs may not necessarily impose lower regulatory costs on business

Bearing in mind these observations, LG coordination and consolidation provides the opportunity to realise regulatory efficiencies.



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## 6 Business perceptions of local government regulation

### Key points

- Business stakeholders raised many concerns regarding local government regulation including complex regulatory frameworks, jurisdictional overlaps and inconsistencies, protracted timeframes, lost business opportunities, lack of transparency, regulatory creep and the inadequate resourcing of local governments.
- Many businesses reported that it is the cumulative cost of all regulation that concerns them the most — this compounding effect of regulation can have pervasive effects, particularly on small business.
- More than one in five surveyed businesses indicated that regulatory dealings with local and territory governments in the last three years have had a negative impact.
  - The perception that regulation had a negative impact on business was highest in New South Wales, Western Australia and Queensland.
  - The view that regulation had a positive impact on business was most common among businesses based in South Australia and Victoria.
- A significant majority of surveyed businesses with dealings in multiple areas of regulation reported that regulations in the areas of planning and land-use and building and construction had the most impact on business.
- While the majority of surveyed businesses were satisfied overall with their recent regulatory dealing there were a number of areas of concern:
  - half stated that approval times were uncertain
  - 43 per cent of businesses said the time and effort to comply was excessive
  - one third considered that there was too much duplication with state government regulation, rules and guidance were too complex and fees were unreasonable.
- Businesses with recent regulatory dealings with local governments in Queensland, Western Australia and New South Wales were not satisfied with their overall dealings while businesses with local government dealings in South Australia and Tasmania were the most likely to be satisfied with their dealings. Complaints that:
  - the time and effort to comply were too long was most common among businesses with dealings in Queensland and New South Wales
  - approval times were uncertain were most common for businesses with dealings in Western Australia and Queensland
  - there was too much duplication with state government regulation were common among businesses with dealings in New South Wales and Queensland
  - rules and guidance were too complex and that business was treated unfairly were most commonly reported among businesses with dealings in New South Wales
  - fees were unreasonable were most common among businesses with recent dealings in Queensland.

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While most businesses agree that much regulation is both necessary and beneficial, many have suggested that the volume of LG regulation and inconsistencies that exist between jurisdictions have imposed significant and unnecessary compliance burdens.

This chapter firstly presents some snapshot statistics of businesses in LG areas. It briefly explores some unnecessary burdens that may arise from LG regulation and introduces the Commission's approach to gathering information. The chapter then follows with a discussion on the broad range of concerns raised by participants to this study including a presentation of results from business perception surveys. Finally, it presents the areas of LG regulation selected for benchmarking.

## **6.1 A statistical snapshot of business in local government areas**

Considerable diversity exists both within and between jurisdictions. Chapter 2, for instance, described the diversity in size, population and roles between LGs. Chapter 3 documented significant differences in legislative frameworks and chapter 4 reported differences in the revenue resources and skills base of LGs. Business activity is another area of diversity between LG areas.

In a well-managed regulatory system, business would be expected to thrive. The Chamber of Commerce and Industry Queensland commented:

While acknowledging that effective regulation can deliver positive outcomes for business and the community, inappropriate and inefficient regulation continues to impact significantly on the cost of conducting business in Queensland. (sub. 36, p. 1)

While regulation can have a direct impact on business activity, there are a number of other factors which impact on business growth and participation in LG areas including demographic trends, average household income, labour market participation, access to credit and availability of land. This section presents some snapshot statistics to highlight diversity in business participation between LGs. However, it does not attempt to attribute the reasons for any differences as the LG regulatory environment is just one of a multitude of factors which can impact on business activity.

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## **Business numbers in LG areas**

In June 2009, there were almost 2 million businesses operating throughout Australia in LG areas. The majority of these businesses were in the most populous states of New South Wales (34 per cent), Victoria (26 per cent) and Queensland (21 per cent).

Business communities in LG areas are dominated in number by small businesses. Most businesses (60 per cent) are non-employing and a further 24 per cent employ fewer than 5 people. Only 15 per cent of businesses employ 5 or more workers.

The LG with the largest population and greatest number of businesses is Brisbane City Council, with a population in excess of one million people and over 107 000 businesses.

The median number of businesses in single LG areas in Australia was 1153. However, there are wide disparities between jurisdictions. In general, LGs in Victoria have the greatest number of businesses (with a median of over 4300). This compares with median business numbers of 300 and 75 in LGs in Western Australia and the Northern Territory, where business numbers per LG area are generally the lowest (table 6.1).

By LG regional classification (as defined in chapter 2), the majority of businesses are located in urban metropolitan areas, where the majority of Australia's population resides. In June 2009, 44 per cent of the population living in LG areas were living in urban metropolitan regions. Similarly, almost 900 000 businesses or 45 per cent of businesses were operating in urban metropolitan areas throughout Australia. A significant number of businesses are also located in urban regional LG areas while relatively few businesses operate in rural and remote areas (table 6.1).

Table 6.1 Number of businesses in LG areas by size and region, June 2009<sup>a</sup>

	NSW	Vic	Q/d	WA	SA	Tas	NT	Total
<b>Businesses by LG area (no.)</b>								
Median	1 865	4 303	695	294	997	866	75	1 153
Lowest <sup>b</sup>	36	310	0	3	0	117	0	0
Highest	43 837	29 370	107 401	18 615	14 692	5 725	6 190	107 401
<b>Businesses by size (no.)</b>								
Non-employing	391 060	304 667	248 116	129 498	89 883	21 927	7 357	1 192 508
Employ 1–4 people	174 055	126 068	93 211	46 506	28 699	8 099	2 615	479 253
Employ 5–19	76 323	56 497	45 987	23 559	16 281	5 239	1 471	225 357
Employ 20 or more	25 501	19 772	18 446	10 000	5 595	1 808	805	81 927
<i>Total</i>	<i>666 939</i>	<i>507 004</i>	<i>405 760</i>	<i>209 563</i>	<i>140 458</i>	<i>37 073</i>	<i>12 248</i>	<i>1 979 045</i>
<b>Businesses by LG region (no.)</b>								
Urban capital city	43 837	29 370	107 401	13 085	14 692	5 725	6 190	220 300
Urban metropolitan	295 685	270 398	161 032	102 552	67 962	na	na	897 629
Urban fringe	109 222	79 925	6 456	43 381	22 604	9 049	1 293	271 930
Urban regional	156 498	96 182	112 174	17 799	9 413	10 326	2 501	404 893
Rural	61 034	31 129	14 168	27 431	25 787	11 973	1 811	173 333
Remote	663	-	4 529	5 315	0	-	453	10 960
<b>Business density (number of businesses per 1000 population)</b>								
Average	94	93	92	93	87	74	56	92
Median	106	97	94	114	102	73	18	100

<sup>a</sup> Of the 563 LGs under study this data includes 558. The ABS does not report business numbers for Silverton Village, Tibooburra, Gerard, Yalata and Nipapanha. <sup>b</sup> In a number of Aboriginal LGs there are no recorded businesses. The Commission excludes business numbers in unincorporated areas and in Weipa (which is administered by Rio Tinto). na not applicable.

Sources: ABS (*Regional Population Growth, Australia 2010-11*, Cat. no. 3218.0); ABS (*Counts of Australian Businesses, including Entries and Exits, June 2007 to June 2009*, Cat. no. 8165.0, data cube 'Businesses by Industry Division by Statistical Local Area by Employment Size Ranges'). The Commission used the ABS SLA to LGA concordance (ABS Cat. no. 1216.0) to convert the published SLA data into LGA data. At the SLA level, the ABS randomly adjusts the data to avoid the release of confidential data.

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## Business density in LG areas

Business density, defined as the number of businesses per 1000 population, is likely to provide more meaningful estimates of differences in business activity between jurisdictions than business numbers alone as the measure accounts for diversity in population size.

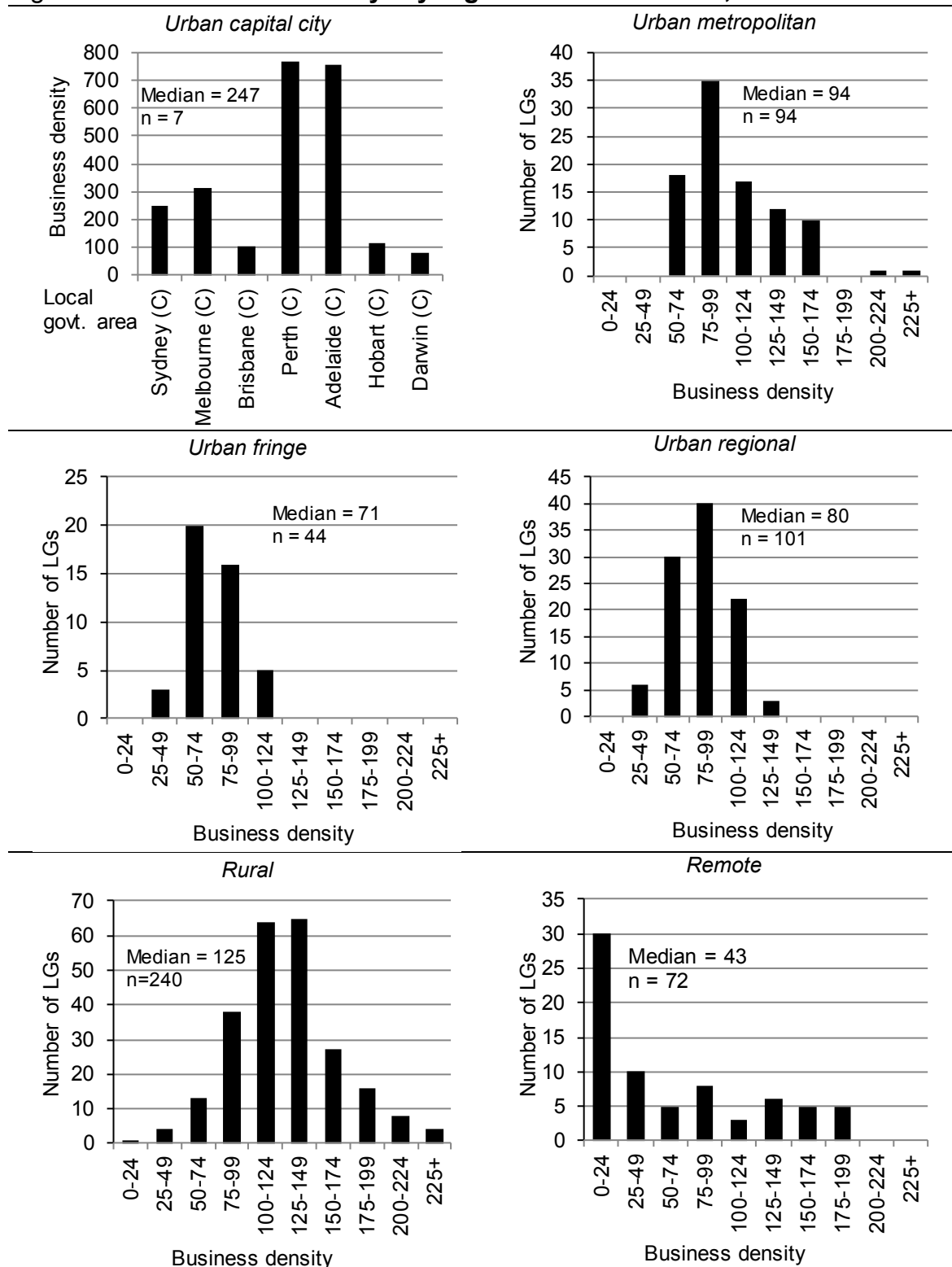
Table 6.1 shows that in most states business density is around 90 businesses per 1000 population (with the exception of Tasmania and the Northern Territory where estimates are lower at 74 and 56 businesses per 1000 population, respectively). The median business density of LG areas is more variable, ranging from a median of 18 businesses per 1000 population in the Northern Territory to 114 businesses per 1000 population in Western Australia.

Figure 6.1 presents population density for each LG area by regional classification. Median density ranges from 43 businesses per 1000 people in remote areas to 247 businesses per 1000 people in urban capital cities. However, it is important to note that the estimates do not take into account that business customers may reside in LG areas outside the area of business. This is of particular importance in capital cities. For instance, the relatively high business densities in Perth City and Adelaide City Council (both over 750 businesses per 1000 population) reflects that business customers in these LG areas are drawn from residents from a range of LG areas.

Capital cities aside, the classification with the highest median business density is rural LG areas (125 businesses per 1000 population). The rural LG with the highest business density is Lake Grace, one of the largest agricultural shires in Western Australia, with over 250 businesses per 1000 people. However, business density for the large majority (80 per cent) of rural LGs is between 75 and 175 businesses per 1000 people.

At the opposite end of the scale, in remote LG areas the largest business density is in Richmond Shire Council, Queensland where there are about 180 businesses per 1000 people but for the majority (75 per cent) of remote LGs, business density is less than 100 (figure 6.1).

**Figure 6.1 Business density<sup>a</sup> by regional classification<sup>b</sup>, June 2009**



<sup>a</sup> Number of businesses per 1000 population <sup>b</sup> Of the 563 LGs under study this data includes 558. Data is not reported for Silverton Village, Tibooburra, Gerard, Yalata and Nipapanha.

Data sources: ABS (*Regional Population Growth, Australia 2010-11*, Cat. no. 3218.0); ABS (*Counts of Australian Businesses, including Entries and Exits, June 2009*, Cat. no. 8165.0). The ABS SLA to LGA concordance (ABS catalogue 1216.0) was used to convert the published SLA data into LGA data.



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## 6.2 Unnecessary burden of regulation

Repeatedly in consultation and submissions, businesses reported that it is the ‘total weight’ or cumulative cost of all regulation that concerns them the most.

Coles Supermarkets Australia, for example, commented:

While we agree regulation is necessary to achieve certain policy objectives, it is the cumulative impact of regulation that imposes the greatest burden on our business. As a national retailer, we strongly support any reform program aimed at simplifying and reducing the regulatory compliance burden on business, across and within local government. (sub. 5, p. 1)

Similarly, the Department of Resources, Energy and Tourism stated:

The cumulative impact of regulation is a significant challenge for the tourism industry. It is important for regulators to be mindful that businesses must meet a range of regulatory requirements which can be confusing and costly to navigate. (sub. 37, p. 3)

This compounding effect of regulation can have pervasive effects, particularly on small business. The Small Business Development Corporation (of Western Australia) commented:

Small businesses operate in an environment of regulations, covering many aspects of their daily operations, and which are set by all tiers of government. As is well understood, small businesses are typically disproportionately and detrimentally impacted by government regulations and compliance burdens, and any moves to reduce this impost would be greatly welcomed by the sector. (sub. 29, p. 2)

Generally, for regulation to achieve its objectives a necessary consequence is that some burden is placed on business. However, when regulations are poorly designed or there are duplicative reporting requirements or inconsistent application and interpretation between jurisdictions, they may impose greater burdens on business than is necessary to achieve their objectives. In this study it is unnecessary regulatory burdens that are of primary concern. Some specific examples of unnecessary burdens that may arise from LG regulation are provided in box 6.1.

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### Box 6.1      **Some examples of unnecessary burdens**

Unnecessary burdens may arise from:

- additional administration and operational costs (including paperwork costs) needed to meet regulatory requirements
- excessive coverage of the regulations, including ‘regulatory creep’ — regulations which encompass more activity than was intended or required to achieve the objective
- specific regulations which are covered under generic regulation
- unduly prescriptive regulation that limits the ways in which businesses may meet the underlying objectives of the regulation
- unwieldy licence application and approval processes
- excessive time delays involved in obtaining responses and decisions from regulators
- rules or enforcement approaches that inadvertently provide incentives to operate in less efficient ways
- regulations which unnecessarily result in lost business opportunities, constrain the capacity to respond to changing technology or change the characteristics of their products, what they produce or where they produce it
- associated costs of education and training or consulting services required to understand and comply with complex regulatory requirements and changes to those regulations
- invasive regulator behaviour such as overly frequent audits, inspections or information requests
- inconsistent processes within and across councils, including differences in interpretation of similar requirements
- overlap or conflict in the activities of LGs with state and commonwealth regulators
- limited appeals processes and the ease with which these can be accessed.

## **The Commission’s approach to gathering information**

The Commission drew on a range of sources to identify areas of LG regulation which impose unnecessary burdens on business. These included submissions, consultations with business, regulators and other stakeholders, existing survey data, a small and medium businesses survey conducted through the Sensis Business Index and a survey of LGs. Appendix B details the Commission’s approach to gathering information.

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### **6.3 Regulatory concerns raised in submissions and in consultations**

Through submissions and stakeholder consultations, the Commission was made aware of various areas of LG regulation where differences existed among Australian jurisdictions and which imposed burdens on business. However, given the sheer breadth of LGs' regulatory roles and the broad range of concerns raised by business during consultations and in submissions, it is not feasible to report every concern raised. The Commission's approach has been to focus on activities of LGs that materially affect costs incurred by business, as consistent with the terms of reference.

Planning and land use, building and construction, transport, public health and safety, environment and food safety were the regulatory areas repeatedly raised as areas of concern in consultations and submissions. Specific concerns raised in these areas are discussed in the chapters which follow and a list of those areas benchmarked is provided in section 6.6. The national survey of business perceptions of LG as regulator, discussed in section 6.5, also provides information across different areas of regulation.

Participants also raised a number of generic or overarching concerns related to LG regulation and processes. These concerns can be grouped into three categories — the cost of LG regulation; the transparency of regulatory requirements and decision making; and the resourcing of LGs.

#### **The cost of LG regulation**

Business raised many concerns about the cost of LG regulation including complex regulatory frameworks, intra- and inter-jurisdictional overlaps and inconsistencies, protracted timeframes and lost business opportunities.

##### *Complex regulatory frameworks*

Many participants to this study reported that complexity is making the regulatory environment increasingly difficult to navigate. For example, the Business Council of Australia commented:

The complexity involved in addressing regulatory requirements is becoming increasingly difficult for business to manage, resulting in a significant cost burden for many companies. This complexity is also relevant for local government resourcing, with companies highlighting the fact that there often appears to be a lack of knowledge and understanding regarding the guidelines that they are required to enforce. (sub. 38, p. 3)

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Similarly, the Department of Resources, Energy and Tourism noted:

Australia's regulatory environment is complex. Businesses are often required to satisfy the regulatory requirements of Commonwealth, state and local government, and to interact with more than one regulatory authority at the Commonwealth and state level. In many instances, to establish a new business or expand/change the nature of an existing business, regulatory approvals are needed concurrently and a delay in one area can impact business costs and start-up times. (sub. 37, p. 3)

Nekon describes the complex planning system in Tasmania where there are 36 different planning schemes to comprehend:

The 36 planning schemes have developed into very complex documents that even professionals both within and outside councils appear not to fully understand at times. This leads to property developers and their consultants enduring considerable frustration in navigating through the requirements of 36 different planning schemes. (sub. 24, p. 1)

A number of submissions reported that complexity in regulatory processes are particularly onerous for small business. For example, the New South Wales Small Business Commissioner stated:

Local councils, over time, have developed complex processes which are consistently applied to all applicants, regardless of their capacity to deal with these processes. This means that there is no discretion about how councils can work cooperatively with small businesses in a way which may be more appropriate than the way they deal with large businesses. (sub. 18, p. 2)

#### *Inter- and intra-jurisdictional overlaps and inconsistencies.*

As foreshadowed in the earlier comment by the Department of Resources, Energy and Tourism, regulatory complexity often arises from intra- and inter-jurisdictional differences in regulation. Intra-jurisdiction differences were noted as a primary concern for the Australian Institute of Architects who said:

Inconsistency between local government area planning schemes, even when purportedly made under the same state or territory authority, is a significant barrier to an efficient planning approval system. Ostensibly, planning schemes under an overarching strategic plan, developed by a state or territory government, should vary only in what geographical areas have the relevant zone under the strategic plan applied. We understand this is often not the case. (sub. 40, p. 1)

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Similarly, the NSW Business Chamber (NSWBC) commented:

With 152 councils continuing to operate in NSW, NSW businesses are exposed to significant variations in interpretation and application of councils' regulatory functions. While the NSWBC is supportive of the democratic principles underlying local government decision making, the current size and scope of councils in NSW means that councils are not effective in working with business in driving economic growth. This is particularly apparent within the Sydney Basin. (sub. 11, p. 8)

Stakeholders also expressed concerns regarding the coordination of regulatory processes between different government bodies. For example, the National Farmers Federation said:

In Tasmania, it has been noted that a lack of a coordinated approach and communication between local government and other government bodies regarding the administration of regulation can result in wasted time and money ... An overlay of administration of regulation by multiple levels of government bodies leads to a lack of clarity and creates the impression of unnecessary complexity. This can lead to farmers spending an inordinate amount of time trying to ascertain which tier of government they should be dealing with for a particular matter. (sub. 30, pp. 3–4)

Differences in regulatory interpretation between states were a key concern for participants including member companies of the Business Council of Australia. By way of example:

One company described the highly variable advice received from different states in regards to the interpretation of the word 'meat' in the Uniform Trade Measurement legislation. In one state meat was defined as red meat only while in another it was defined as all animal flesh other than seafood. Similarly, the different interpretation and approaches that individual environmental health officers have applied to the food safety legislation has in some cases resulted in considerably varied ratings for inspections in the one site. (sub. 38, p. 2)

Inconsistencies in enforcement procedures were also reported by Coles Supermarkets which commented:

While progress has been made to improve the effectiveness and consistency of all levels of government regulation, inconsistencies in the development and enforcement of local government regulation remains a key issue for our business. For a national retailer with 2200 outlets, any form of inconsistency limits our ability to implement nationally uniform processes and procedures, or alternatively, requires us to implement the most stringent requirement at much greater expense. Inconsistencies also create duplication in paperwork or administration, team communications and require specialist legal, regulatory and compliance resources to monitor all possible regulations to ensure ongoing compliance. (sub. 5, p. 2)

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Further, Hosted Accommodation Australia described how businesses in its industry were affected by inconsistencies:

In some instances the regulation requirements established at a state level are not being followed correctly resulting in either charges being made for services that are not being delivered or over interpretation of the regulation's requirements. Some users are being instructed to carry out regulatory functions beyond the required regulation at their own expense, whereas others are incurring costs on instruction from council officers to undertake expenditure that is not required under the regulation with the proviso that not to comply would result in further action. (sub. 13, p. 1)

### *Protracted timeframes*

Complaints regarding delays in LG decision making have been a recurring theme in this study. The NSW Small Business Commissioner noted:

Some of the most common complaints I hear about are the delays and perceived obstructionism by local councils in relation to planning and other business-related applications made by small businesses. These behaviours have the tendency to impose rules to hinder growth rather than provide solutions to encourage jobs growth, promote sustainable development and create thriving environments. (sub. 18, p. 1)

The Housing Industry Association said:

Many of the problems faced by builders when dealing with local government relate to the plethora of planning requirements and delays in the administration of the planning and building system. Particularly in planning there are long delays experienced in processing applications and local governments are frequently unable to meet statutory deadlines. (sub. 34, p. 6)

The NSW Small Business Commissioner added that small businesses were particularly burdened by time delays.

A small business is understandably less financially able to deal with long time delays in processing; however there is no capacity within councils to respond to the fact that the economic impacts for small businesses are significantly more arduous. It should not be acceptable that the approval process for development applications can take years in some instances, for what can be minor works. (sub. 18, p. 2)

### *Lost business opportunities*

Opportunity costs can pose a significant compliance cost for business. Lost opportunities may result from regulation-induced changes in prices and resource allocation and delays in the introduction of new products and services. Regulations can change the incentives facing businesses in ways that lead them to change the characteristics of their products, what they produce or where they produce it.

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A number of participants reported the loss of business opportunities arising from LG regulation. The Small Business Development Corporation stated:

... variations in planning requirements impact on small business and ultimately end consumers. As the RTRG reported ‘Some developers may avoid projects in certain areas where they have experienced delays or difficulties in the past and others may choose not to enter the market at all’. (sub. 29, p. 6)

The Department of Resources, Energy and Tourism added:

Planning schemes are complex and challenging to navigate and can act to prohibit, discourage or limit the scope of developments. This is particularly the case where land is zoned in a manner that does not provide for tourism uses. (sub. 37, p. 4)

In a similar vein, the Queensland Tourism Industry Council said that businesses:

... draw attention to an increasingly complex and costly regulatory environment, threatening the viability of existing operations and deterring further investment. (sub. 33, p. 4)

Further, the Victorian Caravan Parks Association commented:

The current environment for new developments is already heavily burdened with high costs and lack of availability of debt funding, and the difficulty in finding affordable development sites, so the uncertainty and delays caused by regulation are increasing the number of parks being sold for redevelopment and reducing the number of new tourist parks. (sub. 32, p. 2)

## **Transparency in regulatory requirements and decision making**

During the course of the study many businesses called for increased transparency in regulatory processes to address concerns about the lack of certainty. For example, the Small Business Development Corporation said:

The SBDC believes that local governments should publish and make publicly accessible internal policies and guidelines used in decision-making processes, including clearly defined timeframes for common applications and approval processes. (sub. 29, p. 13)

Similarly, the Australian Trucking Association commented:

What the industry expects from any level of government is accountability, transparency and the opportunity for a platform of discussion with policy makers. While some areas of local government are achieving this, a large number are not fulfilling their role as public providers. (sub. 8, p. 10)

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The setting of LG fees and charges was raised as an area where increased transparency is considered warranted. Hosted Accommodation Australia said:

A further major problem is the lack of transparency of costs and charges made by councils for services. Confusion exists as to what is being paid for and the service provided. The differences in charges that exist across many Councils effectively creates a deterrent to the development of an accommodation business in one shire as opposed to an adjacent shire which has a more lenient approach to recovery of costs. (sub. 13, p. 1)

This view was echoed by the Accommodation Association of Australia:

It may be stating the obvious, but because councils operate in a monopoly, i.e. they don't compete with each other, businesses have little choice but to foot the bill for these costs, i.e. they are unable to simply choose to pay another council instead. It is the submission of the Accommodation Association that a more formal and transparent structure of costs imposed by LG on business be put in place. (sub. 17, p. 4)

### *Regulatory creep*

Participants to the study identified a number of areas of 'regulatory creep'. Regulatory creep is a term used to describe the propensity of regulators to broaden regulation over time and beyond the boundary of the regulation's intent.

The Chamber of Commerce and Industry Queensland (CCIQ) suggest that a lack of understanding of the compounding effect of regulation is the primary cause of regulatory creep:

CCIQ firmly believes it is the cumulative effect of regulation and its ongoing growth that creates a regime that is stifling to business and the economy. Unfortunately it is our experience that governments struggle to fully appreciate and understand the cumulative effect of regulation and this is the primary reason for regulatory creep. (sub. 36 p. 2)

Regulatory creep impacts on business by increasing compliance costs above what is necessary to achieve the intended policy outcome.

The Brisbane City Council described regulatory creep in environmental regulation:

The expansion of the regulatory system has resulted in regulatory inconsistency and excessive burdens on businesses attempting to understand and comply with all levels of regulation. In the environmental regulatory area in particular, Council's experience is that provisions change constantly and even the website locations of such provisions move around. Businesses incur substantial costs employing technical experts to work through the regulations and interpret them for their business. (sub. 26, p. 5)



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Similarly, the Business Council of Australia reported overregulation regarding noise and environmental regulation:

One company describes an instance where LG processes have crept into the remit of state government in regards to noise and environmental management at a refinery site. This has led to similar regulation being imposed at both the state and local levels resulting in additional complexity, time and costs for the associated business. (sub. 38, p. 1)

Further, the Housing Industry of Australia in a paper attached to its submission described regulatory creep in building regulation:

The problem of Local Government regulatory interventions over and above the minimum necessary requirements of the BCA [Building Code of Australia] has been well documented. The concerns centre on the cost impacts on housing affordability in particular and whether the regulatory interventions have been subject to COAG Principles. The subsequent erosion of national consistency that results from such interventions is also a significant concern for industry. (sub. 34, p. 12)

### **Inadequate resourcing of local governments**

A number of participants expressed concern that inadequate resourcing of LGs is impacting on LG regulatory processes and decision making creating unnecessary burdens on business.

The Australian Logistics Council noted:

It is true that because of a lack of size, many local government areas do not have the skills and resources, or alternatively, do not prioritise the task of undertaking, or obtaining, the engineering assessments necessary to make informed road access decisions. Regrettably, on occasion decision making can be either inconsistent or capricious. (sub. 15, p. 3)

The NSW Small Business Commissioner considers that inadequate resourcing contributes to delay costs in LG decision making:

Many small businesses face unacceptable delays when they seek planning approvals from councils. There is a common complaint that local council staff do not understand the financial impacts when small business owners are required to adhere to duplicative and excessive assessment procedures and wait for significant periods for council assessments. Anecdotally, the current situation has arisen due to lack of adequate resourcing of councils, a culture which is not strongly focussed on customer service or an appreciation of how businesses operate and lack of appropriately skilled planners to undertake assessments. (sub. 18, p. 2)

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Participants generally considered that small LGs are more burdened by inadequate resourcing. The Small Business Development Corporation noted:

Just like small business themselves, very small local governments often have problems attracting qualified and competent staff for specialised positions (such as managerial roles, town planners, engineers and building surveyors), particularly in regional and remote areas. The lack of appropriately skilled and experienced council staff can lead to poor or inconsistent decision-making, which can have a detrimental impact on small businesses. (sub. 29, pp. 10–11)

Similarly, the National Farmers Federation described under resourcing in Queensland.

The issue of resourcing/staffing is a particular concern to remote rural councils in Queensland as they have a limited rate base (e.g. Boulia has only 300 to 400 people) and it is often difficult to attract and retain appropriately qualified staff. In August 2011, 90% of councils in Queensland were facing a skill shortage. (sub. 30, p. 3)

### *Revenue ‘gouging’*

Some stakeholders reported that the inadequate resourcing of LGs has resulted in them seeking to obtain additional revenue from business.

The NSW Small Business Commissioner commented:

In many cases, local governments are seeking additional revenue streams to support their operations, which have the unintended consequences of imposing additional costs on local businesses which inhibit growth rather than encourage it, and have the potential to contribute to the undermining of an entire region’s growth. (sub. 18, p. 2)

The Small Business Development Corporation observed:

The Accommodation Association is becoming increasingly concerned that LGs are gouging tourism accommodation businesses through the council rates they are charging these businesses. An example of this is Shire of Roebourne, which is centred on Karratha in the resource-rich Pilbara region in WA. (sub. 29, p. 5)

Similarly, in consultations in Darwin, it was repeatedly raised that the lack of a revenue stream from rates in shires could potentially result in LGs looking towards mining and agricultural businesses to provide increased revenue.

## **6.4 Business perception surveys**

Business perception surveys can be used as tool for gaining a broad understanding of business views in relation to the regulatory role of LGs. The Commission used a

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survey of small and medium-sized businesses to question them on a range of perceptions including:

- the areas of regulation where businesses have the most regulatory dealings
- the LG regulations that businesses are most concerned about and which create the largest burden
- information on the consistency and differences between LGs as regulators
- identification of any particular industries which may face burden from LG regulation
- differences between business perceptions of LG in urban, fringe, rural and remote areas
- LG regulatory areas where there is too much duplication with state government regulation
- whether dealings with LG have improved or worsened in recent years.

### **Victorian survey of business perceptions of local government**

A comprehensive survey of business perceptions of state and LG regulations in Victoria was conducted by Roy Morgan Research in December 2009, commissioned by the Victorian Competition and Efficiency Commission (Roy Morgan Research 2010).

In this survey, 605 Victorian businesses or one third of all those surveyed indicated that they had a regulatory involvement with LG over the previous three years. A quarter of businesses stated their most recent dealing was related to planning and land use regulations and another quarter indicated their dealing was related to building and construction. There was also a significant number of dealings related to road, parking and transport and food safety. Table 6.2 presents some key results.

Overall, 68 per cent of businesses indicated that their business was treated fairly by LG in their regulatory dealings. If a business whose most recent dealing was related to transport, the environment or planning and land use, they were the least likely to agree that their business was treated fairly. Other findings included:

- the majority of surveyed businesses agreed that information provided by council was clear and that advice was reliable and consistent
- businesses in planning and land use and building and construction were most likely to feel uncertain about how long decisions would take and feel that the time and effort to comply was too long

- about 30 per cent of business respondents stated that there was too much duplication of LG regulation with state/territory regulation but in the environment protection and pollution regulatory area the percentage was significantly higher (44 per cent)
- businesses which indicated that the regulatory dealing had a negative impact ranged from 18 per cent in the health and professional regulatory area to over 50 per cent in planning and land use (table 6.2).

**Table 6.2 Business perceptions of local government in Victoria**

Most recent regulatory dealing, by major regulation area

	<i>Planning &amp; land use</i>	<i>Building &amp; construction</i>	<i>Roads, parking &amp; transport</i>	<i>Food safety</i>	<i>Health &amp; professional</i>	<i>Environment protection &amp; pollution</i>	<i>Total</i>
	Per cent of respondents which agree						
Business was treated fairly	61	74	57	86	80	59	68
Information provided by council was clear	60	67	59	85	87	63	67
Advice council gave was reliable and consistent	54	66	53	78	76	48	63
Felt uncertain about how long the decision would take	65	63	53	21	29	44	50
Felt the time and effort it took to comply was too long	57	52	31	19	13	30	38
Felt there was too much duplication with state government regulations	35	33	20	16	29	44	28
Felt the dealing had a negative impact on the business	51	43	46	22	18	37	38
<i>Number of businesses in sample (per cent)</i>	<i>146 (24)</i>	<i>145 (24)</i>	<i>91 (15)</i>	<i>88 (15)</i>	<i>45 (7)</i>	<i>27 (4)</i>	<i>605 (100)</i>

Source: Roy Morgan Research (2010, p. 21).

The survey also sought information on any recent changes in LG business perceptions (table 6.3). Of particular significance, 50 per cent of business respondents stated that LG regulation was more demanding in 2009 than in 2007. By industry, businesses in agriculture, forestry and fishing, construction and property and business services were most likely to agree that regulation had become more demanding over the two year period (figure 6.2).

**Table 6.3 Change in perceptions of LG in Victoria**

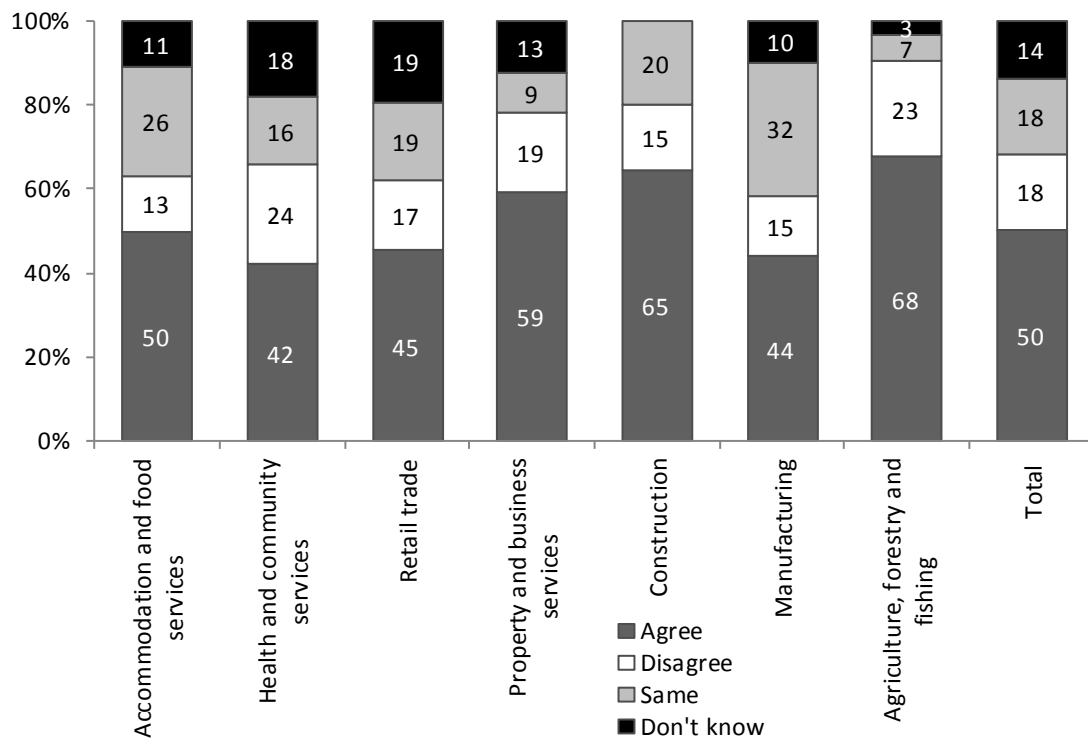
Business regulation in 2009 compared with regulation in 2007

	<i>Agree</i>	<i>Same</i>	<i>Disagree</i>	<i>Don't know</i>
Per cent of respondents				
Council regulation is more demanding	50	18	18	14
Council regulation is more streamlined	23	18	37	23
Council decision making is more transparent	22	21	38	19
Council monitoring is more intrusive	38	19	25	19
Council timeliness has improved	18	18	39	25
The quality of council staff advice and guidelines have improved	26	23	34	17

Source: Roy Morgan Research (2010, p. 33).

**Figure 6.2 Regulation is more demanding in 2009 than in 2007**

By industry, Roy Morgan survey conducted in 2009.



Data source: Roy Morgan Research (2010, p. 34).

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## Other state surveys

Business SA included three supplementary questions in its September 2011 *Business SA Survey of Business Expectations* to provide a snapshot of business perceptions on LG regulation in South Australia.

- When asked if LG regulations have a positive or negative impact on business operations 40 per cent of respondents reported a negative impact, a further 40 per cent indicated that there was no impact and 17 per cent reported a positive impact.
- By regulatory area, business respondents indicated that building and construction (27 per cent), infrastructure and roads (20 per cent), planning and land use (18 per cent), health and safety (7 per cent) and environmental issues (3 per cent) were of most concern.
- By the nature of concern, fees and charges concerned the most respondents (38 per cent) followed by the timeliness of decision making (14 per cent), reporting requirements (10 per cent), consistency across councils (10 per cent), transparency of processes (4 per cent) and clarity and scope of information (4 per cent). The remaining 20 per cent of respondents did not consider any areas of LG regulation were of concern (sub. 9, pp. 1–2).

In 2010, *Reducing the Burden*, a report by the Red Tape Reduction Group, Western Australia, identified a number of LG regulatory areas which impact on business operations. Of the top ten issues raised during consultations, five involved LG, namely planning, environmental licences and approvals, liquor licensing, LG operations and building. Further, the report concluded that the majority of regulatory burdens in Western Australia was not sourced from legislation or regulation passed through parliament, but from quasi-regulations such as policies, procedures and business rules. (Small Business Development Corporation, sub. 29, p. 4).

In 2011, the Chamber of Commerce and Industry's, Queensland Red Tape Survey reported that the majority of business considered that LG regulation has a moderate (35 per cent) or high impact (31 per cent) on their business.

In addition respondents reported that the three most costly compliance processes were:

- complying with and implementing LG regulatory requirements (24 per cent)
- completing LG paperwork and reporting requirements (21 per cent)
- understanding LG obligations and regulatory requirements (17 per cent). (Chamber of Commerce and Industry Queensland, sub. 36 pp. 3–4)

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## **A need for a national survey of business perceptions**

A number of differences between jurisdictions can be observed when comparing the results from state surveys. For example, in South Australia fees and charges and building and construction were reported as the biggest concerns whereas in Victoria, timeliness and consistency and planning and land-use were considered by business as the major issues.

However, it is problematic to compare survey results which are based on different survey designs and methods. A consistent national survey of business perceptions would provide more reliable estimates on any differences in perceptions between state and territory jurisdictions.

Useful information on business perceptions of LG as a regulator were provided through consultations and submissions to this study. The Commission separately consulted with a number of peak business organisations such as the Business Council of Australia and state and territory Chambers of Commerce who drew attention to issues facing large business. Some of these subsequently made submissions.

In Australia, 99 per cent, of all employing businesses are small (employing less than 20 people) and medium (employing between 20 and 100 people) — only one per cent of employing businesses employ more than 200 people (ABS 2012c). Small business repeatedly raised in consultations and submissions (sections 6.2 and 6.3) that small business — in particular micro businesses which employ less than 5 people — may be disproportionately affected by LG regulations and compliance burdens. Small business with lower levels of turnover are likely to face higher compliance costs per employee than larger firms. Participants in this study suggested that small business is likely to be less financially able to deal with long time delays in processing and administrative costs are generally more onerous for small business as they are less likely than larger firms to employ specialist labour for such tasks.

The sheer number of small and medium businesses makes it difficult to consult with and gauge perceptions across all jurisdictions, industries and areas of LG regulation. To overcome this, the Commission used the national Sensis Business Index survey of small and medium sized businesses to provide a wider view of business perceptions throughout Australia.

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## 6.5 Results from the national survey

Through the Sensis survey, nearly 2000 small and medium businesses across all jurisdictions were asked about the types of regulatory dealings that they had with LG over the last three years, their perceptions of LG as a regulator and the impact of LG regulation on their business. The survey includes the ACT, but as there are no LGs in this jurisdiction the perceptions of the territory government as a regulator is examined. In the Northern Territory perceptions of both LGs and the territory government (which performs most roles usually undertaken by LGs in state jurisdictions) are examined. Results for the Northern Territory and ACT are reported (because it was a national survey), however, in general the territories are not included in the analysis.

All industries except mining and agriculture were covered in the survey. Appendix B provides more information about the Sensis survey and a list of survey questions is provided in appendix M.

To provide statistical measures that reflect the actual population of small and medium businesses in each jurisdiction, the respondent data in the Sensis survey has been weighted. The use of weighted data better allows for assessments to be made regarding the population of small and medium businesses within each jurisdiction, rather than simply just those firms responding to the survey.

### Regulatory dealings with local and territory governments

Of the 1913 small and medium businesses surveyed, almost 60 per cent (1102 businesses) had a regulatory dealing with a LG or territory government in the last three years. These 1102 businesses will be referred to as ‘in scope’ when analysing the survey data. It is the experience of these 1102 business on which the analysis is based. Appendix B provides a breakdown in the number of these businesses by state/territory, industry, geographic region of last council dealt with and business size (by employment number).

Survey results indicate that of the 1102 in scope businesses, 89 per cent had dealings with the LG in their area, 28 per cent dealt with other LGs in their state, 9 per cent had a regulatory dealing with a LG outside their state or territory and 2 per cent had dealings with a territory government.

The number of regulatory dealings a business had with a local or territory government in the last three years varied considerably. In scope small and medium businesses had a median of five regulatory dealings. However, the maximum



number of dealings reported was 97 (by a South Australian business in the communications and business services industry).

Generally, in scope surveyed businesses reported that they had dealings with very few LGs other than the one in which the business is located. Where businesses reported dealings with multiple LGs, the median number of councils a business dealt with in their state was three. However, the maximum number of councils a business dealt with in their state in the last three years was 50 (reported by a Queensland business in the construction industry).

Similarly, the median number of dealings businesses had outside their state or territory — for businesses that reported having such dealings — was three but an ACT business in the communications and business services industry reported the most dealings — 30 different councils outside the ACT in the last three years.

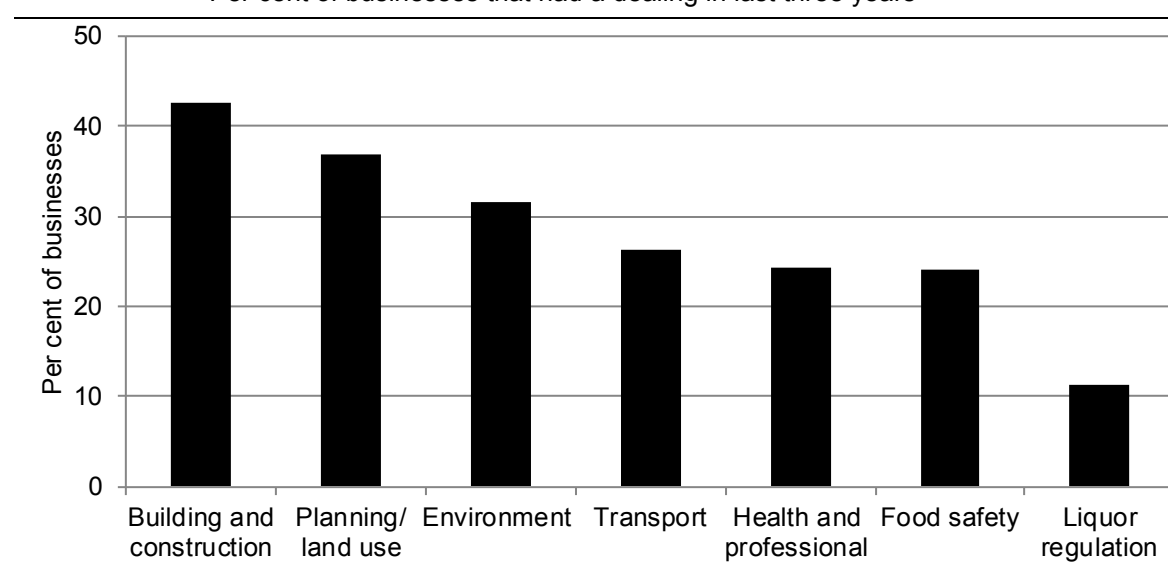
Regulations covering building and construction, planning and land use and the environment were the most commonly reported areas of local government interaction.

Of the small and medium businesses in scope, over the last three years:

- 43 per cent reported a dealing in building and construction
- 37 per cent had a dealing in planning and land-use
- 32 per cent reported interaction with LG in environmental regulation (figure 6.3).

**Figure 6.3 Areas of regulatory dealings**

Per cent of businesses that had a dealing in last three years



Data source: Survey of small and medium businesses (2011).

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The state and territory breakdown of areas of regulatory dealings found that:

- Queensland businesses reported the largest proportion of dealings in building and construction
- Victorian businesses were the least likely to have a regulatory dealing in building and construction, the environment and transport, but reported the largest proportion of dealings in the food safety regulatory area
- New South Wales businesses reported the largest proportion of dealings in planning and land use
- Tasmanian businesses reported the largest proportion of regulatory dealings in transport (table 6.4).

Not surprisingly, areas of regulatory dealings were highly correlated with industry classification. For example, 70 per cent of businesses in the construction industry had a LG or territory regulatory dealing in building and construction and nearly 70 per cent of businesses in hospitality had a dealing in food safety in the last three years (table 6.4).

In every regulatory area, medium businesses (which employ between 20 and 199 people) were more likely to have a regulatory dealing with a local or territory government than micro businesses (which employ one to four employees). For example, in the building and construction regulatory area almost 60 per cent of medium sized businesses had a regulatory dealing with a local or territory government in the last three years compared with 41 per cent of micro businesses which reported a dealing in the same area (table 6.4).

**Table 6.4 Regulatory areas by state/territory, industry and business size**  
Per cent of businesses that had a dealing in last three years

<i>Industry</i>	<i>Building &amp; construction</i>	<i>Planning/ land use</i>	<i>Environment</i>	<i>Transport</i>	<i>Health</i>	<i>Food safety</i>	<i>Liquor</i>
<b>By state/territory businesses are located</b>							
New South Wales	44	46	39	30	27	25	14
Victoria	31	33	17	20	20	28	13
Queensland	53	23	39	24	25	23	6
Western Australia	42	37	21	27	25	14	8
South Australia	42	32	35	28	18	22	4
Tasmania	47	39	30	44	29	27	10
Northern Territory	56	41	20	32	35	19	20
ACT	49	46	38	25	31	16	10
<b>By primary industry of businesses</b>							
Manufacturing	30	30	35	26	23	11	4
Construction	70	63	46	43	12	7	1
Wholesale trade	48	22	25	13	15	23	3
Retail trade	29	16	26	21	26	28	6
Hospitality	35	33	26	15	25	69	52
Transport and storage	27	39	47	32	19	13	8
Communication, finance and business services	50	53	32	28	25	16	10
Health and community services	41	33	19	28	40	24	5
Cultural, recreational and other services	41	33	34	28	33	42	28
<b>By business size<sup>a</sup></b>							
<b>Small businesses</b>							
Micro businesses	41	36	31	26	23	22	10
Other small businesses	43	36	31	25	27	30	13
<i>Total small businesses</i>	<i>42</i>	<i>36</i>	<i>31</i>	<i>26</i>	<i>24</i>	<i>24</i>	<i>11</i>
Medium businesses	59	48	45	40	27	26	16
<b>All businesses</b>	<b>43</b>	<b>37</b>	<b>32</b>	<b>26</b>	<b>24</b>	<b>24</b>	<b>11</b>

<sup>a</sup> In this analysis micro businesses employ between one and four employees, other small businesses employ between 5 and 19 employees and medium businesses employ between 20 and 199 employees.

Source: Survey of small and medium businesses (2011).

## The overall impact of regulatory dealings

Businesses were asked whether the impact of regulatory dealings with local and territory governments over the last three years was positive, negative or caused little impact either way — to which 1003 businesses responded. Around half said there was very little impact, 24 per cent stated that the impact was negative and

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22 per cent judged that regulatory dealings over the last three years had a positive effect on business.

The perception that local or territory government regulation had a positive impact on business over the last three years was most common among businesses based in South Australia and Victoria while the perception of a negative impact was highest in New South Wales, Western Australia and Queensland (figure 6.4).

Business opinion on the impact of regulation differs depending on the industrial classification of businesses. Businesses in the wholesale trade and construction industries were almost twice as likely than the average business to indicate that regulation had a negative impact on business, while transport and storage and health and community service businesses were twice as likely than the average businesses to consider that LG regulation had a positive impact on business (figure 6.4).

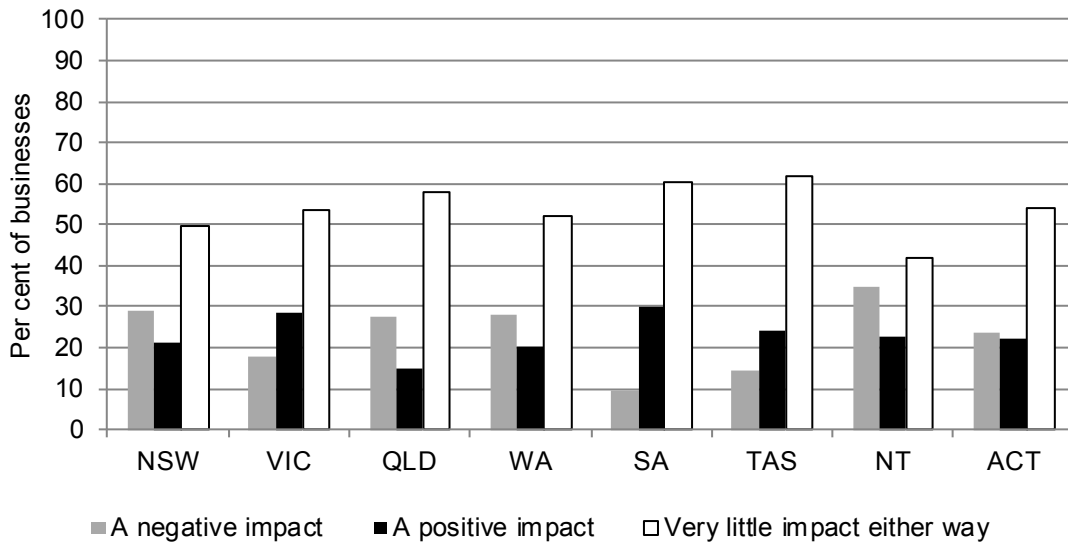
The survey data show little difference in perceptions between businesses of different sizes. For instance, 26 per cent of micro businesses, 20 per cent of other small businesses and 27 per cent of medium sized businesses stated that the impact of regulatory dealings with local and territory governments had a negative impact on their business.

Almost 530 small and medium businesses indicated that they had dealings in multiple areas of regulation over the last three years. These businesses were also asked which area of regulation had the most impact on business.

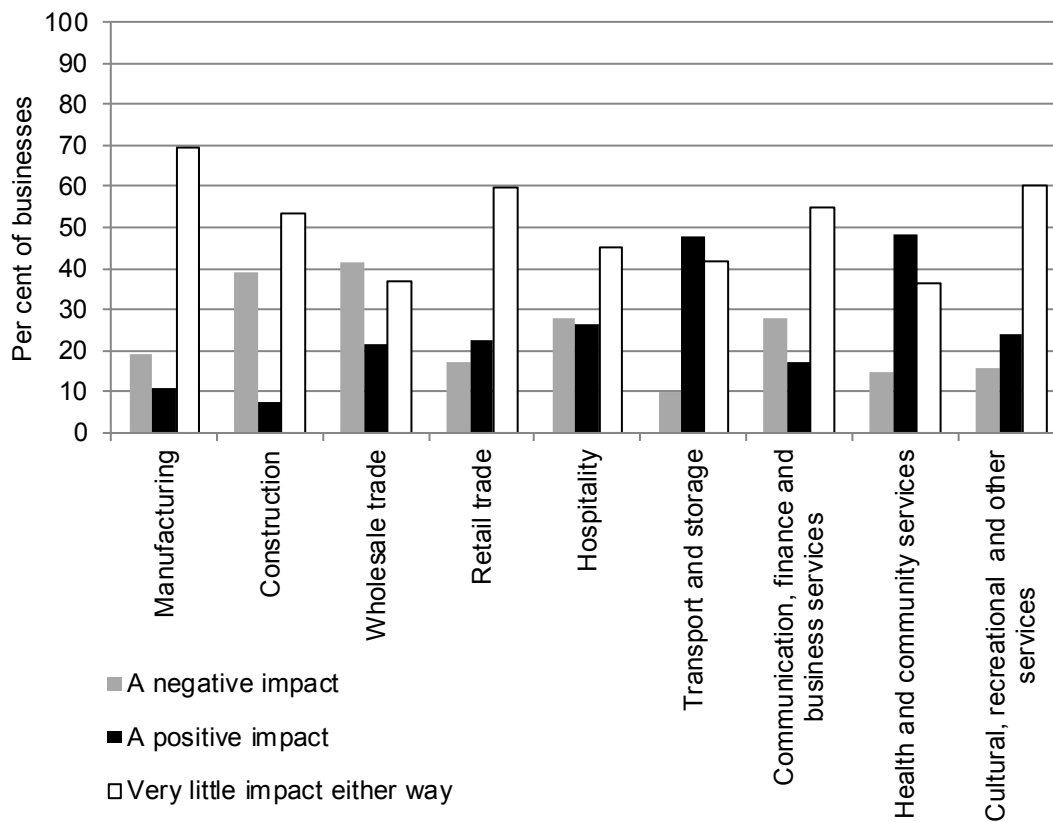
**Figure 6.4 The impact of regulatory dealings on business**

Per cent of businesses which had a regulatory dealing in the last three years

*By state or territory where businesses are located*



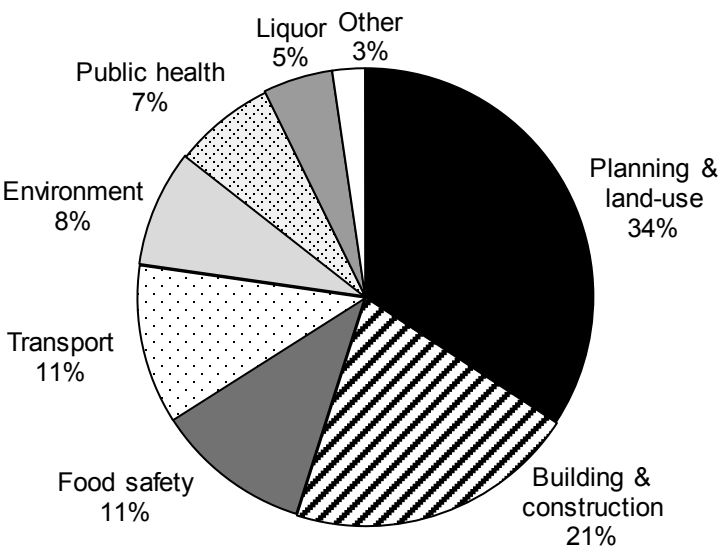
*By primary industry of businesses*



Data source: Survey of small and medium businesses (2011).

Overwhelmingly, these businesses indicated that regulations in the areas of planning and land use (34 per cent) and building and construction (21 per cent) had the most impact on business operations. Very few businesses nominated health and liquor as areas having the most impact on a business (figure 6.5).

**Figure 6.5 Regulatory areas with the most impact**  
Per cent of businesses which had dealings in multiple regulatory areas



Data source: Survey of small and medium businesses (2011).

**Business perceptions related to the most recent regulatory dealing**

The survey results presented up to this point have reported general perceptions across all jurisdictions in relation to all the regulatory dealings businesses had with local and territory governments in the past three years. Perceptions were presented by the jurisdiction where businesses were located. However, many businesses undertook regulatory dealings outside the state or territory where they were located.

The survey sought information from business about its most recent regulatory dealing and which local or territory government it was with. This provided data on business perceptions by local government area. While the sample size is too small to evaluate the performance of individual LGs, in this section, business perceptions are presented by the state/territory and geographic classification of the LGs where businesses had their regulatory dealings.

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### *The nature of most recent regulatory dealings*

The most common reason businesses gave for their recent regulatory interaction with a local or territory government was seeking advice and information — 35 per cent of in scope businesses nominated seeking advice and information as the reason for their most recent dealing. However, in South Australia this proportion was significantly larger (46 per cent).

Applications for approvals, permits and licences (31 per cent of all in scope businesses) and routine inspections (13 per cent of in scope businesses) were also commonly reported by business.

Data was broadly consistent across all states and geographic regions. The most notable difference was that the reporting of non-compliance by another business primarily occurred in urban capital cities (table 6.5).

The nature of the most recent regulatory dealing also varied little between businesses of different sizes. The most notable difference was that 44 per cent of medium businesses reported that their most recent dealing was applying for a licence, approval or permit compared with 30 per cent of small businesses which undertook the same interaction (table 6.6).

The nature of the dealing was generally correlated with the industry of the business. For example, businesses in the hospitality industry were almost three times more likely than the average business to nominate a routine inspection as their most recent dealing (table 6.6).

**Table 6.5 Nature of dealings by state/territory and geographic region**

Per cent of businesses which had a regulatory dealing in the last three years

	Seeking advice and information	Routine inspection	Investigation of complaint against your business	Application for approval, licence or permit	Reporting non-compliance of another business	Complaints about various matters	Issues and enquiries regarding land	Other
<b>By state/territory of most recent dealing</b>								
New South Wales	35	10	5	27	9	5	1	9
Victoria	38	15	4	29	5	6	1	2
Queensland	29	19	3	39	0	2	1	6
Western Australia	44	9	5	29	3	5	0	6
South Australia	46	19	0	27	2	5	0	1
Tasmania	39	11	0	45	0	4	1	0
Northern Territory	34	13	2	32	4	5	0	10
ACT	50	4	1	37	0	0	0	9
<b>By geographic region of most recent dealing</b>								
Urban Capital City	18	8	7	31	21	4	0	11
Urban Metropolitan	34	18	5	30	6	2	1	3
Urban Fringe	42	15	3	25	3	8	0	4
Urban Regional	39	8	1	34	0	7	2	9
Rural	43	18	2	29	0	3	0	5
Remote	39	15	0	36	1	1	0	8
<b>All businesses<sup>a</sup></b>	<b>35</b>	<b>13</b>	<b>3</b>	<b>31</b>	<b>5</b>	<b>5</b>	<b>1</b>	<b>6</b>

<sup>a</sup> Includes unclassified state and geographical data.

Source: Survey of small and medium businesses (2011).



**Table 6.6 Nature of dealings by industry**

Per cent of businesses which had a regulatory dealing in the last three years

	Seeking advice and information	Routine inspection	Investigation of complaint against your business	Application for approval, licence or permit	Reporting non- compliance of another business	Complaints about various matters	Issues and enquiries regarding land	Other
<b>By primary industry of businesses</b>								
Manufacturing	25	17	14	23	0	11	0	11
Construction	35	4	4	36	15	0	0	6
Wholesale trade	17	25	3	42	6	2	0	5
Retail trade	33	21	7	21	2	8	4	5
Hospitality	30	30	5	28	0	2	1	4
Transport and storage	46	8	1	20	0	7	0	18
Communication, finance and business services	46	2	0	36	4	3	2	7
Health and community services	29	5	0	48	8	6	1	2
Cultural, recreational and other services	37	24	0	28	2	5	1	4
<b>By business size<sup>a</sup></b>								
<b>Small businesses</b>								
Micro businesses	37	12	3	31	5	5	1	6
Other small businesses	30	18	6	29	3	4	4	7
<i>Total small businesses</i>	35	14	4	30	5	4	1	7
Medium businesses	30	9	3	44	3	6	1	4
<b>All businesses</b>	<b>35</b>	<b>13</b>	<b>3</b>	<b>31</b>	<b>5</b>	<b>5</b>	<b>1</b>	<b>6</b>

<sup>a</sup> In this analysis micro businesses employ between one and four employees, other small businesses employ between 5 and 19 employees and medium businesses employ between 20 and 199 employees.

Source: Survey of small and medium businesses (2011).

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### *Satisfaction with most recent regulatory dealing*

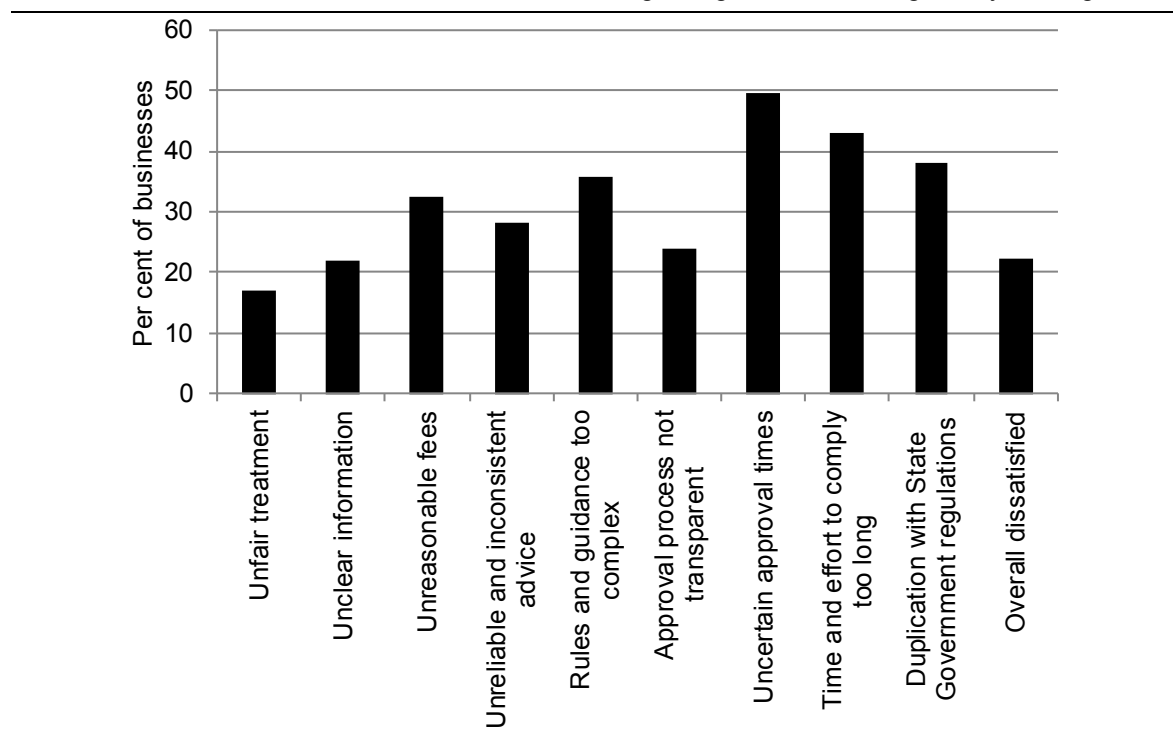
The majority of businesses were satisfied with their most recent regulatory dealing — 83 per cent of businesses agreed that their business was treated fairly and 78 per cent of businesses stated that overall, they were satisfied with the way the local or territory government handled their dealing.

However, there were a number of areas where a significant number of businesses expressed concern about their most recent regulatory interaction with a local or territory government. In particular:

- half of all businesses with a relevant dealing stated that approval times were uncertain
- 43 per cent of relevant businesses believed that the time and effort to comply was excessive
- more than one third of relevant businesses found that there was too much duplication with state government regulation, rules and guidance were too complex and that fees were unreasonable (figure 6.6).

**Figure 6.6 Business perceptions of treatment by territory and local governments**

Per cent of business with an issue regarding most recent regulatory dealing



*Data source:* Survey of small and medium businesses (2011).

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The breakdown of concerns by state and territory is particularly relevant to this study. Overall, businesses with a recent dealing in Queensland, Western Australia and New South Wales were most likely to indicate that they were not satisfied with their regulatory dealing while businesses with regulatory interactions in South Australia and Tasmania were the most likely to be satisfied (table 6.7). Other results from the state breakdown of perceptions related to businesses' most recent regulatory dealings, include:

- businesses with dealings in Western Australia and Queensland were most likely to indicate that approval times were uncertain
- the perception that the time and effort to comply was too long was most common among businesses with dealings in Queensland and New South Wales
- the view that there was too much duplication with state government regulation was a common concern among businesses with dealings in New South Wales and Queensland
- businesses with recent dealings in New South Wales most commonly reported that rules and guidance were too complex and they were treated unfairly
- the perception that fees were unreasonable was most common among businesses with recent dealings in Queensland
- businesses with dealings in Queensland were also most likely to report that information provided by the LG was not clear and that LG advice was not consistent
- in every area, a smaller proportion of businesses with dealings in South Australia and Tasmanian expressed concern than the national average (table 6.7).

The most notable difference in the breakdown of data on satisfaction levels by geographic region was that concerns were more pronounced in urban capital cities. For example, 64 per cent of those businesses having their most recent dealing in an urban capital city reported uncertain approval times and 60 per cent said that the time and effort to comply was too long and that there was duplication or overlap with state government regulations (table 6.7).

By industry, businesses in construction were the most likely to indicate that overall they were not satisfied with their recent regulatory dealing while businesses in transport and storage were the most likely to be satisfied with their recent regulatory dealing.

By size of business, differences in perceptions were less apparent: 23 per cent of micro businesses, 20 per cent of other small businesses and 26 per cent of medium businesses were overall, not satisfied with their recent dealing (table 6.8).

**Table 6.7 Business perceptions in relation to most recent regulatory dealing with a territory or local government**  
Per cent of businesses with a concern in nominated areas, by state and geographic region

	<i>Unfair treatment</i>	<i>Unclear information</i>	<i>Unreasonable fees</i>	<i>Unreliable/ inconsistent advice</i>	<i>Rules and guidance too complex</i>	<i>Approval process not transparent</i>	<i>Uncertain approval times</i>	<i>Time and effort to comply too long</i>	<i>Duplication with state government regulations</i>	<i>Overall dissatisfied</i>
<b>By state/territory of most recent dealing</b>										
New South Wales	22	23	30	31	43	25	53	46	45	24
Victoria	12	14	25	23	29	19	37	35	25	17
Queensland	15	35	56	39	38	35	58	49	43	30
Western Australia	17	26	11	28	36	19	59	43	37	26
South Australia	9	7	17	11	19	13	47	20	17	8
Tasmania	11	14	20	17	30	15	39	34	27	12
Northern Territory	21	20	31	39	42	42	63	50	na	29
ACT	13	25	29	31	41	30	49	46	na	26
<b>By geographic region of most recent dealing</b>										
Urban Capital City	26	33	50	45	54	36	64	60	58	31
Urban Metropolitan	20	14	27	27	35	17	46	35	30	19
Urban Fringe	10	23	14	16	38	12	51	33	26	13
Urban Regional	15	31	44	34	33	36	51	48	41	31
Rural	6	21	27	28	33	23	47	50	51	20
Remote	3	3	9	4	11	5	27	1	54	3
<b>All businesses<sup>a</sup></b>	<b>17</b>	<b>22</b>	<b>33</b>	<b>28</b>	<b>36</b>	<b>24</b>	<b>49</b>	<b>43</b>	<b>38</b>	<b>22</b>

<sup>a</sup> Includes unclassified state and geographical data. na not applicable.

Source: Survey of small and medium businesses (2011).

**Table 6.8 Business perceptions in relation to most recent regulatory dealing with a territory or local government**

Per cent of businesses with a concern in nominated areas, by industry and business size

	<i>Unfair treatment</i>	<i>Unclear information</i>	<i>Unreasonable fees</i>	<i>Unreliable/ inconsistent advice</i>	<i>Rules and guidance too complex</i>	<i>Approval process not transparent</i>	<i>Uncertain approval times</i>	<i>Time and effort to comply too long</i>	<i>Duplication with state government regulations</i>	<i>Overall dissatisfied</i>
<b>By primary industry of businesses</b>										
Manufacturing	14	23	43	38	30	20	43	37	31	31
Construction	37	36	55	40	51	48	57	54	51	40
Wholesale trade	31	17	20	40	54	22	74	49	57	18
Retail trade	19	19	35	21	31	15	41	35	40	20
Hospitality	10	16	24	21	31	21	49	32	42	17
Transport and storage	14	31	30	9	25	6	32	28	33	8
Communication, finance and business services	8	23	31	33	30	30	50	55	36	25
Health and community services	16	20	21	27	36	18	55	41	23	21
Cultural, recreational and other services	11	15	25	20	39	21	45	34	31	12
<b>By business size<sup>a</sup></b>										
<b>Small businesses</b>										
Micro businesses	18	23	35	29	35	26	48	45	38	23
Other small businesses	14	18	28	25	35	20	51	38	38	20
<i>Total small businesses</i>	17	22	33	28	35	24	49	43	38	22
Medium businesses	14	23	26	27	44	21	56	44	37	26
<b>All businesses</b>	<b>17</b>	<b>22</b>	<b>33</b>	<b>28</b>	<b>36</b>	<b>24</b>	<b>49</b>	<b>43</b>	<b>38</b>	<b>22</b>

<sup>a</sup> In this analysis micro businesses employ between one and four employees, other small businesses employ between 5 and 19 employees and medium businesses employ between 20 and 199 employees.

Source: Survey of small and medium businesses (2011).

The 208 businesses which indicated they were unsatisfied overall with their most recent regulatory dealing were also asked to nominate reasons for their dissatisfaction. Explanations varied considerably. The main reasons alluded to by businesses were a lack of government understanding of business, time delays by council, inconsistency and a lack of transparency in decision making (table 6.9).

**Table 6.9 Reasons for dissatisfaction**  
Per cent of business which were dissatisfied with recent dealing<sup>a</sup>

<i>Reason</i>	<i>Per cent</i>
Council's lack of understanding of my business/not supportive	28
Time delays by council	26
Inconsistent administration or advice by council	22
Lack of transparency of decision making	17
Complexity of rules and guidance	16
Quality of council staff advice	15
The time and effort it took us to comply was too high	13
Unreasonable rules/regulations or excessive red tape	11
Fines, fees and charges are too high	10
Lack of advice and information	9
Lack of consultation/communication	9
Inaction/they have done nothing/problem unresolved	8
Bad service/inept at their job	6
Issues referred to state agency	4
Loss of business opportunities	3
Too much information was requested	3
Lack of opportunities to have decisions reviewed/lack of appeal rights	2
Duplication or overlap with state regulations	2
Other	8

<sup>a</sup> Data sums to more than 100 because of multiple responses.

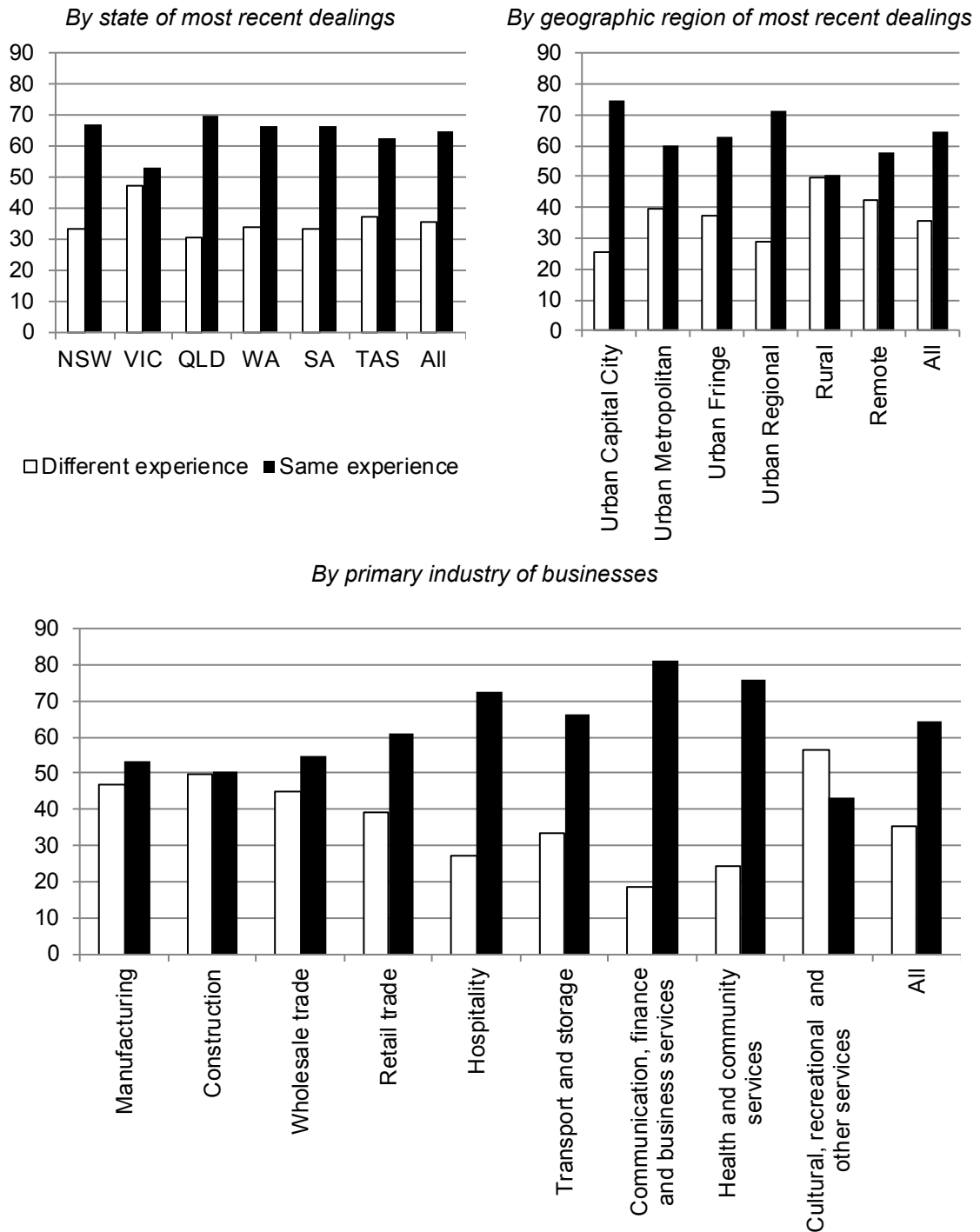
Source: Survey of small and medium businesses (2011).

In submissions and consultations businesses reported that consistency between LGs was a major concern. To measure consistency, the survey asked businesses (which had experience with multiple LGs) how their most recent experience compared with their other LG experiences.

More than one third of the 575 businesses which responded to the question reported that their regulatory experiences differed between LGs. However, for those businesses where the most recent dealing was in Victoria it rose to almost 50 per cent of businesses which reported a different experience between LGs (figure 6.7).

**Figure 6.7 Comparison of LGs<sup>a</sup>, by state, region and industry**

Per cent of businesses which have dealt with multiple LGs<sup>b</sup>



<sup>a</sup> Businesses were asked 'how has your experience with this LG (ie. LG most recently dealt with) compared with other councils you have dealt with?' <sup>b</sup> All includes unclassified state and geographical data.

Data source: Survey of small and medium businesses (2011).

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By geographical classification businesses with a recent dealing in a rural area were most likely to report an inconsistent experience between LGs. Further, by industry, businesses in cultural, recreational and other services and construction reported the highest incidence of inconsistency between their LG experiences (figure 6.7).

The Commission also analysed the business perceptions of regulatory experiences between LGs, by business size. However, perceptions did not vary between businesses of different sizes.

### **How can local governments improve their regulatory roles?**

The regulatory roles performed by LGs are not static — but change to reflect the evolving range of functions which they are expected to undertake and LG perceptions of areas where they can improve their regulatory performance. As such, it is useful to examine business views on how LG performance has changed.

Just over 1000 small and medium businesses responded to the question ‘thinking about all your past regulatory dealings with local (or territory) government, would you say that over the last three years your satisfaction levels have improved, stayed the same or worsened?’

The vast majority of these businesses indicated that their level of satisfaction about their regulatory dealings with LGs had stayed the same — 69 per cent. While 12 per cent indicated that they were more satisfied with the performance of LGs, 19 per cent indicated a decreased level of satisfaction.

Any differences between states in business satisfaction with LG performance is of particular relevance to this study. The perception that LG performance of regulatory roles had worsened in the last three years was most common among businesses based in Queensland and New South Wales (figure 6.8). However, between the states there were no significant differences in the proportion of businesses which indicated that regulatory performance had improved.<sup>1</sup>

The change in satisfaction level with LG regulatory functions differs depending on the industrial classification of businesses. Businesses in the construction and wholesale trade industries were twice as likely as the average to indicate that the regulatory performance of LGs had worsened, while transport and storage businesses were almost three times more likely than average to consider that the regulatory performance of LGs had improved over the last three years (figure 6.8).

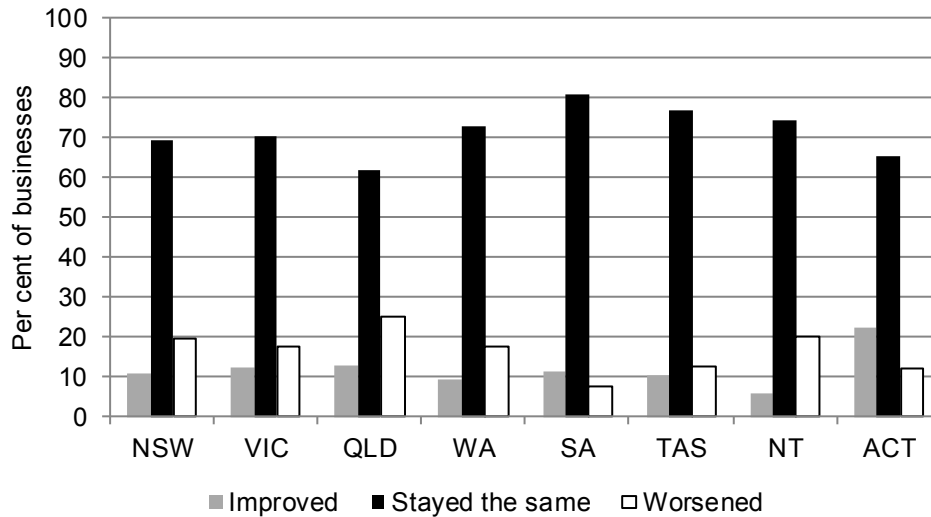
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<sup>1</sup> The perception that regulatory performance had improved was the highest in the ACT where the regulatory role of the ACT Government was examined (as there are no LGs in the ACT).

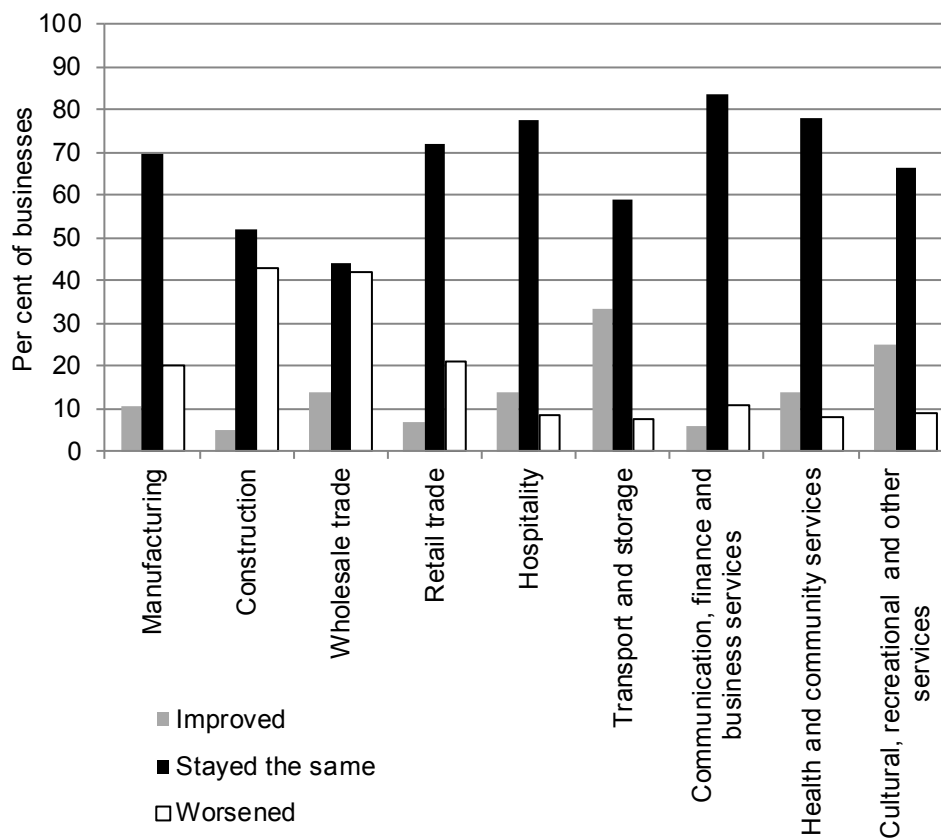


**Figure 6.8 Impression of dealings by state/territory and industry**  
per cent of businesses with regulatory dealings in the last three years

*By state or territory where businesses are located*



*By primary industry of businesses*



Data source: Survey of small and medium businesses (2011).

By business size, there was no difference in the proportion of businesses which reported that their regulatory dealings had worsened in the last three years. However, medium businesses (18 per cent) were more likely to indicate that regulatory experiences had improved over the last three years when compared with micro businesses (10 per cent), while micro businesses (70 per cent) were more likely to perceive no change in dealings in comparison with medium businesses (63 per cent).

As part of the survey, businesses were asked to nominate a change they thought would most improve the regulatory role performed by LGs — which 1027 businesses chose to answer. The most common answer given was ‘Nothing’ or that they were happy with the regulatory role performed by LGs by 22 per cent of respondents — followed by those which indicated that they did not know how to improve the regulatory role of LGs. Other suggested changes included improving response times, reducing the number of regulations, less red tape and lower compliance costs (table 6.10).

**Table 6.10 Business suggestions for improving the regulatory role of LGs**  
Per cent of the 1027 businesses which provided a suggestion

<i>Suggested improvement</i>	<i>Per cent</i>
Nothing/happy with local government	22
Don't know	17
Improve response times/streamline processes	8
Fewer regulations/ less red tape/ lower compliance costs	8
Increase understanding of business and local needs	5
Consistency in regulation, information and decision making across LGs	4
Transparent information, processes and timelines	4
Increased communication and consultation	4
Simpler regulation and processes	3
Increased access to staff and information (including on-line)	3
Abolish local government	2
Improved customer service	2
Improved local government staff numbers and qualifications	2
Less duplication, better coordination between federal, state/territory and local governments	2
Improved decision making	2
Increased commercialisation/privatisation or less bureaucracy	2
Amalgamation	1
Flexible interpretation of regulations and decision making	1
De-amalgamation	1
Greater power	1
Other	7
<b>Total</b>	<b>100</b>

<sup>a</sup> Totals may not sum as a result of rounding

Source: Survey of small and medium businesses (2011).

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Some businesses had divergent opinions. For example, a small number of businesses nominated either amalgamating or de-amalgamating LGs as the best way to improve LGs regulatory functions. There was also some support for abolishing LGs and a few businesses also suggested abolishing state governments — with one participant recommending the ‘creation of super councils and the disbandment of state governments’.

## **6.6 Areas of local government regulation selected for benchmarking**

Benchmarking is the process of comparing an area of interest using one or more indicators resulting in a standard, or point of reference, against which that area of interest can be ‘compared, assessed, measured or judged’ (OECD 2006). Benchmarking helps an organisation understand how it is performing relative to either its peers or against some standard (such as best practise standard) and is used as a tool to inform decision making.

As foreshadowed earlier, it is not feasible to benchmark all aspects of LG regulation. The focus for this study has been to benchmark areas of LG regulation which have the greatest potential to impact on business, especially where it appears that any costs imposed could be reduced while still achieving regulatory objectives.

In choosing these areas, the Commission has considered the perceptions of businesses (gauged through consultations, submissions and surveys) as to which regulatory areas of LGs have the greatest impact on business costs. Areas chosen for benchmarking were also selected on the basis that they were likely to provide useful information to policy makers seeking reforms aimed at reducing the compliance cost of LG regulation.

### **Criteria for benchmarking**

In order to identify the most useful areas to benchmark and to avoid potentially erroneous comparisons, the Commission has developed criteria for selecting regulations (and administration and enforcement practices) raised by stakeholders as being of concern as well as those areas identified by the Commission to benchmark. The criteria are consistent with those used in previous benchmarking studies including food safety and occupational health and safety. Areas to benchmark were selected where:

- 
1. there are differences in either the regulation itself or in the administration and enforcement of that regulation or differences in how responsibilities are allocated between each state government and its LGs
  2. the benchmarking analysis of the regulation or its enforcement/administration should contribute to either current or proposed reforms
  3. there appears to be a difference between jurisdictions in the cost the regulation or its enforcement/administration imposes on business
  4. where there are differences in the costs imposed by regulations, those differences do not appear to be matched by a difference in the effectiveness of those regulations
  5. it appears feasible to construct indicators which will enable informative benchmarking across jurisdictions, wherever possible based on existing data.

The reference date chosen for benchmarking LG regulation and its burden on business was 2010-11. However, as the Commission has made use of existing data wherever possible (appendix B), some indicators make use of data collected in earlier or later periods. The study's approach to benchmarking LG as a regulator is described in more detail in appendix C.

Table 6.11 provides a list of the concerns raised by participants which the Commission has chosen to benchmark. These concerns form the basis of chapters which follow. In each chapter, the primary concerns within a selected regulatory area are discussed in detail, indicators are developed and benchmarks are presented.

There were a number of concerns raised by business which could not be considered for benchmarking. In general these related to LG rates setting and concerns about the provision of services, both of which are outside the study's terms of reference.

**Table 6.11 Regulatory areas selected for benchmarking**

By main business concern

<i>Description of regulatory area benchmarked</i>	<i>Main business concern relevant to benchmark</i>
<b>Chapter 7</b>	
<b>Building and construction</b>	
Fees charged for assessing building applications	Fees not based on actual resource effort, inefficient cross-subsidies
Technical building standards	Intra and inter jurisdictional overlaps, inconsistent enforcement, excessive compliance cost
Construction site management	Excessive compliance cost, inconsistent enforcement
Delays in processing applications	Uncertain and protracted timeframes
Inspection regimes	Excessive compliance cost, inconsistent enforcement
<b>Chapter 8</b>	
<b>Parking and transport</b>	
Provision of guidelines on transport and parking areas	Complex regulatory frameworks, inconsistent advice and interpretation
Level of consultation prior to parking changes	Excessive compliance cost, lack of transparency
Parking contributions (in lieu of provision) by developers	Excessive compliance cost, lack of transparency, lost business opportunities
Fees for assessment of proposed heavy-vehicle routes	Excessive compliance cost, uncertain and protracted timeframes
Restrictions imposed on heavy vehicle access	Lost business opportunities, inconsistent advice and interpretation
<b>Chapter 9</b>	
<b>Food safety</b>	
Types of business that need to be registered or notified	Excessive compliance cost, inconsistent enforcement, complex regulatory frameworks
Fees charged for licensing, registering or notifying business or for undertaking inspections	Excessive compliance cost
Duration of food safety inspections	Excessive compliance cost, inconsistent enforcement, lost business opportunities
Use of progressive enforcement tools and education	Excessive compliance cost
Transparency of regulatory activities — publish results of inspections	Lack of transparency and review

(continued next page)

Table 6.11 (continued)

<i>Description of regulatory area benchmarked</i>	<i>Main business concern relevant to benchmark</i>
<b>Chapter 10</b>	
<b>Public health</b>	
Types of business that need to be registered or notified	Excessive compliance cost, inconsistent enforcement, complex regulatory frameworks
Frequency of inspections (compared to recommended frequency for food safety)	Excessive compliance cost, inconsistent enforcement
Transparency of regulatory activities — publish results of inspections	Lack of transparency and review
<b>Chapter 11</b>	
<b>Environment</b>	
Environmental regulation (in general)	Inadequate resourcing
Water management (drainage)	Excessive compliance cost, intra and inter jurisdictional overlaps, uncertain and protracted timeframes
Waste management	Inconsistent enforcement, excessive compliance cost
Coastal management	Intra and inter jurisdictional overlaps, inconsistent advice and interpretation
Vegetation and weed control	Uncertain and protracted timeframes, excessive compliance cost, Intra and inter jurisdictional overlaps
Air and noise quality	Excessive compliance cost, lost business opportunities
<b>Chapter 12</b>	
<b>Planning, rezoning and development assessment</b>	
Availability of relevant information online	Lack of transparency, complex regulatory frameworks, inconsistent advice and interpretation
Time taken to assess development applications	Uncertain and protracted timeframes, lost business opportunities, excessive compliance costs, inadequate resourcing of local governments
Use of measures to expedite processes	Excessive compliance costs
Practices employed to facilitate transparency and accountability	Lack of transparency and review, inconsistent advice and interpretation

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## 7 Building and construction

### Key points

- Local governments impose a range of costs on businesses through regulation of building and construction activity. In combination, these costs can have a material impact on building firms. The main costs imposed stem from:
  - local governments mandating standards beyond those in the Building Code of Australia (BCA)
  - delays in assessing and processing building applications
  - conditions placed on construction site activity
  - inspection regimes used to assess compliance for building and plumbing work
  - often inconsistent fees and charges for assessing building applications.
- In terms of leading practices, a gateway model to vetting deviations from the BCA (similar to that used in Victoria, Queensland and Western Australia) lowers the risk of unnecessary compliance costs on business. Tasmania's use of enforceable standards for construction site regulation similarly imposes the lowest compliance cost on business. Tasmanian local governments also had, on average, the lowest building application fees and among the fastest approval times of any state. Western Australia and South Australia had the most cost-effective and least onerous building inspection regimes.
- Adoption of leading practice approaches to the regulation of building and construction activity across jurisdictions could materially reduce building compliance costs. The main differences evident in 2010-11 involved the:
  - basis on which local governments set fees for building consent
  - cost, breadth and frequency of inspections during the construction phase
  - extent and substance of conditions placed on construction site management
  - deviations from standards contained in the BCA (eg sustainable building design).
- The compliance costs associated with these differences could be reduced by:
  - introducing charging regimes for assessing building applications based on the time taken to efficiently conduct the assessment
  - subjecting standards beyond those specified in the recently adopted National Construction Code to independent cost-benefit assessment before introduction
  - implementing consistent state-based guidelines or enforceable standards in relation to construction site management
  - moving to risk-based building and plumbing inspections.

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Building regulation plays an important consumer protection role. By addressing the information problems faced by consumers in determining the structural, safety and other characteristics of completed buildings, regulation aims to mitigate against the potentially significant costs of non-compliant or defective building work, such as rectification costs and costs associated with resolving disputes (PC 2004a).

This chapter assesses the impact of local government (LG) administered building regulation on businesses. The next section presents an overview of the legislative framework that governs building and construction activity including the specific role played by LGs. Section 7.2 discusses the impact on business highlighting areas where excessive regulatory burdens are imposed and identifying leading practice approaches to building regulation.

## 7.1 Overview of the regulatory framework

The legal framework for regulating aspects of building and construction activity is variously outlined in either a specific building Act or provisions contained within more general legislation such as the *Environmental Planning and Assessment Act 1979* in New South Wales, the *Local Government (Miscellaneous Provisions) Act 1960* in Western Australia and the *Development Act 1993* in South Australia. These Acts include provisions on practitioner registration, building inspections, occupation requirements, authorised officers, appeals, record keeping and specific building safety features. Practitioner registration and/or licensing authorities are generally established under such Acts and those authorities are responsible for both registering or licensing suitably qualified building practitioners (including certifiers) and monitoring the quality and standard of services they provide. In some jurisdictions, notably New South Wales, accreditation requirements for building certifiers (private and LG) are covered by a specific Act — the *Building Professionals Act 2005 (NSW)*.

Another key regulatory means by which consumer protection is delivered is through the development and application of minimum building standards which are described in the *Building Code of Australia 2011* (the BCA). The BCA covers both domestic and commercial buildings and includes performance-based technical standards pertaining to building structure, fire resistance, access and regress, services and equipment, health and amenity and energy efficiency. Similarly, the Plumbing Code of Australia sets out minimum standards for plumbing work while electricity and gas installations are regulated via specific Australian Standards. Each jurisdiction has adopted (with variation) and referenced the BCA in their respective building regulations. These regulations also outline specific operational requirements with respect to the issuing of building permits, frequency of building



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inspections, occupancy certificate requirements, regulatory enforcement, fines, building maintenance and appeals mechanisms.

In addition, environment protection legislation is used in most jurisdictions to control issues related to construction site activity with the aim of protecting public health, safety, amenity and the environment. Noise abatement, air and stormwater pollution and builders' refuse are examples of some of the issues addressed and enforced under state environmental legislation.

Finally, provisions enabling local governments to develop and enforce local laws (including in relation to building matters) and to set fees for services provided to building and construction businesses (such as certifying that buildings conform to the BCA and other relevant standards) are generally found in local government Acts in each jurisdiction (except in South Australia where fees are prescribed under the *Development Act 1993*). Not all jurisdictions, however, provide scope to make local laws.

While the primary aim of building regulation is to protect consumers from defective building work, inappropriate or excessive regulation can have a significant cost impact on building and construction businesses which may not only be passed onto consumers but may also affect regional economic performance. As an indicator of the significance of the sector and the potential costs of excessive LG regulation, the total value of building approvals in Australia was estimated to be around \$75 billion in 2010-11 (ABS 2011e). Though the potential costs are significant, there was little in the way of hard evidence presented to the Commission about the level or extent of costs stemming from building regulation (including that administered by LGs).

## **The regulatory role of local governments**

LGs administer aspects of jurisdictional building and construction laws (except in the Northern Territory where this is a Territory Government function), may have authority to make their own local laws related to building activity and the authority to place conditions on building (or planning) approval. The specific elements of the administrative role played by LGs are listed in appendix K.

In all jurisdictions, formal building approval is needed before most building work can commence. Building approval requires that the development complies with the terms of the planning approval and the building standards prescribed in the BCA (recently subsumed into the National Construction Code) and any other standards adopted by a specific jurisdiction (or individual LG). Building approval can be issued by either LG certifiers/surveyors or (where legislation permits this) a private building certifier/surveyor. As such, regulatory compliance costs are associated with

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both LG and private certifier/surveyor administration of state-based building legislation. The focus of this study, however, is specifically on LG regulation. While jurisdictions differ somewhat in the processes involved (see appendix K for an example of the typical process in New South Wales), certifying authorities (whether private or municipal/LG) are generally responsible for:

- overseeing the construction work on the site
- ensuring compliance with the relevant conditions of the development approval
- ensuring the proposal complies with relevant standards, codes and local laws
- ensuring that critical stages of the construction have been inspected
- issuing an Occupation (or Final Inspection) Certificate for the building work before the building is occupied or the use of the development commences.

As noted, the provision of certification or surveying services is shared (in most jurisdictions) between municipal/LG and private building certifiers/surveyors who compete for the right to issue building approvals (in some cases in tandem with planning approval) and conduct building inspections (except in South Australia where this function is only carried out by LG certifiers) to ensure compliance with building standards, approval conditions and construction site requirements. Market penetration by private certifiers/surveyors varies across and within jurisdictions. Victoria and major population centres in Queensland and Tasmania rely entirely or predominantly on private sector certification.

LG certification still accounts for a significant share of activity in a number of other Australian jurisdictions. In Western Australia, for example, all building licences and inspections were issued and performed by LG surveyors in 2010-11 (private certification was introduced on 2 April 2012). In New South Wales, 55 per cent of construction (and occupation) certificates were issued by LGs in 2010-11 (NSW DP&I 2012) although the overall figure masked considerable variation across LGs. In South Australia, LG certification accounted for around half of all building rules consents issued in 2009-10. LG surveyors in parts of Tasmania (except Hobart) also accounted for a significant share of certification services.

## **7.2 The impact on business**

Building and construction businesses face both direct and indirect impacts from LG (and private certifier/surveyor) building regulation that provide scope for unnecessary burdens (discussed below) to be placed on those businesses. The main types of direct impacts are outlined in table 7.1 and include:

- fees, charges and levies associated with lodging a building application, obtaining approval for associated activities (such as demolition), and contributing to the operation of jurisdictional building control systems, dispute resolution services and building industry training and long service leave arrangements (see appendix K)
- procedural requirements in the preparation, submission and provision of sometimes extensive supporting material in order to obtain building approval (such as engineering reports) and occupation certificates
- costs of meeting conditions specified in local laws or within planning and building approvals (such as working hour restrictions, site fencing, refuse disposal and traffic management)
- increased holding costs associated with any unnecessary delays in obtaining building approval or complying with the regulatory framework.

**Table 7.1 Sources of building and construction regulatory costs to business**

<i>Cost</i>	<i>Sources</i>
Increased costs associated with certifier interactions	<ul style="list-style-type: none"> <li>• Supporting documentation needed to accompany building and/or planning application</li> <li>• Inconsistent enforcement of building laws</li> <li>• Differences in regulatory processes across certifiers and jurisdictions</li> </ul>
Increased business operating costs	<ul style="list-style-type: none"> <li>• Fees for assessing building applications</li> <li>• Cost of meeting building standards especially those that are inconsistent with the BCA and/or jurisdictional Codes</li> <li>• Cost of meeting conditions placed on construction site management</li> <li>• Fees for mandatory inspections</li> <li>• Fees for enforcing development consent conditions or compliance orders</li> <li>• Fees for occupancy permit/certificate of final inspection</li> </ul>
Lost business opportunities	<ul style="list-style-type: none"> <li>• Opportunity cost of delays in obtaining building approval and/or occupancy permit/certificate of final inspection</li> </ul>

Importantly, while direct costs such as building application fees, charges related to construction site management and levies for managing building control systems will initially be paid by building companies in most instances as the contracting agent, the ultimate burden of these costs will be shared between builders and end-consumers depending on the prevailing supply and demand conditions.

Overlaying the direct impacts are the indirect impacts, including those arising from: complex, inconsistent and unpredictable regulatory frameworks; and intra- and inter-jurisdictional differences in administration and regulatory processes. These

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add to the risks and compliance burdens faced by business and non-business ‘users’ of the building and construction regulatory system.

Although both direct and indirect costs are linked to LG regulation, those costs are ultimately the combined result of overarching state building legislation and regulations, the manner in which LGs apply those jurisdictional building laws and the nature of competition for building approval services in each jurisdiction. In commenting on the genesis of compliance costs that arise from building and construction regulation, the New South Wales Department of Planning and Infrastructure (pers. comm., 29 June 2012) said that with respect to problems such as inconsistency and uncertainty:

These problems are symptoms of a number of complex and varying issues relating to building control including issues associated with a performance-based building code, a competitive certification environment, integrated planning and building systems and practitioner competency. NSW has an opportunity to address some of the identified issues via its Planning System Review.

Building Codes Queensland (pers. comm., 21 March 2012) provided a more specific compliance cost driver in referring to potential regulatory ‘creep’ (e.g. where building related matters are included in planning schemes). It said:

This means similar building matters are required to be assessed under a local planning instrument and also required to be assessed under a building development approval. This duplication of process can result in uncertainty and increased cost of compliance with building laws, multiple application fees and costly delays for the building development sector.

## **Excessive regulatory burdens on business**

In comparing the burden of LG building regulation processes across states, it is important to recognise that building approval systems differ across those jurisdictions. In particular, states operate (to varying degrees) integrated planning and building systems whereby the assessment of certain proposals incorporates planning considerations as part of the building approval process. In New South Wales and South Australia, for example, planning and building issues are covered under a consolidated Act and this facilitates the consideration of building issues (either before, during or post construction) as part of the development assessment process. Those state systems are also characterised by separate independent statutory bodies and government agencies who are responsible for certifier accreditation and the licensing, auditing and disciplining of building professionals.

In Victoria, Tasmania and Queensland, on the other hand, planning and building issues are dealt with under distinct Acts with a separate authority (the Building

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Commission, Workplace Standards Tasmania or the Building Services Authority respectively) responsible for regulating all aspects of building professional conduct (including certifiers, builders and tradespersons). While not in the scope of this study, the building system operated by the ACT Government stands out in that a single regulatory authority (ACTPLA) is responsible for administering all aspects of the planning and building regulatory regime. This approach could be argued to provide the most integrated, responsive and efficient building and planning control system of any Australian jurisdiction. (A listing of relevant legislative instruments applicable in each jurisdiction is provided at appendix K.)

The differences in building (and planning) regulatory systems has implications for a range of building outcomes including the time taken to assess building applications and the basis on which construction sites are regulated. Where the differences result in higher costs to businesses without commensurate additional benefits, the regulatory burdens are excessive and unnecessary.

In addition, the degree of competition for building certification services also varies across jurisdictions and this has consequences for both the compliance cost burden associated with regulation and the quality of building outcomes. As mentioned, private certifiers play a significant role in the market for building approval services in most jurisdictions. Reflecting the benefits of a more competitive environment, building and construction firms operating in those jurisdictions should incur lower compliance costs (via lower fees and charges or less lengthy building approval delays) from permit and inspection requirements than in jurisdictions where competition from private surveyors is less pronounced. A relatively recent comparative study of Australian building regulatory regimes (van der Heijden 2008) appears to confirm the beneficial impact of private certification. On the basis of interviews with a broad cross-section of building industry participants:

... it was learned that private certifiers are able to provide a more cost-effective, faster, more specialised, more client-friendly, and more available service. Their fees are negotiable and private certifiers seem to have a more businesslike attitude than their public counterparts. (van der Heijden 2008, p. 161)

Of interest, that study also reported that the introduction of private certification had led to a fragmentation of the certification market with private certifiers generally involved in larger developments (such as commercial works) and the higher end of the domestic market leaving LGs to assess smaller (less profitable) developments such as the lower end of the domestic market (van der Heijden 2008). This observation is also relevant to the issue of LG cost recovery from building services discussed below.

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The submission to this study by the Australian Institute of Architects highlighted the outcomes delivered by a competitive certification market in saying:

The benefit of private certification in building regulation compliance is well established, and it has brought about significant time and cost savings for the building industry. (sub. 40, p. 3)

The submission by the Housing Industry Association (HIA) similarly stated:

HIA has observed that where private certification has been implemented in building surveying significant improvements in the time frames for building approval and therefore overall cost of building have been realised. For example, in Victoria, private certification of building saw the process for achieving a building permit for a new dwelling drop from about 24 weeks to a week or less immediately. (sub. 34, p. 11)

But although Victorian building approval times have certainly improved since private certification was introduced, the magnitude of the improvement looks to be somewhat less than that suggested by the HIA. In fact, as reflected in the building approval times shown in appendix K, gross Victorian building determination times in 2010-11 were just over 6 weeks (from application lodgement date to permit decision date which includes delays awaiting further information from applicants).

Anecdotal evidence reinforces the view that the catalyst for reduced building permit approval times in Victoria was competitive pressure from private certifiers rather than additional resources moving into a previously under-resourced service area. Indeed, the introduction of private certification led to a substitution away from local government employment to private surveying.

And in Queensland, a recent discussion paper on ways to improve building certification in that state confirmed that:

After the introduction of private building certification [in 1998], many building certifiers started their own business. This increased competition within the industry, reduced building approval times, and led to competitive pricing and out-of-hours inspections. (Queensland Department of Local Government and Planning 2011d)

However, that discussion paper also raised concerns about probity issues (conflicts of interest) and the standard of private certifier work in Queensland that mirrors alleged problems experienced in jurisdictions such as Victoria. In the Victorian context, a recent report by the Victorian Auditor-Generals Office found:

Ninety-six per cent of [the 401 mainly privately certified] permits examined did not comply with minimum statutory building and safety standards. Instead, our results have revealed a system marked by confusion and inadequate practice, including lack of transparency and accountability for decisions made. In consequence, there exists significant scope for collusion and conflicts of interest. (VAGO 2011, p. viii)

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Importantly, however, VAGO (2011) noted that as they did not perform inspections for the permits examined, it was not possible to determine how any issues associated with the building surveyor's assessment affected a building's actual compliance with building and safety standards during or after construction. Nevertheless, the experiences in Queensland and Victoria do ***highlight the benefits of an effective auditing system.***

The remainder of this chapter *examines* cost issues in more detail and, where possible, points to leading practices either operating in one or more jurisdictions, in prospect or in place in a context other than LG building regulation. Cost arising from the following issues are examined:

- differences in the method of setting fees for assessing building applications
- substantive variations in building standards (from those prescribed in the BCA) across both LGs and states
- the regulation of construction sites through local laws and/or conditions placed on planning/building approval
- delays associated with obtaining building approval
- differences in inspection regimes.

## **Building application assessment fees**

All jurisdictions allow the charging of fees (by both LG and private certifiers/surveyors) to cover all or some of the costs associated with ensuring that building, plumbing and construction activity complies with regulatory standards. These fees represent the main direct administrative cost faced by building proponents and can be charged for the assessment and issuance of a certificate or permit, mandatory inspections, occupancy certificate or permit and/or certificate of final inspection. A fee (and/or bond) covering inspection of possible damage of LG assets (roads, footpaths and drains) before and after building work may also be imposed. In addition, a range of levies for long service leave payments, building industry training and regulatory administration and dispute resolution services may be collected by LGs on behalf of statutory authorities. Amounts vary from one jurisdiction to the next with payment required before building permits or construction certificates can be issued (see appendix K).

The basis for imposing these fees, and the range of items that incur some type of fee, charge or levy, differ between jurisdictions and between local authorities within most jurisdictions (table 7.2). Fees may be set as a fixed charge or vary according to either construction cost or gross floor area. As such, variable fee setting approaches

act as (imprecise) proxies for the scale and complexity of a project and hence the resource effort required to assess them. Unlike private sector certifiers, most LGs do not base building approval fees on the actual time taken to assess whether proposals comply with regulatory requirements. But current LG charging regimes provide greater certainty than time-based approaches, a point acknowledged by the Australian Institute of Building:

... the benefit of a set fee is that all parties know where they stand, rather than developers and/or builders questioning whether the supposed time taken by council staff for the inspection has been well spent. A set fee can also be easily budgeted for. (sub. DR63, p. 1)

**Table 7.2 Nature of building permit fee setting by jurisdiction, 2010-11**

<i>Jurisdiction</i>	<i>Fee basis</i>	<i>Fee nature</i>
NSW	Set by LG	Based on cost of works (domestic) Based on floor area (commercial/industrial/retail)
	Set by private building certifiers/surveyors	Market rates
Victoria	Set by LG	Based on contract value or floor area
	Set by private building certifiers/surveyors	Market rates
Queensland	Set by LG	Based on cost of works
	Set by private building certifiers/surveyors	Market rates
Western Australia	Legislated LG fees	Based on estimated construction cost: <ul style="list-style-type: none"> <li>• Residential (Class 1 and 10) 0.35%</li> <li>• Commercial 0.2 % plus 0.2% training levy plus \$41.5 Building Registration Board levy</li> </ul>
South Australia	Legislated LG fees	Based on floor area: <ul style="list-style-type: none"> <li>• Fee calculated as 0.0023 times construction index times prescribed floor area times complexity factor</li> </ul>
	Set by private building certifiers/surveyors	Market rates
Tasmania	Set by LG	Based on floor area (eg. Derwent Valley) Based on value of works (eg. Southern Midlands)
	Set by private building certifiers/surveyors	Market rates

Sources: LG websites.

Most jurisdictions allow LGs to set their own fees. The exceptions are Western Australia and South Australia where fees are prescribed in legislation. Given that LGs in South Australia compete with private certifiers for building approval work, a prescribed fee has implications for the nature of competition and the costs faced by businesses. In particular, private certifiers in South Australia set their own fees and have flexibility to compete with LG surveyors on price (and service) characteristics. As a result, the share of private certification has increased dramatically in recent



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years to more than 50 per cent in 2009-10. The New South Wales Department of Planning and Infrastructure (pers. comm., 27 June 2012) commented specifically on the impact of regulated LG fees in jurisdictions where private certifiers compete for the same work:

In states where private building approvals are available (in addition to LGs) the idea of setting LG fees or setting fee criteria for building approvals that would apply only to LG is not appropriate as this would provide a competitive advantage to private operators who would not be subject to fixed fee regime. However, a consistent approach to fee setting methodology (including estimation of construction costs) applicable to both public and private operators may be useful.

LGs in New South Wales, on the other hand, are able to set building service fees independently and this has provided much greater scope to compete with private sector certifiers. Indeed, a submission by private certifying company ACROCERT raised competitive neutrality issues in suggesting that New South Wales LGs were cross-subsidising building regulatory services from other LG revenue sources:

Many councils are also able to keep certification service fees and charges to a minimum because they can supplement service provision from consolidated revenue and not charge the full costs associated with providing certificates and conducting inspections. (sub. 2, p. 8)

The submission by the Australian Institute of Architects appears to support the view that LG certification is generally less expensive than private practitioners:

The time savings and advisory function of the private certifier in achieving compliance are considered by the industry to be generally worth the additional cost over public certification — hence the growth of this service industry. (sub. 40, p. 3)

ACROCERT also pointed to higher educational, accreditation and other requirements for private certifiers which placed them at a competitive disadvantage to LG certifiers. As well as higher qualification and experience requirements in New South Wales, private certifiers must also pay a \$1500 annual accreditation fee (compared to a \$250 accreditation renewal fee for council certifiers) and are subject to potential fines and compensation payments arising from professional misconduct which do not apply to council accredited certifiers. From 1 March 2013, all persons seeking new (not renewal of) accreditation as a building certifier in New South Wales will be subject to the same accreditation requirements. However, council certifiers accredited before 1 March 2013 can continue to work under their existing accreditation certificate.

To the Commission's knowledge, LG and private certifiers are subject to the same licensing/accreditation requirements in most other jurisdictions. The exceptions are South Australia where private certifiers are required to have eight years of experience and be fully accredited and registered (while LG building officers have

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varying qualification requirements depending on the nature of work) and Western Australia where private certifiers did not operate in 2010-11). The only exception is professional indemnity requirements. Accordingly, ACROCERT contended that:

... it should not come as any surprise to find that private certifiers [in NSW] charge more for their services than council certifiers and, as a result, councils currently enjoy the largest share of the market. (sub. 2, p. 10)

Importantly, LG authorities are covered by the competitive neutrality provisions of the National Competition Policy and Related Reforms Agreement (COAG 1995). Under the Agreement, government businesses, whether Commonwealth, state or local, are required to operate without net competitive advantages over other businesses as a result of public ownership unless there is a demonstrated public benefit. A related agreement, the Competition Principles Agreement, requires each jurisdiction to establish effective complaints processes to deal with issues like those raised by ACROCERT.

Returning to the issue of fee setting, most jurisdictions require fees (in general) to be set to recover the actual cost to LG of providing the service. The exception is Tasmania where fees do not need to be fixed by reference to the cost to LG (sub. 27, p. 9). But while LGs may seek to fully recover costs, the basis for charging certification fees has little in common with actual costs and instead relies on perceived cost drivers such as floor area and construction cost. Results from the Commission's survey of LGs appear to confirm this inconsistency with cost recovery for building services around 65 per cent on average. New South Wales and Queensland had the highest level of cost recovery (72 and 73 per cent on average) and South Australia the lowest (43 per cent). The low South Australian figure may reflect the prescribed fee constraint in that State and/or that South Australian LGs are required to perform a number of building functions that are considered community services but which are provided without charge.

Stylised examples of building application fees across jurisdictions are presented in box 7.1 with detailed costings for selected councils shown in appendix K. As well as highlighting the significant variation in fees within and across most jurisdictions, the examples suggest that the legislated fees used in South Australia and Western Australia generally result in lower application fees (for residential buildings in the case of South Australia and commercial/industrial buildings in the case of Western Australia) compared to other states. While business compliance costs are lower in these two states, this does not mean that legislated fees are a more efficient means of charging for certification services than the alternatives.

***Given that many LGs are not recovering costs, this suggests the potential for inefficient cross-subsidisation between building applications for different***

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*building types and/or between building and non-building revenue sources.* One prominent hypothetical example would be where a project home builder is constructing single residential detached dwellings according to an identical or similar design in different locations. Under current LG fee regimes, that builder would be charged the same fee for each application even though the initial application would largely determine compliance with relevant building standards (siting issues aside).

A move to efficient time-based charging would lead to considerably lower compliance costs in this situation. Concomitantly higher costs would be imposed on more differentiated and/or more complex building developments. To be consistent with good regulatory practice, fees should typically recover the efficient administrative cost of processing building applications. Issues relevant to the efficient recovery of costs were analysed by the Commission (PC 2001) and some of the main points are presented in chapter 4 of this report.

The importance of setting charges efficiently was recognised by participants to this study including Brisbane City Council which supported the concept of time-based-charging:

A fee model that allows a fee to be imposed based on the actual time taken to perform the required building certification and ancillary administrative functions may reflect a true ‘user pays’ approach providing for an equitable apportioning of the cost of service provision. (sub. DR64, p. 6)

Others warned against the risks of unintended consequences from a move to time-based charging regimes. In particular, the Queensland Government argued:

Charging regimes for building applications that are based on time may result in longer approval times as the local government is not encouraged to quickly assess applications. (sub. DR51, p. 1)

However, the Commission considers that competitive pressure from private certifiers will mitigate the risks of LGs using time-based charging as a means to raise more revenue and, as a consequence, extend approval times. The constraint imposed by statutory time limits on processing times is also a relevant consideration here.

While charging regimes could be more efficient, fees account for a small share of total construction costs (box 7.1). Fees would represent a higher share of a builder’s profit margin but the impact will depend on the extent to which building application fees are passed on to end consumers. This will depend on market conditions and the nature of the project with standardised developments less likely to provide scope for pass-through than customised/one-off designs.

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## Box 7.1      **Stylised examples of building consent application fees**

### **Background**

The building application fees presented below are based on stylised examples of residential and commercial/industrial building projects across LGs (see appendix K) in order to provide a sense of the variability in fees charged. In the case of a single residential dwelling, the criteria applied to determine the cost of obtaining approval are a floor area of 200m<sup>2</sup> with a construction cost of \$300 000 and minimum mandatory inspection requirements where these apply. With respect to commercial/industrial buildings, the criteria applied involves a building with a gross floor area of 5000m<sup>2</sup> with a construction cost of \$1 million and minimum mandatory inspection requirements where these apply. The results are hypothetical in that they refer to the fees that would apply to a proposed building which met the floor space and financial criteria noted above not whether an actual building which matched these criteria had even been approved.

The information was drawn from LG websites (where fees were available) or by phoning individual LGs who provided building certification services. Given that a number of LGs (especially larger ones) in jurisdictions such as Victoria and Queensland no longer provide certification services this narrowed the available sample to smaller rural and regional LG areas. Hence, while LGs from all states were chosen randomly, the comparisons are not representative.

Importantly, as many LGs impose the same fee across a range of construction costs or floor areas, the fees shown below may well be the same for a different set of criteria. In addition, the Commission has only estimated fees across a relatively small sample of LGs and this means that care needs to be exercised in drawing inferences from the results. That said, the results are indicative of the variability of building application fees across LGs. The exceptions are South Australia and Western Australia where fees are regulated and all LGs charge the same fee.

### **Single Residential Dwelling**

Of the sampled **New South Wales** LGs, Blacktown City Council had the lowest fees in 2010-11 at \$1240 inclusive of all mandatory inspections (equivalent to 0.4% of the total construction cost) and the occupancy certificate. By comparison, fees imposed by Mosman Council were nearly three times higher at \$3250 (1.1% of the total construction cost).

In **Victoria**, (where LG authority surveyors issued just 14 per cent of building permits in 2010-11), the lowest fees were recorded by Wyndham Council at \$750 (equivalent to 0.2% of the total construction cost) while the highest was imposed by Monash Council at \$1350. In terms of transparency, all sampled Victorian LGs used a single fee rather than separate fees for the application, inspections and occupancy certificate.

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Box 7.1 (continued)

**Queensland** LGs imposed multiple fees which included a lodgement fee, a plumbing assessment fee and plumbing inspection fees. Tablelands Shire Council had the highest overall fee at \$1919.75 (equivalent to 0.6% of the total construction cost) while Cairns Regional Council had the lowest combined fee at \$1395.2.

All **Western Australian** LGs charged \$1050 for a building license (equivalent to 0.35% of the total construction cost).

All **South Australian** LGs charged \$504 for building rules consent (equivalent to 0.1% of the total construction cost).

**Tasmanian** residential building (and plumbing) permit fees ranged from \$813.2 at Sorell Council to \$1800 at Southern Midlands Council.

#### **Commercial/Industrial Building**

Results for **New South Wales** reveal that the City of Newcastle had by far the lowest fees at \$2080 while Mosman Council again had the highest fees at a minimum \$12 475 (plus inspection charges).

**Victorian** commercial/industrial fees ranged from \$1750 at Wyndham City Council to \$6600 at both Knox City Council and Greater Shepparton City Council.

Charges by **Queensland** LGs ranged from being discretionary at Cairns Regional Council to a minimum of \$18 788.50 (plus plumbing fixture charges) at Rockhampton Regional Council.

All **Western Australian** LGs charged \$2000 for a commercial/industrial building licence.

All **South Australian** LGs charged \$11 150 for commercial/industrial building rules consent.

In **Tasmania**, the lowest commercial/industrial fees were charged by Devonport Council and Kingborough Council with minimum charges of \$274 and \$355 respectively plus variable inspection charges. Derwent Valley Council was by far the most expensive charging a minimum \$25 040 plus inspections.

Sources: Derived from LG fee schedules (see appendix K).

*Consistent with leading practice 4.3, local government charging regimes for assessing building applications should be based on the efficient recovery of administrative costs. This would avoid potentially inefficient cross-subsidies between different types of building applications and between building and non-building revenue sources. It would also enable LGs to devote greater resources to assessing building applications and should reduce processing times and the associated delay costs faced by builders.*

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Hence, the Commission considers that observed differences in current fee setting approaches or moving to time-based charging are unlikely to significantly impact on building activity (either by discouraging projects or encouraging substitution between or within jurisdictions) and nor would they be significantly affected if fees were raised to fully recoup regulatory administration costs. In turn, raising fees to recover efficient costs would enable LGs to devote greater resources to assessing building applications and should reduce processing times and the associated delay costs faced by builders.

## **Building standards**

As noted in chapter 6, although issues of general regulatory interpretation featured prominently among business concerns regarding compliance cost issues, the main criticisms were directed toward:

- inconsistencies in on-site technical requirements with LG interpretation of performance-based standards contained in the BCA creating uncertainty and distorting on-site work practices (especially in non-residential construction where there is more extensive use of performance-based standards and less similarity between projects)
- differential enforcement or non-enforcement of regulations contained within the BCA. For example, the National Tourism Alliance (sub. 28, p. 3) noted different requirements for Class 2 and 3 buildings within the BCA led to lower building costs for Class 2 buildings. The Alliance pointed to concerns that LGs have not effectively enforced building code regulations after construction has been completed and have ignored the practice of conversion of Class 2 buildings to short term accommodation
- the cost of complying with technical standards in variance to those contained in the BCA. Under the Intergovernmental Agreement on the BCA, jurisdictions are, among other conditions, able to vary standards based on particular geographical, geological or climatic factors, as defined in the BCA
- inconsistent construction site management in a number of areas including environment impacts, energy efficiency, public safety, traffic management and asset protection (see below).

In terms of quantifying the magnitude of the associated compliance costs, a recent cost-benefit study by the Australian Building Codes Board (ABCB) looked specifically at local government regulations that exceeded the minimum building standards of the BCA and concluded that ‘such interventions significantly impact on

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housing affordability and the analysis suggests that many of the issues regulated would be best be left to market mechanisms' (ABCB 2008, p. 1).

A non-exhaustive list of sixteen interventions was identified (see table 7.3) relating to increased ceiling heights, reduction of external noise, improved access for people with a disability and more stringent energy and water efficiency requirements. Cost increases of between one and 14 per cent were identified with a total increase in construction costs of around \$66 million per year across the nine interventions subject to detailed analysis.

Moreover, the interventions specific to residential housing (increased room sizes, ceiling and floor heights, circulation dimensions and termite protection) resulted in a cost increase of around \$21 000 per house, or 6.4 per cent of construction cost. Interventions related to residential apartments buildings (including increased ceiling heights, room sizes, lift requirements and fire ratings of exit doors) added 10.8 per cent to construction costs.

Business also raised concerns regarding perceived overlaps and interactions between standards set at the jurisdictional or national level (such as in relation to environmentally sustainable building design issues, noise regulations, accessible housing and occupational, health and safety). For example, the Business Council of Australia referred to noise and environmental regulation:

The lack of legislative and administrative coordination between state and local government jurisdictions can impose significant and unnecessary burdens on industry through inconsistent, overlapping and conflicting regulation. The following examples demonstrate some of the ways in which this is occurring.

- One company describes an instance where local government processes have crept into the remit of state government in regards to noise and environmental management at a refinery site. This has led to similar regulation being imposed at both the state and local levels resulting in additional complexity, time and cost for the associated business. (sub. 38, p. 1)

The HIA also commented on the issue of standards (specifically with reference to sustainability requirements such as sensitive urban design, best practice storm water drainage, universal design, energy and water efficiency, and material selection) in a number of Melbourne LGs. Noting the absence of any formal legislation or regulation in the area, the HIA said 'Councils are increasingly adopting policies and standards that exceed or pre-empt national and state building codes.' (sub. 34, p. 13). Commenting on the need for state-based guidelines referenced through legislation to address this issue, the HIA provided examples of the consequences of the current ad hoc approach:

**Table 7.3 Selected local government building interventions above requirements specified in the Building Code of Australia<sup>a</sup>**

<i>Jurisdiction</i>	<i>Building Type</i>	<i>Standard</i>	<i>% cost increase</i>	<i>Annual cost increase<sup>b</sup></i>
NSW	Residential buildings and serviced apartments	Acoustic privacy, ceiling heights	4.12%	\$26.4 million
NSW	Class 2 Dwelling (Apartments < 4 levels)	Adaptable housing for people with a disability	1.53%	\$8.5 million
NSW	Child Care Centre (1 storey)	Increased amenity, fire safety	4.60%	\$0.2 million
NSW	Dwelling House Development (Apartments < 4 levels)	Ceiling heights, location and size of balconies, aircraft noise attenuation, energy efficiency and building design, water heaters, dual flush toilets, water saving devices, building materials and whole of life termite protection	6.40%	\$2.1 million
NSW	Mixed Use Premises (3 storey block of flats)	Ceiling heights, solar design and energy efficiency, noise attenuation, access for disabled people, and rainwater tanks for gardens, car washing, toilet cisterns and washing machines	13.62%	\$2.1 million
NSW	Residential Flat Buildings (Mixed use Premises, 3 storey block of flats)	Ceiling heights, room sizes, requirements for lifts, noise attenuation, number of exits, fire rating of exit doors, widths of corridors, orientation, and location of windows	10.82%	\$21.0 million
NSW	Development Control Plan – Bushfire Protection	Sprinkler systems and other protective measures	Not calculated	Not calculated
NSW	General Development Guidelines	Energy efficiency, hot water systems, rainwater tanks, access for disabled people and adaptable housing	4.05%	\$0.8 million
TAS	Bushland Management Schedule	Protection from bushfire	Not calculated	Not calculated
VIC	Planning Scheme requirements	Energy and water efficiency	Not calculated	Not calculated
QLD	Residential design – single unit dwelling code	Location and size of balconies, verandas and decks	Not calculated	Not calculated
QLD	Rainwater tanks for bushfires	Protection from bushfire	Not calculated	Not calculated
SA <sup>c</sup>	Development Plan 2003	Older and/or disabled persons requirements	Not calculated	Not calculated
SA	Apartment Building – Multi storey apartments	Ceiling heights, minimum floor areas, other amenity issues	0.93%	\$1.0 million
WA	Planning Scheme – Development and design policy	Universal access, noise transmission between dwellings, external noise, natural light and energy efficient design	Not calculated	Not calculated
WA	Health Local Law, room size	Ceiling height, minimum floor area	1.59%	\$3.9 million

<sup>a</sup> Only nine of the sixteen interventions subjected to cost-benefit analysis are referred to in the text. <sup>b</sup> This column refers to the total cost increase per year across all building developments in the LG area. <sup>c</sup> While there are requirements in South Australia for disability access to apartment buildings, these are not specific to LGs and are rarely invoked due to presales of most residential buildings.

Source: Australian Building Codes Board (2008).



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The requirements are difficult to satisfy as they are often applied at the planning permit stage before the house design has been finalised and an energy rating has been produced. Also, clients haven't yet decided on products, materials, fixtures and fittings that councils request be included in sustainability assessments. (sub. 34, p. 13)

The Australian Institute of Architects similarly lamented the costs of ad hoc LG involvement in building design that were imposed on builders and professionals trying to gain knowledge of differing requirements across LG boundaries. It too called for state or even national guidelines and the application of cost-benefit analysis to assess the regulation:

The Institute believes that local governments use planning rules to regulate what are essentially building regulation matters. Often, these activities are couched as sustainability initiatives. However, no matter how well intentioned, regulating sustainable building practices and in particular, the type of appliances and fixtures for use in a local government area, is a failure of the system. That local government ... feels the need to regulate matters unrelated to land use, demonstrates a lack of current building regulations response to community aspirations. Mandating the inclusion of solar hot water systems, or rainwater tanks for example, ought be a state/territory or nationwide measure, not a piecemeal local government initiative.

Sustainability initiatives at a state/territory (or national) level have regulatory efficiency, and all parties know what is expected and can plan for such measures. There is an inevitable cost to business of ad hoc regulation in this field by local government.

These local government introduced requirements are examples of regulatory 'creep' that are not subject to a Regulatory Impact Statement type evaluative process – meaning that there is no cost benefit analysis to justify the regulation. (sub. 40, p. 2)

***The findings of previous Commission inquiries such as that into The Private Cost Effectiveness of Improving Energy Efficiency (PC 2005) reinforce the dangers associated with piecemeal policy approaches in dealing with issues such as sustainability and energy efficiency.*** Significantly, the Commission found that:

There is considerable uncertainty about the extent to which building standards have reduced energy consumption and emissions. In addition, it is doubtful that the net financial benefits predicted in regulation impact assessments have been achieved in practice. The limited available evidence suggests that the costs of current standards have been much higher than were predicted. (PC 2005, p. 232)

The importance of eliminating variations in building standards (including those that are created by LG planning systems) has also been recognised at an inter-jurisdictional level with the COAG Reform Council noting that:

The key outstanding issues in building regulation reform are;

- the ongoing elimination of variations to the BCA; and

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- the interaction of building regulation under the BCA and regulation of building outside the BCA, including through local government planning processes. (2009, p. 46)

In Queensland, the Sustainable Planning Act 2009 and Building Act 1975 both limit the ability of LGs to introduce variations to the BCA. Where a variation is inconsistent with the BCA or the Queensland Development Code it has no effect. ***In addition, a requirement for the relevant Minister to approve changes to LG planning instruments provides an opportunity to remove provisions that relate to building issues.*** And with specific reference to sustainability issues, the introduction of standardised legislative instruments (in particular, the Queensland Development Code Part 4.1 Sustainable Buildings) means there are no LG variations relating to sustainability. This has provided jurisdictional consistency and represents a climate-specific incremental change compared to the base requirements of the BCA.

Similarly, Victoria operates a gateway model (a requirement placed on all jurisdictions under the intergovernmental agreement for the operation of the ABCB) to scrutinise amendments to municipal planning schemes which might seek the introduction of different standards by LGs. ***This model includes a requirement for Ministerial authorisation for a planning scheme amendment to be prepared, as well as Ministerial approval of the amendment. From a governance perspective, this approach would at the very least provide a level of consistency in the application of new regulatory standards.***

In Western Australia, the Building Act 2011 (which came into effect on 2 April 2012) places limits on the ability of LGs to impose building standards in conflict with the National Construction Code. In particular, NCC standards prevail over standards in town planning schemes. This has applied to proposed new planning schemes and new local laws since 2005. ***There is also a requirement that the Departments of Planning and Local Government refer any inclusions of standards in planning schemes or local laws to the Building Commission.***

A robust evaluation of the costs and benefits of different building standards to those agreed through the ABCB as a pre-requisite to the introduction of a different standard would also be an effective means of reducing the compliance burden on business. This regulatory impact statement (RIS) approach is in fact adopted by the ABCB itself in considering potential amendments to the Code. The submission by Master Builders Australia supported this approach:

Master Builders believes that the application of the BCA by local government should be transparent. Local Government should develop their own RIS processes to justify any deviation from the BCA. (sub. DR62, p. 5)

However, to address potential conflicts of interest involved with LGs performing and/or contracting out cost-benefit assessments, responsibility for commissioning those studies would be best left with the relevant state government department. The cost of obtaining these independent assessments could then be passed back to the LG requesting the change. Alternatively, state governments could establish a gateway model similar to that employed in Victoria which requires Ministerial assessment and approval before LGs can impose different building standards.

#### LEADING PRACTICE 7.1

*A gateway approach (similar to that used in Queensland, Victoria and Western Australia) to scrutinise proposed building standards that are inconsistent with either the National Construction Code or relevant jurisdictional Development Codes guards against potentially costly requirements being imposed by local governments.*

## Construction site management

All states have enacted jurisdiction-wide legislation and/or enabled LGs to develop local laws or impose conditions on planning/building approval that are designed to manage the impact of building activity on public health, safety, amenity, the environment and community assets, such as roads and footpaths (table 7.4). While these regulations may provide community benefits, the concern for this study is whether or not those benefits are delivered cost-effectively and whether all the costs imposed on business are necessary to deliver the benefits sought.

**Table 7.4 Legal basis for construction site regulation by jurisdiction**

<i>Jurisdiction</i>	<i>Construction site management regulation</i>
NSW	Planning approval with guidelines provided by State Government
Victoria	State legislation ( <i>Environment Protection Act 1970</i> , <i>Occupational Health and Safety Act 2004</i> ) and local-laws
Queensland	By-laws/Sustainable Planning Act
Western Australia	By-laws/various State legislation (EPA, OHS, LGA)/State policies
South Australia	<i>Occupational Health Safety and Welfare Act 1986</i> , <i>Environment Protection Act 1993</i> , LG requirements for public realm activity
Tasmania	Various State Legislation (LUPAA, LGA, <i>Building Act 2000</i> and Regulation) and Planning approval (stormwater)

Sources: Regulatory authority websites.

Importantly, observed differences in the nature and administration of construction site regulations within and across jurisdictions can reflect a host of factors including

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differences in the physical environment (including density), environmental protection issues, resource availability, climate, community preferences and, as a result of these factors, the priorities set at the local level. Commenting on the reasons behind differences in regulatory application across LGs in south east Queensland, Brisbane City Council (BCC) noted:

Minimum outcomes will be similar however specific focus may be different. For example, BCC provides a higher level of regulation focus on erosion and sediment control issues (water contamination) associated with building sites than most other local authorities in Queensland. (sub. 26, p. 6)

From a business perspective, differences in construction site regulation can have significant cost impacts. These stem from both the need for building firms to meet higher standards (perhaps higher than necessary) in some jurisdictions or LG areas and the compliance breaches that flow from uncertainty about the applicable law. Moreover, building and construction businesses may face comparatively higher costs than other sectors because they are more likely to have dealings across multiple LGs and, for some larger firms, multiple jurisdictions (VCEC 2010).

Importantly, the magnitude of the costs imposed on business will depend on the degree to which construction site regulations are enforced. Consistent with widespread resourcing constraints reported by many LGs, anecdotal evidence indicates that some builders simply ignore the regulatory requirements. In other words, the actual compliance costs from such regulation may not be as great as suggested by building industry interests. Equally, the amenity of communities may be being compromised.

In terms of quantifying the magnitude of the associated compliance costs, Victoria's system of building site regulation was a component of a recent comprehensive review of local government regulation in Victoria (VCEC 2010). A survey of 30 Victorian LGs undertaken in 2008-09 to inform that review found an extensive range of local laws used by the majority of Victorian LGs responding to the survey. Local laws were most prevalent in areas related to:

- storm water, asset protection (100 per cent of responding LGs)
- hoardings (86 per cent of LGs)
- site fencing and identification, builders' refuse, sanitary facilities, cranes and towers (71 per cent of LGs)
- noise, working hours limits, gantries, cover on the road (57 per cent of LGs)
- sustainability (43 per cent of LGs).

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The compliance costs associated with the *substance* of these local laws alone was estimated to be \$116.8 million in 2008-09 (compared with \$25.4 million in LG administrative costs mainly for building inspections and \$7.3 million in delay costs mainly for property information requests). To put this figure in perspective, it represented 0.6 per cent of the total value of building work in Victoria in 2008-09 (Allen Consulting Group 2010a). Spread across the 98 113 building permits issued in that year, compliance costs averaged around \$1190 per permit.

Compliance costs in respect of domestic (mainly residential) building work accounted for 60 per cent of the total with builders refuse (\$43.3 million), site fencing and identification (\$17.5 million), asset protection (\$7.0 million) and hoardings, signs and awnings (\$2.0 million) the most significant components. For non-domestic construction (including commercial, industrial and office work), the local laws associated with the greatest compliance costs were: noise and hours of operation (\$25 million); hoardings, signs and awnings (\$6.1 million); site fencing and identification (\$5.5 million); parking (\$4.8 million); asset protection (\$4.3 million); and builders refuse (\$0.8 million).

As mentioned earlier, building and construction businesses may face comparatively higher costs than other sectors (from local law variation) because they are more likely to have dealings across multiple LGs (VCEC 2010). While the costs per business may be small, the aggregate cost across all building and construction companies can be quite large. For example, VCEC (2010) estimated that reducing compliance and delay costs in the three local laws of most concern to business (working hours, site-fencing and LG asset protection) would amount to between \$5.2 million and \$11.8 million per year in Victoria alone.

In contrast to the broader focus of the VCEC study, the Commission's nation-wide survey of LGs only looked at variations in the *prevalence* of local laws related to construction site management. In that regard, Commission's survey results (table 7.5) showed greater consistency (compared to the VCEC findings) in the availability and use of regulatory measures to manage construction sites across all jurisdictions (although the lower response rate to the Commission's survey means the results need to be treated with some caution).

### *Basis of construction site regulation*

LGs in New South Wales, South Australia and Tasmania are limited in their ability to enact local laws relating to building and construction. In these jurisdictions, the regulation of construction site management issues (such as noise abatement, air and stormwater pollution and builders refuse) are addressed and enforced under state legislation (in particular, environmental protection legislation). In principle, this

should provide for greater consistency within those jurisdictions on building and construction related matters and may leave no authorised regulatory role for local LG (where they are not delegated to enforce the legislation).

**Table 7.5 Construction site regulation**  
Per cent of local governments using regulatory measure<sup>a</sup>

<i>Regulatory measure</i>	<i>NSW</i>	<i>Victoria</i>	<i>Queensland</i>	<i>Western Australia</i>	<i>South Australia</i>	<i>Tasmania</i>
LG asset protection	92	100	75	67	89	100
Site fencing/identification	92	92	100	67	78	100
Demolition activities	92	92	75	67	67	100
Builders refuse	92	100	75	89	67	100
Sanitary facilities	92	100	50	89	67	100
Noise/hours of operation	92	92	100	89	78	100
Tree preservation	92	100	100	78	78	100
Storm water	92	92	75	78	56	100
Air pollution	92	92	75	89	56	100
Hoardings/signs/awnings	92	92	100	78	78	100
Cranes and towers	83	92	50	78	67	100
Road occupation	92	100	75	78	78	100
Parking	92	92	75	78	67	0

<sup>a</sup> LG responses by State are NSW (12), Victoria (12), Queensland (4), WA (9), SA (9) and Tasmania (1).

Source: Productivity Commission survey of local governments - building and construction survey (2011-12, unpublished).

In New South Wales, issues relevant to environmental discharges (air quality, noise, water pollution and waste management) are dealt with under the *Protection of the Environment Operations Act 1997* (see chapter 11). Most construction sites are regulated by LGs typically through conditions placed at the planning approval stage (such as requirements for an environmental impact management plan) and the compliance process during the construction phase. This case by case approach allows for greater flexibility in tailoring regulation to specific circumstances but also provides for more discretion by LG officers and hence greater regulatory variability and possibly less transparency (at least compared to local laws). According to the HIA, such flexibility has actually led to uncertainty regarding regulatory responsibility, particularly where private certifiers act as the certifying authority (the case in 40 per cent of construction certificate approvals):

... in NSW local government's ... retain responsibility for 'offsite' activities, for example damage to public property, noise controls, sediment and erosion controls or water pollution. These responsibilities fall under the local government's public responsibility. However, the exercise of these functions is poorly managed by many local councils. They have taken on a 'policeman' role focused on both the building work 'on and off site' and of the work of the accredited certifier.

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This ultimately plays out in costs being added to the process, whether through fines or levies. For example, Parramatta City Council and Ryde City Council each have a policy of charging an 'Environmental Enforcement Levy', which covers the costs associated with potential investigations of complaints or conducting audits linked with development under construction or after completion, regardless if the site is or was under control of a private certifier. This policy assumes the applicant/builder will carry out activity that is non-complying with the development consent.

Builders are often faced with fines for infringements outside their construction site. The structure of penalty infringement notices is that once issued they cannot be unissued by a local council. However HIA has numerous examples where the builder can show evidence that another party was responsible for the infringement – such as waste or sediment control. The complexity of fighting these penalties means that many simply pay the fine. (sub. 34, p. 12)

However, the NSW government does issue guidelines recommending construction site practices that address noise, waste management and air quality. In relation to (non-domestic building) construction noise, for example, recommended standard hours of construction work are 7.00 am to 6.00 pm Monday to Friday, 8.00 am to 1.00 pm Saturday with no work on Sundays and public holidays (NSW Department of Environment and Heritage 2011).

South Australia similarly uses the *Environmental Protection Act 1993* to issue construction industry codes of practice (dealing with issues like stormwater pollution) and advisory notes (regulating working hours to deal with construction noise). By way of example, the recommended standard hours of construction work are more liberal than in New South Wales allowing work from 7.00 am to 7.00 pm Monday to Saturday but no work on Sundays and public holidays (Environment Protection Authority SA 2011).

In contrast to these 'recommended' or 'voluntary' approaches, the Tasmanian *Environmental Management and Pollution Control Act 1994* (and related regulations) specifies enforceable conditions (and associated penalties) on building site activity such as noise and working hours, air and stormwater pollution. In relation to permitted hours of construction work, the Act allows the most expansive opportunities to undertake construction work with permitted hours from 7.00 am to 6.00 pm Monday to Friday, 8.00 am to 6.00 pm on Saturdays and 10.00 am until 6.00 pm on Sundays and public holidays (see section 53 of the Act).

Western Australian LGs rely on a combination of local laws (in areas like builder's refuse, site fencing, cranes and gantries in Perth City Council) and a range of State Acts to deal with building issues including:

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- noise, air and storm water pollution, builders refuse and hours of operation under the *Environmental Protection Act 1986* (*Environmental Protection (Noise) Regulations 1997*)
  - signs and builder identification under the *Planning and Development Act 2005*
  - hoardings, road closures and LG asset protection under the *Local Government Act 1995* and
  - crane and gantries under the *Occupational, Health and Safety Act 1984*.

Using standard hours of work as a comparative example, noisy construction work activities can only be conducted between 7.00 am and 7.00 pm Monday to Saturday and in accordance with the relevant Australian Noise Standard. Construction work outside these hours must be shown to be reasonably necessary and requires (inter alia) a Noise Management Plan lodged with, and approved by, the relevant LG.

Other jurisdictions (particularly Victoria and to a lesser extent Queensland) use local laws as the primary means of dealing with construction site management issues (see appendix K for examples of issues covered). The inconsistent nature and use of those laws has been an ongoing concern for building and construction firms particularly in Victoria.

For example, the Master Builders Association of Victoria (MBAV) recently highlighted differential working hour requirements as a major compliance issue:

In Victoria, there are a plethora of different rules and standards governing what are appropriate working hours on building sites. According to our recent *Building Trends* survey, 28 per cent of commercial builders and six per cent of residential builders rated council imposed restrictive working hours as the local government law which has the greatest negative impact upon their business.

In many municipalities across Victoria, regulated start times on weekends often commence after the official remuneration clock begins ticking for commercial construction workers (for example, workers are paid from 7 am - 3.30 pm, but in most LG areas, workers cannot undertake any construction activity until 9 am). By restricting start times to 9 am on a Saturday, builders are forced to pay employees at double time penalty rates from the commencement of work — despite no actual benefit. Naturally, it comes as no surprise that this type of outcome is causing employers in commercial construction to shift away from Saturday work, leading to projects taking 15 per cent longer to complete. (2009, p. 14)

While restrictions to working hours may be a blunt way of addressing noise issues (as noisy activities are treated in the same way as less intrusive work), such regulation seeks to strike a balance between community amenity and the need to facilitate development. However, consistent with the view expressed by VCEC (2010) in its response to the MBAV (2009), the costs to builders could be



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eliminated without affecting community interests by amending the starting times of construction work on Saturdays (through the enterprise bargaining process).

More generally commenting on the impact of local law use in Victoria, the Department of Planning and Community Development (VIC DPCD 2011a) noted that research undertaken in 2009 confirmed the variance and inconsistency of building site management across municipalities in that state:

- imposes significant administrative and compliance burdens on industry
- reduces business productivity
- increases costs to businesses, particularly those operating in multiple LG areas
- increases housing and construction costs.

The HIA agreed with this observation in saying ‘local laws create minor yet significant inconsistency between local government areas’ and that ‘some local laws [such as site fencing in greenfield areas] are not considered relevant to local conditions’ (sub. 34, p. 14).

The HIA went on to advocate for the preparation of state-based guidelines because:

Under the current legislative framework, local councils have developed a range of local policies and development controls for matters such as storm water management, landscaping, driveway design and construction, erosion and sediment control, waste management and demolition processes, to name a few. Whilst there is a high level of consistency in these policies across council areas there are also variations which remove the consistency and certainty for residential development. (sub. 34, p. 14)

MBAV (2009) went further in calling for the development of consistent and legally enforceable state-wide standards (akin to the approach in Tasmania) in critical building areas including: working hours and noise abatement; protective works permits; disposing of waste material; management of rubbish bins and skip on-site; site fencing; noise abatement; crane usage; sustainability; disability access; painting activity controls; fire prevention plans; and demolition activity controls.

LG representatives, on the other hand, argued that regulatory differences across LGs substantially reflect differences in local conditions. In terms of local laws, for example, the Municipal Association of Victoria, observed the following:

Attempts to ‘benchmark’, ‘harmonise’ or ‘streamline’ council services must acknowledge the fundamental rationale behind the disparity in local laws, be they differing community priorities, or variation in local circumstances such as the level of business activity, or population density. (sub. 10, p. 2)

*Use of enforceable conditions or standards in the regulation and management of construction site activity, with the conditions being flexible enough to deal with genuine differences in local circumstances, is the most consistent and effective means of regulating construction sites.*

## **Building approvals**

A significant concern raised by business interests in consultations undertaken for this and other related studies was the length of time taken to obtain building approval. This was particularly the case in jurisdictions with lower levels of private certification activity and where statutory time limits on processing times were absent. Some participants did acknowledge that certain local governments were highly efficient in processing building applications but for others, delays in processing applications were substantial. ***LGs with electronic lodgement of building applications were typically viewed to provide more timely responses to application processing.*** Disparities in the information required to be submitted with building applications across LG areas was also raised as a source of frustration.

Most jurisdictions impose statutory timeframes on LGs to assess building applications (see table 7.5 and appendix K). In Western Australia, for example, local governments are required to issue or refuse a building licence or building approval certificate within 35 days of receiving the application (Red Tape Reduction Group WA 2009). Prescribed times can, however, be exceeded in practice as a result of requests for further information or delays in getting other approvals. In addition, the *Building Act 2011* (due to come into effect on 2 April 2012) will include shorter (10 working days) fixed approval processing times for some building types. In South Australia, LGs have up to 4 weeks (20 business days) to process a building rules consent for Class 1 and 10 buildings. For all other building classes, South Australian LGs should deal with building applications within 12 weeks (60 business days).

Tasmania's statutory timeframes are even shorter with surveyors (LG and private) required to process certificates of likely compliance within 14 days. LGs then have 7 days to either issue or refuse the building permit. Data for 2009-10 indicate average permit approval times (on a stop-the-clock basis which excludes the time involved in waiting for further information from applicants where an application is incomplete or for advice from external referral agencies) of about 13 days across Tasmania's 29 LGs was well within the statutory timeframe. This was also the fastest processing time of any jurisdiction with more than half of Tasmanian LGs achieving average building application approval times of less than 10 days. As

noted earlier, this result may reflect the fact that reported Tasmanian building approval times only represent the time taken to assess compliance with relevant building standards rather than also incorporating consideration of planning matters which is a feature (to varying degrees) of the integrated planning and building assessment systems in other jurisdictions.

**Table 7.5 Statutory building approval times, 2010-11**

<i>Jurisdiction</i>	<i>Statutory time limit excluding further information requests</i>
NSW	No time limit for a construction certificate (residential and commercial/industrial) 10 business days for complying development certificate (residential and commercial/industrial)
Victoria	10-28 business days for Class 1 and 10 buildings 15-35 business days for other classes
Queensland	20 business days
Western Australia	35 days
South Australia	20 business days for Class 1 and 10 buildings 60 business days for other classes
Tasmania	21 calendar days

*Sources:* Jurisdictional Building Regulations

In the Victorian regime, the minimum statutory timeframe is the shortest of all states with the responsible authority (LG or private surveyor) allowed 10-35 business days (on a stop-the-clock basis) to approve a building application. In terms of actual approval times (on a gross basis), the average number of working days between permit application and issue date was 35 days. Of interest, privately certified building permits were only slightly faster at 30 days. There was also considerable variability across LGs (measured in terms of a 35 day standard deviation from the average).

Finally, New South Wales stood out among its peers as being the only jurisdiction where no statutory time limits apply (except for complying development). However, this did not result in actual average processing times being higher than other jurisdictions. Indeed, the average time taken by New South Wales LGs to process complying development certificates (which combine the functions of development consent and a construction certificate for low impact projects including certain single and double-storey houses) was 14 days in 2010-11 (NSW DP&I 2012).

As shown in appendix K, LG processing times vary both between and across jurisdictions and the differences can be significant. However, compared to the delays associated with obtaining planning approval (see PC 2011b), processing times for building approvals are considerably faster.

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An indication of the magnitude of costs involved is provided by the holding costs incurred by builders from developments that are delayed for longer than necessary. Holding costs are often expressed in terms of the additional interest and rent, higher input costs and contractual penalties (for not meeting agreed delivery times) faced by businesses but are most usefully measured as the foregone return (opportunity cost) from having funds tied up for longer than necessary in a building project.

Given the opportunity cost of a building project will vary from one project to the next, the Commission has not sought to estimate the costs. Instead, it has drawn on estimates produced by organisations involved in building regulation. These include the Brisbane City Council which recently conducted an exercise that assumed (in a planning context) that holding costs were \$1000 per week for an average small development and \$1500 per week for an average large development. Accordingly, large cost savings are potentially available if some of the LGs shown in appendix K achieved leading practice processing times.

## **Construction stage inspections**

Once building approval has been issued, LGs acting as the certifying authority are responsible for conducting mandatory inspections of building and, in some jurisdictions, plumbing work to ensure that work meets relevant building and plumbing standards. Mandatory inspection requirements differ from one jurisdiction to the next but may be performed at pre-commencement, footings and internal drainage, slab or bearers/joists, frame/pre-sheet, waterproofing wet areas, external drainage and storm water and after building work is complete for issuance of an occupancy certificate. In addition, new building projects (in all jurisdictions) will likely have more than the minimum number of mandated inspections because of the need for reinspections if a compliance breach has been identified or because the component nature of the building process means individual stages (such as frames for multi storey buildings) are completed in sections that may require separate inspections. Administration of these variable inspection requirements impose differential compliance burdens on business (table 7.6). In those jurisdictions with mandatory inspection regimes, LGs typically require 24 to 48 hours (either written or verbal) notice before inspections can take place.

In terms of building activity, LGs in New South Wales are required to conduct the highest minimum number of building inspections with seven separate stages of a construction project subject to scrutiny by LG or private certifiers for Class 1 and 10 buildings. The New South Department of Planning and Infrastructure (pers. comm., 27 June 2012) noted the current regime was established [in response to the recommendations of the Campbell Inquiry into *general* building

quality issues in 2002] to ensure not only that the building was fit for occupation but also that work is generally consistent with the planning approval. Moreover, it noted that while it generally supported a risk-based approach to inspections (see below), a discretionary inspection regime in a competitive certification environment would lead to a variable practice in the industry and could result in an overall loss of building quality. It also pointed to the significant cost of rectifying defective building work and the role that appropriate regulation plays in mitigating the cost of defective work.

**Table 7.6 Mandatory critical stage new building inspections by jurisdiction**

<i>Inspection stage</i>	<i>NSW<sup>a</sup></i>	<i>Victoria</i>	<i>Queensland</i>	<i>Western Australia</i>	<i>South Australia<sup>b</sup></i>	<i>Tasmania</i>
Commencement	✓	✗	✗	✗	✗	✗
Foundation and Footings	✓	✓	✓	✗	✗	✓
Slab/ reinforcement or bearers/joists	✓	✓	✓	✗	✗	✗
Frame	✓	✓	✓	✗	✗	✓
Wet area waterproofing	✓	✗	✗	✗	✗	✗
External drainage/storm water	✓	✗	✗	✗	✗	✗
Occupancy	✓	✗	✗	✗	✗	✓
Final/completion	✗	✓	✓	✗	✗	✓

<sup>a</sup> Applies to Class 1 and 10 buildings. <sup>b</sup> In South Australia, builders have an obligation to notify council at commencement and completion stage but there are no mandatory inspections at those construction points.

Sources: Queensland Building Services Authority, Glenelg Shire Council, Tea Tree Gully Council, Queensland Department of Local Government and Planning, Cassowary Shire Council.

In the Commission's view, this highlights the need for an effective auditing regime to guard against the risks of non-compliant building work. In that context, it is also important to keep in mind that defective work can result from sources other than non-compliance with building standards. Alternative contributors to defective work include whether performance-based standards are themselves sufficiently unambiguous in the circumstances (highlighting the inherent trade-off in the BCA between certainty and flexibility and innovation), defective materials and poor quality workmanship (related to 'look and feel' characteristics). The role of a certifier in conducting mandatory inspections should be the assessment of compliance with the minimum building standards required to preserve human safety (a functional test), it is not to police a general quality benchmark set above the standards contained in the BCA.

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More importantly, it is not clear that states with less intensive inspection regimes are subject to an increased incidence of defective building work or greater safety risks or costs from building defects safety. What is clear, is that building and construction firms operating in New South Wales face greater potential compliance costs than other jurisdictions. By extension, New South Wales LGs also have higher building resourcing requirements which may be more effectively employed in the processing of building applications to reduce approval times. In comparison, building legislation in Victoria, Queensland and Tasmania required only four construction stage inspections by LGs in 2010-11.

South Australia and Western Australia imposed the least onerous requirements on business. In South Australia, building firms were only required to notify LGs on commencement and completion of building work and LGs are given discretion to perform audit inspections at any stage of the construction process. While all South Australian LGs are required to have a formal inspection policy, these can vary from one LG to the next. For example, Adelaide City Council inspects:

- all Class 1 and 2 buildings twice
- 80 per cent of class 3 to 9 buildings once prior to issuing a Certificate of Occupancy
- all swimming pools
- 50 per cent of other class 10 buildings (Adelaide City Council 2003).

Western Australia had no statutory inspection requirements in 2010-11 though, like South Australia, LGs had discretion to perform inspections. As an example of the inconsistent approach to inspections in Western Australia, the City of South Perth performed inspections at concrete slab and completion stage for all buildings while the City of Subiaco did not perform any residential inspections and either inspected or required a structural engineering report for non-residential construction. Importantly, while discretionary approaches may lead to fewer inspections, they mean less consistency and greater uncertainty for builders and hence may impose higher compliance costs than the mandatory approaches used in other states. Significantly, Western Australia's new Building Act 2011 (which came into effect on 2 April 2012) introduced mandatory inspections for Class 2 to 9 buildings which are nominated by the building permit approval authority. Inspection requirements for Class 1 buildings remain at the discretion of the permit approval authority.

As an indicator of the financial burden that inspection costs place on builders, New South Wales certifiers (LG and private) issued 56 213 construction certificates in 2010-11 (NSW DP&I 2012). Assuming one quarter of these certificates were for construction of new Class 1 and 10 buildings requiring all seven mandatory

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inspection stages, this implies a minimum \$9.8 million in inspection costs at a conservative \$100 per inspection. Time costs for builders needing to participate/cooperate with inspection requirements would be additional to these direct financial costs. In Victoria (where building activity has been considerably more buoyant), there were 63 400 building permits issued for new buildings (by both LG and private surveyors) in 2010-11. At a minimum four inspection points, this implies a lower bound cost estimate of \$25.4 million (noting that LGs issued, and were the responsible authority for, only 14 per cent of permits in 2010-11).

### *A risk-based inspection regime*

The different approaches to building inspection frequency across jurisdictions will have differential impacts on business costs as well as the level of LG resources (as the certifying authority) devoted to building control.

***As a general rule, businesses, LGs and consumers would benefit from having regulators focus on areas which pose the greatest risk to public health and safety, and/or would be the most costly to rectify and/or have the highest likelihood of compliance breaches occurring (including the compliance history of the builder).*** Inspection frequency (and duration) should be tailored to meet that underlying principle. In that vein, a discussion paper informing changes to building regulation in Western Australia noted that while determining which building works constituted a significant risk required careful analysis and judgement, factors relevant to deciding which works to inspect should include the:

- nature of the building design
- compliance record of the builder
- probability of compliance failures
- consequences of compliance failures (WA Department of Housing and Works 2005).

Accordingly, the paper went on to argue for a move away from the discretionary approach used in Western Australia during the reference period (largely because this approach led to inconsistencies across the state) towards a risk-based approach. In terms of how that approach would be made operational:

The option favoured in this paper is to require independent inspection only of those parts of construction that, on proper consideration, are most likely to be associated with departures from the approved plans with consequential risks to public health and safety. This provides for effective building control and at a minimum cost to the community. (WA Department of Housing and Works 2005, p. 60).

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To address the concerns raised by some jurisdictions of a move away from a mandatory inspection approach, the Commission invited comment from participants on the relative performance of jurisdictional inspection regimes in 2010-11 and the potential costs and benefits of moving to a risk-based system. Several participants responded to this request for comment with Business SA supporting the move on the grounds that it would reduce costs to both businesses and LGs:

Business SA generally believes that a risk-based approach to building inspections would tend to reduce costs for both businesses and Councils. Resources would be allocated to where they were most required and businesses would not pay for inspections that were not necessary, nor have disruptions associated with such inspections. (sub. DR48, p. 2)

Brisbane City Council (sub. DR64), on the other hand, considered that current inspection requirements protected the integrity of the building process and provided ‘peace of mind’ about standards of construction to building users and occupiers. In addition:

A prescriptive approach that mandates the aspects or stages of construction that must be inspected also mitigates conflicts of interests, or potential conflicts of interests, of those building professionals involved in the process. (p. 7)

The Commission certainly concurs with these regulatory aims but considers that a risk-based inspection regime could still deliver those aims but with a lower compliance burden on businesses compared to present arrangements in some states. Importantly, risk-based inspection approaches would require increased auditing activity to ensure that building works are compliant with relevant standards. This will have funding/resourcing implications.

In contrast to building inspections (and perhaps reflecting the lower practical risk of major adverse consequences from sub-standard work), several jurisdictions allow licensed plumbing contractors to self-certify their plumbing work and conduct audits on a random (un-announced basis). Electrical and gas installations are regulated in the same way. Victoria, Western Australia and major population centres in New South Wales (those covered by the Sydney and Hunter Water Corporations) operate on this basis. Significantly, in moving to a new regulatory landscape in NSW in March 2010, a key rationale was to achieve consistent interpretation of plumbing standards:

As part of a statewide plumbing reform, NSW Fair Trading will become the state’s single plumbing and drainage regulator.

The changes will consolidate on-site regulation, licensing and the consistent interpretation of standards under one agency.



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This will provide a seamless, more effective statewide regulatory framework and enable greater focus on compliance by linking licences to plumbing and drainage work. (NSW Fair Trading 2011)

In South Australia, plumbing approvals and inspections are the responsibility of SA Water. Tasmania and Queensland are the only two jurisdictions where LGs played a role in plumbing regulation with the issuance of plumbing approvals and the conduct of four mandatory inspections. These inspections are performed by qualified plumbing inspectors and are in addition to the building inspections required in those states. Interestingly, even those Tasmanian and Queensland LGs which have outsourced building certification (and hence inspections) still provide all plumbing certification and inspections in-house.

Importantly, Queensland is currently in the process of implementing a proposal under which plumbers will only be required to notify the Plumbing Industry Council of 'Notifiable Work' rather than the current permit inspection regime for routine plumbing work. LGs will then be able to undertake a risk-based approach to plumbing inspections.

#### LEADING PRACTICE 7.3

*The risk-based approach to building inspections being contemplated by Western Australia offers a more cost-effective means of regulating building compliance without compromising the integrity of the building process. Similarly, regulating compliance with relevant plumbing standards on the basis of risk would offer equivalent benefits.*



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## 8 Parking and road transport

### Key Points

- Local governments own and manage local roads which constitute around 80 per cent by length of Australia's total road network. They have a number of business-related responsibilities in the regulation of road transport, particularly in relation to parking and heavy vehicle road access. Local government regulation of transport and traffic activities affects all types of businesses in different ways and to varying extents.
- Despite the introduction of national standards for parking and road access, there is significant variation in their application by local governments. This can be a source of unnecessary regulatory burden for businesses operating across jurisdictions.
- Local government should provide clear and accessible guidelines to allow prospective developers to fully evaluate their options with respect to the provision of parking, other offsets and cash-in-lieu contributions.
  - Local governments which exhibit this leading practice include Central Coast Council (Tas), Huon Valley Council (Tas), Redland City Council (Qld) and Darwin City Council (NT).
- Local government regulates local road access and use by restricted access (heavy) vehicles except in Western Australia. An inherent tension arises from this role as local government is requested to permit access but has limited recourse to compensation for any damage arising as a result of use by restricted access vehicles. As such, many local governments are reluctant or refuse to allow restricted access vehicles on local roads which results in increased costs and lost opportunities for businesses.
- Good governance principles and leading practices in relation to local government regulation of road access and use are:
  - support local governments to identify and publish vehicle routes and local roads compliant with the Performance Based Standards system
  - provide support to enable local governments to undertake road access assessments in a timely manner and disseminate access information
  - consider the provision of infrastructure to facilitate freight movement in areas where local road access is restricted
  - target outcomes of road access, such as noise levels, rather than placing restrictive conditions on heavy vehicle movements, such as operating hours
  - actively engage local governments in the development of national standards in which they are expected to participate.

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All levels of government in Australia are involved in the regulation of transport activities. With regard to this study's terms of reference, the key areas of importance are where local governments (LGs) either implement legislation on behalf of their state government or regulate in their own right (including local laws). Primarily, these tend to be regulations about private road transport on public local roads and, in particular, those that govern the type and purpose of vehicles permitted to be on different parts of the road network at various times.

Regulations that affect road transport but are principally in place to meet environmental objectives, or are a part of an overall town/city planning scheme, are discussed elsewhere in the report. Regulation of most non-road transport, such as aircraft and trains, is undertaken at a national or state rather than local level, and is therefore not a focus of this study. Further, while there is a well-documented shortfall in financing for local road provision and maintenance (see for example, subs. 8, 21, 23 and 35 to this study alone), the Commission considers that this issue is primarily related to LG service provision rather than regulatory functions. That said, to the extent that a lack of road maintenance may result in increased regulation of road access and usage, this issue will be considered in this chapter.

This chapter begins with an overview of the scope of issues related to LG regulation of road transport (section 8.1) and summarises the broad impact of regulation on business costs (section 8.2). It then focuses specifically on the regulation of vehicle parking (section 8.3) and access and use of public roads (section 8.4).

## **8.1 Overview of the regulatory framework**

### **Role of LG in the regulation of roads and transportation activities**

LGs own and manage around 80 per cent of Australia's 811 000 kilometres of public road network<sup>1</sup> (figure 8.1). According to the Australian Local Government Association:

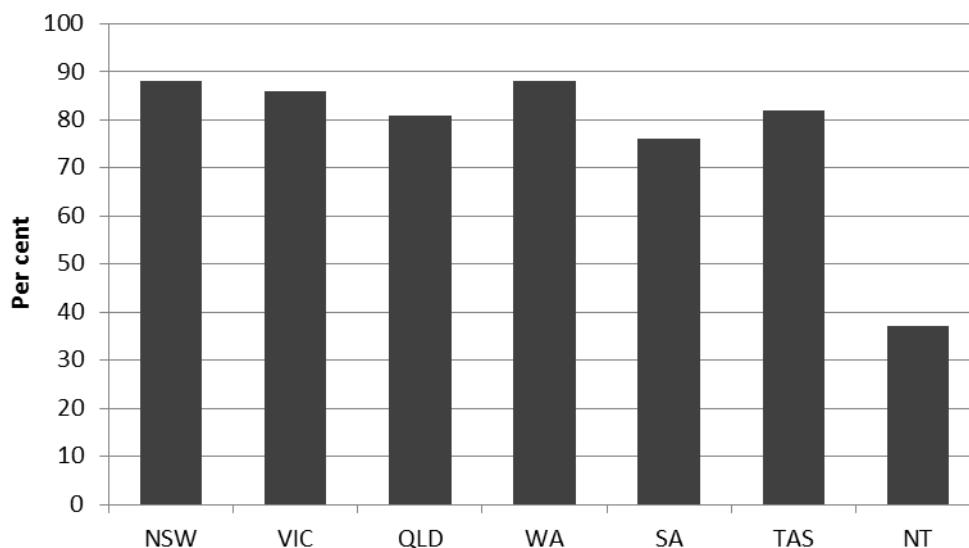
The vast majority of transport journeys, by whatever mode, begin and end on a local road. (ALGA 2010b, p. 4)

Further, almost 30 per cent of travel by commercial vehicles and 20 per cent of all heavy vehicle<sup>2</sup> travel is undertaken on local roads (ALGA 2006b).

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<sup>1</sup> Public roads are roads managed by local or state governments and do not include roads managed by other authorities such as national parks, defence establishments or private organisations.

**Figure 8.1 LG management of roads**  
Per cent of total public roads (by kilometres) in jurisdiction



Data source: AustRoads (2010a).

In most cases, the constitutional power over road transport regulation resides with the states, particularly in relation to intrastate transport. However, the Australian Government does have a role in regard to interstate trade by virtue of section 92 of the Constitution.

With the cooperation and agreement from the states, the Australian Government has established national bodies, rules and guidelines to promote consistency in transport provision and its regulation (box 8.1). All Australian states have given legislative effect to these national rules and guidelines through various road and transport Acts and regulations (appendix F). The states have also enacted legislation and regulations to cover a range of other transport-related matters including: dangerous goods; road planning, use and safety; licensing of vehicles and drivers; and implementation and enforcement. Some also have specific requirements for particular types of vehicles or for particular aspects of traffic management, such as parking.

Typically, these state Acts designate LGs and other organisations as a road ‘authority’, ‘manager’ or ‘regulator’ enabling them, in turn, to implement aspects of the laws on those roads for which they are responsible (table 8.1). The key state government departments and road authorities with which LGs interact and/or receive delegations and funding for transport-related regulatory functions are listed in table 8.1. In relatively small jurisdictions, the state government department is also

<sup>2</sup> Vehicles over 4.5 gross tonnes.

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the responsible road authority. For the most part, LG interactions with state road authorities are reported to be positive in facilitating LG implementation of their regulatory functions (Productivity Commission survey of local governments — transport survey 2011-12, unpublished).

**Box 8.1 National bodies, legislation and standards for road transport**

- National Transport Commission (NTC) — an intergovernmental statutory body, which recommends reforms to improve the productivity, safety and performance of Australia's land-based transport system and assists jurisdictions in the implementation of approved reforms.
- AustRoads — an association, which has each state road authority, the Commonwealth Department of Infrastructure and Transport and the Australian Local Government Association, as its members. AustRoads provides technical input to national and state policy development and aims to improve the practices, consistency and capabilities of road agency operations.
- National legislation, which governs aspects such as the classification of roads, funding for maintenance and consistency in standards, includes:
  - *Australian Land Transport Development Act 1988*
  - *Interstate Road Transport Act 1985*
  - *Interstate Road Transport Charge Act 1985*
  - *Motor Vehicle Standards Act 1989*
  - *National Transport Commission Act 2003*
  - *Nation Building Program (National Land Transport) Act 2009*
  - *Roads to Recovery Act 2000*.
- Australian Road Rules — a set of model road rules, which govern road use aspects such as stopping, parking and speeds. The rules have formed the basis of state road rules since 1999 and are maintained by the NTC. New South Wales adopted the rules by referencing the rules document published by the NTC. Other jurisdictions (except ACT) adopted the rules by reproducing the rules in their local law.
- Australian Standards, referred to in some transport legislation and plans, guide the following aspects of road transport:
  - vehicle design and quality
  - road design and quality
  - traffic management, signage and parking design and implementation.

*Sources:* AustRoads website; NTC website.

**Table 8.1 State agencies with which LG's interact on transport regulation**

<i>State</i>	<i>Government department</i>	<i>Road authority</i>
NSW	Transport for NSW	Roads and Maritime Services <sup>a</sup>
Vic	Department of Transport	VicRoads
Qld	Department of Transport and Main Roads	Transport & Main Roads
WA	Department of Transport	Main Roads Western Australia
SA	Department of Planning, Transport and Infrastructure	Department of Planning, Transport and Infrastructure
Tas	Department of Infrastructure, Energy & Resources	Department of Infrastructure, Energy & Resources
NT	Department of Lands & Planning Department of Construction & Infrastructure	Department of Lands & Planning Department of Construction & Infrastructure

<sup>a</sup> Formerly, the Roads and Traffic Authority.

Sources: State government websites.

The Commonwealth provides significant funding to LGs to maintain, upgrade and construct local and national roads through annual financial grants and specific programs, such as the Roads to Recovery Program (box 8.2). Under the Roads to Recovery Program, Tasmania receives the most assistance per kilometre of local road (table 8.2). State governments also provide funding for LGs to undertake similar activities on their behalf on state roads.

Most LGs (particularly larger urban and regional LGs) have developed transport strategies to provide a framework for considering and implementing the various transport needs of their communities, including the provision and upgrading of roads, car parking, bicycle networks, walking trails and public transport. Many transport strategies are developed within the context of wider regional strategies, particularly for major transport corridors and for coordinating transport policies in metropolitan centres.

Many of the functions of LGs in relation to transport and roads involve the delivery of services — particularly maintenance and construction of roads, street lights, traffic signals and control items. Such functions may be performed on local, state and national roads but these responsibilities vary by state and LG (table 8.3).

As noted, LGs are mainly involved in the regulation of parking and traffic management-related matters, and road access for the transport industry. For those LGs that reported spending some staff time on transport regulation matters, 18 per cent was devoted to exercising regulatory responsibilities related to transport (Productivity Commission survey of local governments — general survey 2011–12, unpublished).

## Box 8.2 LG funding for roads

LG authorities receive local road funding from the Australian Government primarily under financial assistance grants and, more recently, through the Government's 'Roads to Recovery Program'.

Financial assistance grants are tied grants to the state and Northern Territory governments to be paid to LGs but untied in the hands of LGs. Each state receives a fixed share of the grant as set out in legislation. Each LG's share is determined by the state's Local Government Grants Commission.

In contrast, the Roads to Recovery Program funds are distributed according to a population and road length formula set by the state Local Government Grants Commission and must be spent on road infrastructure. Funds are also directed to LGs responsible for local roads in unincorporated areas and in the Indian Ocean Territories.

The Roads to Recovery Program will allocate \$1.8 billion to LGs for maintenance and improvements of local roads over the period 2009-10 to 2013-14. In addition, South Australia's LGs are set to receive a further \$51 million from the Australian Government in supplementary local road funding over the period 2011-12 to 2013-14.

**Table 8.2 Funding for LG roads under the Road to Recovery Program**  
2009-10 to 2013-14

	<i>\$ million</i>	<i>Total Local Roads (km)</i>	<i>\$/km</i>
NSW	484	145 648	3 323
Vic	356	129 723	2 744
Qld	356	153 519	2 318
WA	256	132 209	1 936
SA	142	74 654	1 902
Tas	57	14 324	3 979
NT	28	14 036	1 994
<b>Total</b>	<b>1 679</b>	<b>664 113</b>	<b>2 528</b>

Source: National Building Program website.



**Table 8.3 Local government responsibilities for roads**

■ all state & local roads ■ some state & local roads □ local roads only  
Blank denotes no LG responsibility

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>
Maintenance	□ <sup>a</sup>	■ <sup>f</sup>	□	■	□	■ <sup>p</sup>	□
Street lighting	■ <sup>b</sup>	■ <sup>g</sup>	□	■	■	■ <sup>q</sup>	□
Traffic signals			□		□		□
Kerbside parking (other than freeways)	□ <sup>c</sup>	■	■ <sup>j</sup>	■	■	□	□
Major traffic control items	□ <sup>d</sup>	■ <sup>h</sup>	□	□ <sup>l</sup>	□	□	
Minor traffic control items	□ <sup>d</sup>	■ <sup>h</sup>	□	□ <sup>l</sup>	□	□	□
Railway level crossings (approaches, warning signs, pavement & fences)	□ <sup>e</sup>		□	■ <sup>m</sup>		□	
Road based public transport			□ <sup>k</sup>	■ <sup>n</sup>			
Road safety			□	□ <sup>o</sup>	□	□	□
Bridges & weight of loads	□ <sup>e</sup>	■ <sup>i</sup>	□	□ <sup>o</sup>	□	□	□
Laneways & right-of-ways		□		□	■	□	□

<sup>a</sup> Includes most local roads. <sup>b</sup> Street lighting is a LG responsibility, under subsidy, on all roads. The RMS pays for lighting of freeways, major bridges and some isolated intersections. <sup>c</sup> New work and maintenance of existing parking on state roads is funded by LGs but controlled by the RMS. LGs fund and control kerbside parking on all regional and local roads. <sup>d</sup> Traffic control on most regional and local roads is delegated by the RMS to LGs. <sup>e</sup> LG responsibility on regional and local roads. <sup>f</sup> LGs maintain state main roads & local roads. <sup>g</sup> Shared responsibility with VicRoads and electricity authority for national and state roads. <sup>h</sup> Under delegation from VicRoads on state roads. <sup>i</sup> Excluding bridges over railways. <sup>j</sup> LG responsible in urban areas; for state roads, responsibilities are split between local authorities. <sup>k</sup> Brisbane City Council only. <sup>l</sup> Delegation to rural LGs for non-regulatory signs. <sup>m</sup> Delegation to LGs for LG roads in rural areas. <sup>n</sup> Bus shelters and embayments only. <sup>o</sup> With assistance from Main Roads WA. <sup>p</sup> LG responsibility on state roads only outside of central carriageway. <sup>q</sup> Responsibility of road owner in built-up areas.

Sources: AustRoads (1998); Productivity Commission survey of local governments — general survey (2011–12, unpublished).

## 8.2 The impact on business

The regulation of transport and traffic activities affects all types of businesses in different ways and to varying extents. Businesses in urban areas typically have a higher quality road network but share this with a large number of other road users and with competing community interests. For those businesses in regional Australia, some regulatory areas — such as parking and traffic management — may be less of an issue, but road quality and access can be critical to business activities.

In a survey of nearly 2000 small and medium businesses across Australia, around 10 per cent of business with regulatory dealings in multiple areas indicated that roads, parking and/or other transport regulations have the most impact on their business (Survey of small and medium businesses 2011, unpublished). LG activities

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relating to transport regulations had the most impact on businesses in retail trade; construction; manufacturing; and, unsurprisingly, the transport, postal and warehousing sectors.

LGs reported to the Commission that the main areas of transport related regulation about which business complains include: road-side parking; traffic signage and signals; traffic calming devices; laneway, right-of-ways and road access; weight of loads; and street lighting (Transport survey — 2011–12, unpublished). By far the most important issue for LGs appears to be road-side parking, which was identified by the majority of respondents as the regulatory activity that received the most complaints.

In VCEC's study of LG regulation (2010), it was similarly noted that 'roads, parking and transport' were an area for which 45 per cent of business respondents reported having regulatory interactions with a LG. It was also an area considered by these respondents to have a primarily negative impact on business operations.

### **8.3 Parking**

Parking is a necessary component of transport systems by allowing safe 'storage' of vehicles not in use and facilitating the movement of goods and people and access to commercial and personal services. Parking is provided either as kerbside on-street parking or in dedicated off-street parking areas. Businesses may be affected not just by the provision of car parking for staff and customers but also the availability, location and regulation of loading zones, garbage pick-up areas, taxi ranks, bus stops, coach and tour-bus parking, and truck parking areas.

The demand for parking in a given locality is related to: land use, including in surrounding locations; the relative availability and attractiveness of public transport; geographic, demographic and socio-economic characteristics; price structures; and, factors related to the time of the day or year. The supply of parking is related to the availability and value of land, expected return to car/vehicle park owners from parking fees, and government policies on the desirability and required extent of parking compared with other options. LG regulation can affect both the quantity of parking available and its price.

LG regulation of parking, in the first instance, is guided by the national and state requirements and guidelines (box 8.3). The Australian Road Rules and Australian standards set out the general framework to promote consistency across Australia. In addition, most states also provide further guidelines to LGs on specific areas (such as, on-street parking and stopping areas for certain types of vehicles).

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### Box 8.3      **National and state requirements and guidelines on parking**

Consistency in parking regulation across Australia is provided through the Australian Road Rules. The Australian Road Rules provide general guidelines on the stopping and parking of vehicles (for example, near intersections, in clearways and loading zones) and provide for the general applicability of parking signage and roadside markings. Regulations generally specify where parking is not allowed. Specific rules are also provided for some types of vehicles — for example, heavy or long vehicles are permitted to park for up to one hour in built-up areas and their parking time is unrestricted in non-built-up areas (rule 200).

Consistency in the design of parking facilities across states is delivered through Australian standards on the provision of parking and manoeuvring areas for different types of vehicles and vehicle users (such as people with disabilities), including:

- AS/NZS 2890.1-2004 Parking facilities Part 1: Off-street car parking
- AS 2890.2-2002 Parking facilities Part 2: Off-street commercial vehicle facilities
- AS 2890.3-1993 Parking facilities Part 3: Bicycle parking facilities
- AS 2890.5-1993 Parking facilities Part 5: On-street parking
- AS 1742.11-1999 Parking controls.

The technical implementation of these rules and standards by road managers is guided by Austroads (for example, through the *Guide to Traffic Management part 11 parking*). Austroads (2008) suggests that ‘best practice’ parking regulation should seek to establish an appropriate supply of parking for an area and balance demands for that parking to support identified objectives (such as, social access and amenity, environmental quality, area functionality and support of economic activity). Further, parking regulation should be coordinated throughout a district.

All Australian states have given effect to these national rules and guidelines through legislation (appendix F). With regard to parking, legislation prescribes approaches to parking charges, authorisation required for various parking schemes, powers of parking enforcement officers and resolution mechanisms for parking disputes. Most states also provide guidelines to their LGs on the location of on-street parking and stopping facilities for taxis, buses, trams, coaches and trucks; and the location of off-street parking for trucks and other heavy vehicles. Some states also legislate requirements for the supply of off-street parking in key areas, such as Western Australia’s upper limits on off-street non-residential parking which apply within the Perth Parking Management Area.

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## The role of local government

### *General responsibilities for parking*

Parking is an area in which all LGs have some degree of regulatory responsibility. In general, LGs can set, administer and enforce parking restrictions on local roads and may have shared responsibility for enforcement of parking regulations on state roads. LG implementation of parking regulations and capacity to make local parking laws are provided under both specific transport legislation and state Local Government Acts (box 8.4).

Unique among the states, Tasmanian LGs are also empowered under the *Local Government (Highways) Act 1982* to create and enforce parking restrictions on highways within their municipalities. This includes temporary closure of highways and the granting of exclusive licences to occupy parts of a highway for set periods — for example, for the sale of goods or for entertainment.

### *LG parking provision requirements*

All urban, regional and many rural and remote LGs have parking provision rates or requirements incorporated into their town planning schemes. These are usually based on demand studies from other areas and/or expected parking demand at local developments (Austroads 2008).

LG parking provision rates can vary considerably in the number of spaces required and the way in which this is determined, by the type of development (residential versus retail versus commercial versus industrial) and the zone or part of town in which the development occurs. For example, parking requirements for a shop or restaurant generally exceed requirements for an office development, while determining parking requirements for hotels can involve detailed assessment of the amount of space to be occupied by different functions within the hotel development.

Among the state capital city LGs, Sydney City Council tends to require the least amount of parking to be provided with new developments and Melbourne City Council tends to require the most (table 8.4). These requirements may reflect factors such as the availability and cost of land in these cities, policies on public versus private transport and the existing supply of public parking facilities.

For those businesses that are unable to provide the necessary parking spaces with their development, either because the development is not able to meet demand or parking is restricted in that location by government policy, most LGs provide a

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‘cash-in-lieu’ option whereby additional parking for the development is provided by council in exchange for an ongoing or one-off fee paid by the business.

#### **Box 8.4      Types of LG parking regulations by jurisdiction**

LG regulatory responsibilities relating to parking can vary substantially by jurisdiction.

- In New South Wales, the *Road Transport (General) Act 2005* and the *Road Transport (Safety and Traffic Management) Act 1999* enable LGs to issue parking permits, administer pay parking schemes, install metres, set fees and issue fines.
- Victoria’s *Local Government Act 1989* (schedule 11) empowers LGs to set parking times, fees and conditions on any road or parking area. The *Road Management Act 2004* provides LG with responsibility for parking on arterial roads.
- Queensland’s *Local Government Act 2009* (s.60) gives LGs control of all roads in its LG area, including the parking of vehicles on roads. The *Traffic Operations (Road Use Management) Act 1995* (part 6) also enables LG regulation of parking in off-street areas, and specification of parking times, vehicle types, parking purposes and fees.
- Western Australia’s regulations under its *Local Government Act 1995* provide LGs with responsibilities on parking. Western Australia also has model by-laws to guide its LGs in the preparation of laws on parking facilities and the parking of commercial vehicles on street verges.
- South Australia’s *Private Parking Areas Act 1986* enables LGs to restrict public access to private parking areas and to come to an agreement with the owner of the private parking area for council enforcement of parking provisions. The *Road Traffic Act 1961* enables LG to issue parking permits for certain zones on roads.
- Tasmanian LGs are delegated, from 2010, to approve parking controls, including the issuing of ‘loading zone exemption certificates’ (sub. 27). The delegation to LGs states ‘experience has shown that Councils are able to quickly and effectively regulate parking and respond to the desires of ratepayers with respect to parking’ (TAS DIER 2009, p. 3). Guidelines to LGs in exercising this delegation include:
  - loading zones should be provided where there is regular demand for the loading and unloading of goods
  - in commercial areas, parking for customers and clients should take priority
  - the most sought after parking spaces should be made available to the greatest number of people by the graduated use of time limits. An appropriate time limit generally results in some spaces being available at any given time
  - parking charges can be introduced where demand is particularly high.

**Table 8.4 Parking requirements for new developments in selected LGs**

<i>Locality</i>	<i>Development type</i>	<i>Car parking spaces required<sup>a</sup></i>
<b>Capital cities</b>		
Melbourne <sup>b</sup>	Shop	4 per 100m <sup>2</sup> leasable floor area (1 per 25m <sup>2</sup> )
	Office	3.5 per 100m <sup>2</sup> net floor area (1 per 28m <sup>2</sup> )
	Restaurant	0.4 to each patron permitted
	Hotel	0.4 to each patron permitted
<b>Urban Metropolitan</b>		
Burnside (SA)	Shop	7 per 100m <sup>2</sup> total floor area (1 per 14m <sup>2</sup> )
	Office	4 per 100m <sup>2</sup> total floor area (1 per 25m <sup>2</sup> )
	Restaurant/café	1 per 3 seats + 2 additional if take-away food is sold
	Hotel	1 per 2m <sup>2</sup> of bar floor area + 1 per 6m <sup>2</sup> public lounge/ dining space + 1 for every 3 guest rooms
<b>Urban Fringe</b>		
Gosford (NSW)	Shop	1 per 35m <sup>2</sup> GFA <sup>c</sup>
	Office	1 space per 45m <sup>2</sup> GFA <sup>c</sup>
	Restaurant	1 per 35m <sup>2</sup> GFA on some sites and 1 per 16m <sup>2</sup> floor area elsewhere
	Hotel	1 per 4m <sup>2</sup> of bar area + 1 per 6m <sup>2</sup> of lounge, beer garden, gambling area + 1 per 10 seats or 20m <sup>2</sup> of auditorium + 1 per resident manager + 1 per 2 employees.
<b>Urban Regional</b>		
Bunbury (WA)	Shop	1 per 20m <sup>2</sup> NLA with minimum of 5
	Office	1 per 30m <sup>2</sup> NLA with min of 5
	Restaurant	1 per 4 seats or 5m <sup>2</sup> of public dining area + 1 per 15m <sup>2</sup> NLA used for storage, food preparation, services & administration
	Hotel	1 per 2m <sup>2</sup> NLA bar area + 1 per 4m <sup>2</sup> NLA lounge or garden area + 1 per 4 seats or 5m <sup>2</sup> NLA used for dining, reception or assembly + 1 per 15m <sup>2</sup> NLA used for storage, food preparation, services and administration + 1 per bedroom + a car queuing area sufficient to accommodate 5 cars where drive through facilities provided;
<b>Rural</b>		
Waratah-Wynyard (Tas)	all business & civic uses	1 per 30m <sup>2</sup> or the greater of this and: 1 per 5 seats if seating provided 1 per bedroom if accommodation provided 1 per 6m <sup>2</sup> bar floor area if development includes a bar
<b>Remote</b>		
Diamantina (Qld)	Shop	3 per 50m <sup>2</sup> of total use area (1 per 16.7m <sup>2</sup> )
	Catering premises	1 per 10m <sup>2</sup> of total use area
	Hotel	1 per accommodation unit + 1 per 30m <sup>2</sup> of other total use area

<sup>a</sup> GFA gross floor area; NLA net lettable area. <sup>b</sup> Rates of car park provision in Victoria are standard across all local government areas. <sup>c</sup> Rates applicable in central business 3C zone.

Sources: LG websites.

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## Excessive burdens on business

For some businesses, such as retailers and service providers, the availability and cost of customer parking can be a critical determinant of business success. Unlike many other such determinants, parking availability can change dramatically after a business has chosen its location and developed a successful operating model. For the affected businesses, there is often little they can do about a significant reduction in parking availability and the associated loss of their customer base other than to relocate.

Key costs to business associated with parking-related regulation and their sources are listed in table 8.5. The sources of these costs to business are often a complex mix of limitations associated with the quality and location of physical infrastructure, community or social priorities and regulatory arrangements that relate not just to parking but to other policy areas such as town planning. However, the sources of these parking-related costs to business may also generate considerable benefits to communities<sup>3</sup>, the environment and to businesses, which could outweigh the listed costs to particular businesses.

Businesses submitted to the Commission a number of specific concerns on parking, including:

- inconsistency in enforcement of parking restrictions
- inadequate planning for parking and lack of coordination with public transport policies
- the levels of cash-in-lieu parking contributions where parking is not provided in line with LG policy.

Inconsistency in enforcement of parking restrictions creates uncertainty for businesses and customers and reduces the capacity for planning and discussions on car parking availability. Coles Supermarkets said that ‘there are significant differences in the way in which car parking is enforced between councils’ (sub. 5, p. 6).

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<sup>3</sup> Parking restrictions can also have unintended costs to the broader community as increased parking turnover results in higher traffic volumes and vehicle movement, can lead to more congestion, disruption in traffic flow and a reduction in the attractiveness of an area for pedestrians.

**Table 8.5 Sources of ‘parking-related’ costs to business**

<i>Cost</i>	<i>Sources</i>
<b>Increased costs associated with LG interactions</b>	
Cost of assessing parking implications of local plan revisions	<ul style="list-style-type: none"> <li>• Ineffective LG consultation on revisions to local plans</li> </ul>
Costs associated with uncertainty in parking use	<ul style="list-style-type: none"> <li>• Inconsistency in LG enforcement of parking regulations</li> </ul>
<b>Increased business operating costs</b>	
Increased development costs	<ul style="list-style-type: none"> <li>• LG car park space requirements which may not align with ‘optimal’ car park investment for a development</li> <li>• ‘Cash-in-lieu’ payments to cover shortfalls in development car park provision</li> </ul>
Inefficient handling of business supplies or produce	<ul style="list-style-type: none"> <li>• Lack of loading zones and places for commercial vehicle or truck parking</li> </ul>
Inefficient use of labour resources	<ul style="list-style-type: none"> <li>• Lack (or comparatively high price) of day parking for business employees</li> </ul>
<b>Lost business opportunities</b>	
Loss of potential customers or suppliers	<ul style="list-style-type: none"> <li>• Customer/supplier parking restricted near business, including:               <ul style="list-style-type: none"> <li>- lack of loading zones, commercial vehicle and truck parking</li> <li>- lack of customer parking</li> <li>- parking time limits and charges</li> <li>- location of taxi ranks, bus and tram stops, coach parking</li> <li>- existence of clearways and one-way streets</li> <li>- tanks, water reuse or recycling</li> </ul> </li> </ul>

Western Australia’s Small Business Development Corporation (SBDC, sub. 29) expressed concerns about commercial vehicle parking regulations in a northern Perth suburb. The regulations, designed to limit commercial vehicle parking to one vehicle on any lot within the city (regardless of lot size or zoning), had not been enforced. Consequently, a number of small businesses parked multiple commercial vehicles on their property. A change to the town planning scheme meant that the number of commercial vehicles allowed were related to lot size and zoning. While the SBDC considered the amendments to be reasonable, support for them was lowered by the lack of enforcement by council of previous arrangements.

Inadequate planning for parking and lack of coordination with realistic public transport policies may also impose burdens on business by restricting customer access. For example, the Post Office Agents Association Limited (POAAL), in its submission to the Commission’s inquiry into Australia’s retail industry, noted that while clearways during peak traffic periods may aid traffic flow, this same time of day is also the peak business period for many retail businesses and the introduction of clearways reduces the supply of their customer parking.



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POAAL also noted that ‘local councils have tended to impose unrealistic parking restrictions in shopping areas without due consultation with local retailers’ (sub. 127 to PC 2011d, p. 3). Consistent with this, Moore (2009) said that, in the expansion of parking metre coverage in Brisbane suburbs, ‘business owners have not been consulted about these plans and have not been told ... the hardest hit would be strip shopping centres, which currently have few, if any, parking metres’.

Around 40 per cent of LGs who responded to the Commission’s survey reported that they always consulted business before implementing changes to parking or traffic access while a further 40 per cent limited consultation to businesses in close proximity to the proposed change (Transport survey 2011–12). No LGs indicated that they ‘seldom sought business opinions prior to changes in parking or traffic access’.

***Consistent with leading practice 4.6, if local governments enforced parking restrictions consistently, this would provide business with more certainty and enable them to better assess whether their parking requirements will be met.***

***Consistent with leading practice 12.2, if local governments participated in regional and city strategic planning and consulted with public transport authorities to ensure planning for parking is coordinated with public transport policies, business needs for customer parking may be better catered for.***

***Consistent with leading practice 3.7, consultation by LGs with affected businesses and the wider community before implementing changes to parking restrictions is a leading practice, particularly in relation to what is a desirable level of parking availability and the impact of any proposed change. While LGs currently undertake some consultation, there is scope for improvement through adopting a consistent approach to consultation and outlining the approach in relevant guidelines that give all stakeholders an opportunity to comment.***

A number of participants outlined the negative impact of parking contributions on the viability of business investments either for development or expansion. For example, the New South Wales Small Business Commissioner said:

I have received a number of complaints about councils imposing significant costs associated with car parking contribution levies, which negatively impact on the growth of local businesses. In the instance of a metropolitan Sydney council, a car parking contribution levy of \$31 000 per additional seat in a café was applied to a proposed expansion (amounting to approximately \$500 000). It is noted that no development proceeded, based on these substantial fees by council.

In a regional area, a new small business was advised that there would be a car parking contribution levy of \$11 000 applied for parking spaces for 20 vehicles (amounting to

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\$220 000 for this particular business). Again, this financial impost resulted in the small business operator deciding not to proceed with the investment. (sub. 18, p. 3)

The Commonwealth Department of Resources, Energy and Tourism (sub. 37) also indicated that the value of cash-in-lieu parking contributions required by the relevant LGs was discouraging potential business investments. Similar concerns in both metropolitan and non-metropolitan areas across the country are also reported regularly in the media (box 8.5).

**Box 8.5      Reported concerns over cash-in-lieu parking contributions**

A number of businesses have expressed concern that cash-in-lieu parking contributions were discouraging proposed investments or requiring business to scale down the proposed investment due to the quantum of the contribution required by LG. Many of these businesses are in non-metropolitan areas across Australia.

For example, in Port Hedland in Western Australia, a hotel development was scaled back after the hotel owner was presented with an estimated cash-in-lieu contribution in excess of \$12 million. Following a review by the LG, the estimate was revised down to around \$3 million. However, the developer commented that even with the revised contribution it would be impossible to develop the hotel as planned (North West Telegraph, 2 February 2011).

In Orange, New South Wales, the business owner of city-centre premises that changed in use from an office to a pharmacy was faced with a cash-in-lieu parking contribution of nearly \$90 000. An owner of a gym was required to meet a cash-in-lieu parking contribution of nearly \$120 000 to shift the gym from an arcade to a street corner location. In both these cases, the LG was asked to waive the contributions (Central Western Daily, 6 December 2011).

In Nowra in New South Wales, LG councillors opted to waive the parking contribution for a café owner intending to expand the business into a licensed restaurant following representations from the owner that the proposed contribution of \$16 000 put the development at risk. The contribution was based on the perceived demand for additional parking due to improvements and expansion of the outdoor dining area (South Coast Register, 6 January 2012).

The capacity of LGs to charge developers for deficiencies in car park provision exists in all states but there is little consistency between, and within, jurisdictions as to how cash-in-lieu contributions are determined and spent. There is evidence of significant variation in the value and policies associated with cash-in-lieu contributions requested by LGs (table 8.6).

**Table 8.6 Cash-in-lieu parking contributions for various LGs**

<i>LG authority</i>	<i>\$ per car parking space</i>	<i>Features of cash-in-lieu policy</i>
Redland City Council (Qld)	Between \$20 000 and \$30 000 depending on location	Discretionary, formula-based, specific fund
Central Coast Council (Tas)	Variable based on land value	Discretionary, formula-based, community benefit consideration (50% reduction), specific fund
City of Port Adelaide Enfield (SA)	\$7200 (May 2008)	Discretionary, fixed value, specific fund
Gold Coast City Council (Qld)	\$6000 to \$27 000 depending on location	Discretionary, fixed value by location, specific parking fund for each of 20 'activity centres', review of levels every 5 years
City of Joondalup (WA)	Based on a land value of 30 square metres per space and construction costs	Specific locational exceptions
Macedon Ranges Shire Council (Vic)	Based on a land value of approximately 24 square metres per space, construction costs and maintenance costs	Discretionary, formula-based, may also include a 10% administration charge
City of Rockingham (WA)	Based on land value	Cash in lieu contributions generally only permitted for up to 25 per cent of the overall on-site parking requirements
City of Mandurah (WA)	Based on land value plus 10 per cent	Discretionary, amenity based consideration
Townsville City Council (Qld)	\$7929 per space in Thuringowa city centre	Formula based
Darwin City Council (NT)	Based on land value plus construction costs	Discretionary, formula-based, indexed, specific fund
Huon Valley Council (Tas)	\$4500 per space plus land value of 30 square metres; or at the discretion of the General Manger can be based on a recent land valuation plus 10 per cent	Discretionary, formula-based, specific fund but non-binding
Ashfield Council (NSW)	\$30 000 per space in town centre	Non-discretionary, fixed value based on future demand and cost of developing a centralised public car parking facility, indexed

Sources: LG websites.

Many LGs do not have clear or accessible policies and guidelines regarding the availability and application of cash-in-lieu contributions for parking. LGs differ in relation to parking contributions in three areas:

- the decision to allow cash-in-lieu contributions — delegated or not, automatic right or discretionary

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- the basis for determining the level of contributions — fixed amount or formula per space, variance by location in LG area (city centre or not), level of indexation, reduction to account for community benefit
  - restrictions on how parking contributions are spent — general revenue or parking specific fund, tied to location or spread across LG.

In undertaking their role of balancing community and business interests, LGs must determine whether proposed developments should be able to meet their commitments to provide adequate car parking. In the case of new developments, it may be appropriate for LGs to impose parking contribution levies in excess of the cost of their construction to encourage developers to provide the desired levels of parking within the development. As such, parking contribution levies provide a pricing signal to developers as to the importance of adequate car parking provisions and their value to council (and, by proxy, the community).

Some LGs believe that parking requirements placed on developers can lead to an oversupply of parking and there is a community benefit from LGs providing a central parking service. For example, the Central Coast Council in Tasmania reduces the cash-in-lieu amount by 50 per cent in recognition that public parking is shared ‘among different sites and therefore fewer spaces are required to meet parking demand’ (Central Coast Council, Tasmania 2011, p. 8).

***In the case of changes in land/building use (for example, from commercial to retail) in established buildings, it can be difficult for developers to easily increase car parking to meet LG requirements. The resultant imposition of relatively large parking contribution levies can affect the viability of a development. However, this is not to say that these parking contributions are not a valid response to encourage the provision of desired parking.***

***Good governance principles indicate that publicly accessible guidelines covering the level of parking contributions and the setting of what constitutes adequate parking for the local community should be determined by elected representatives and then implemented by LG staff under delegation. Applications involving extraordinary circumstances should be decided on a case-by-case basis by elected representatives after careful consideration of what is in the best interests of the local community.***

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#### LEADING PRACTICE 8.1

*Local government policy on when cash-in-lieu contributions will be accepted as a substitute for providing parking spaces would be more transparent and provide more certainty to business if the policy is clear and accessible and outlines:*

- *the circumstances in which cash-in-lieu contributions will be considered*
- *how contributions will be calculated*
- *how the money collected will be applied.*

*While no one local government appears to have a parking policy that addresses all of these issues, many local governments in Tasmania have clear and accessible cash-in-lieu policies, as do Redlands City Council (Queensland) and Darwin City Council.*

## 8.4 Road access and use

Australian businesses are heavily dependent on the road network for delivering to their customer base and for the receipt and dispatch of goods. With Australia's freight task estimated to triple between 2008 and 2050, this dependence on road transport is likely to increase and place more demands on the road network (PriceWaterhouseCoopers 2009).

The accessibility and quality of the road network from origin to destination is critical to the performance of freight vehicles. Access constraints for particular vehicle configurations can impact on the efficiency of the entire supply chain and the economic productivity of freight industries and their customers. Most often, access issues centre around non-standard heavy vehicles and local roads used at the start and/or end of freight transport — the so-called 'first and last mile' problem.

Access problems in relation to the local road network are typically associated with a failure to design and maintain road infrastructure consistent with current use requirements; changes in land uses over time; and/or poor land use planning. For example, the location of residential buildings along arterial roads may be inconsistent with community expectations of minimal disruptions from vehicle noise or precautions in the transport of dangerous goods.



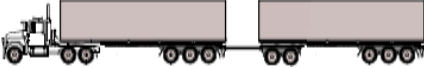

In older established areas, the juxtaposition of land uses can often lead to heavy vehicles needing to use roads that were never intended to carry such vehicles. For example, road surfaces or local bridges may not be able to handle the weight of the newer vehicles without costly upgrades; longer trucks may find corner radii on roads unsuitable for turning; other supporting infrastructure such as utility poles,

overhead wires, median islands, parked cars and roundabouts may obstruct some vehicles.

For the purposes of access to roads, a distinction is made between ‘general access vehicles’ and ‘restricted access vehicles’ (RAVs). General access freight vehicles operate over the whole network on roads managed by state/territory authorities and roads managed by local government, except those expressly prohibited by signs. Currently, the largest general access vehicle combination in Australia is 19 metres in length and 42.5 tonnes.<sup>4</sup> RAVs (that is, those longer than 19 metres and more than 42.5 tonnes) operate on a designated subset of the road network depending on their characteristics (Austroads 2010a).

Traditionally, vehicles have been classified according to the number of axles, gross combined mass and configuration. However, Performance Based Standards (PBS) have been introduced as an alternative approach to heavy vehicle regulation through focusing on nationally agreed safety and infrastructure protection standards, rather than physical characteristics (table 8.7). These nationally accepted classification systems form the basis for regulation of road access by heavy vehicles.

**Table 8.7      Performance Based Standard categories for vehicle access**

<i>PBS road class</i>	<i>Current prescriptive equivalent</i>	<i>Diagrammatic representation</i>
Level 1	Single articulated vehicle	
Level 2	B-double	
Level 3	Road train (Type I)	
Level 4	Road train (Type II)	

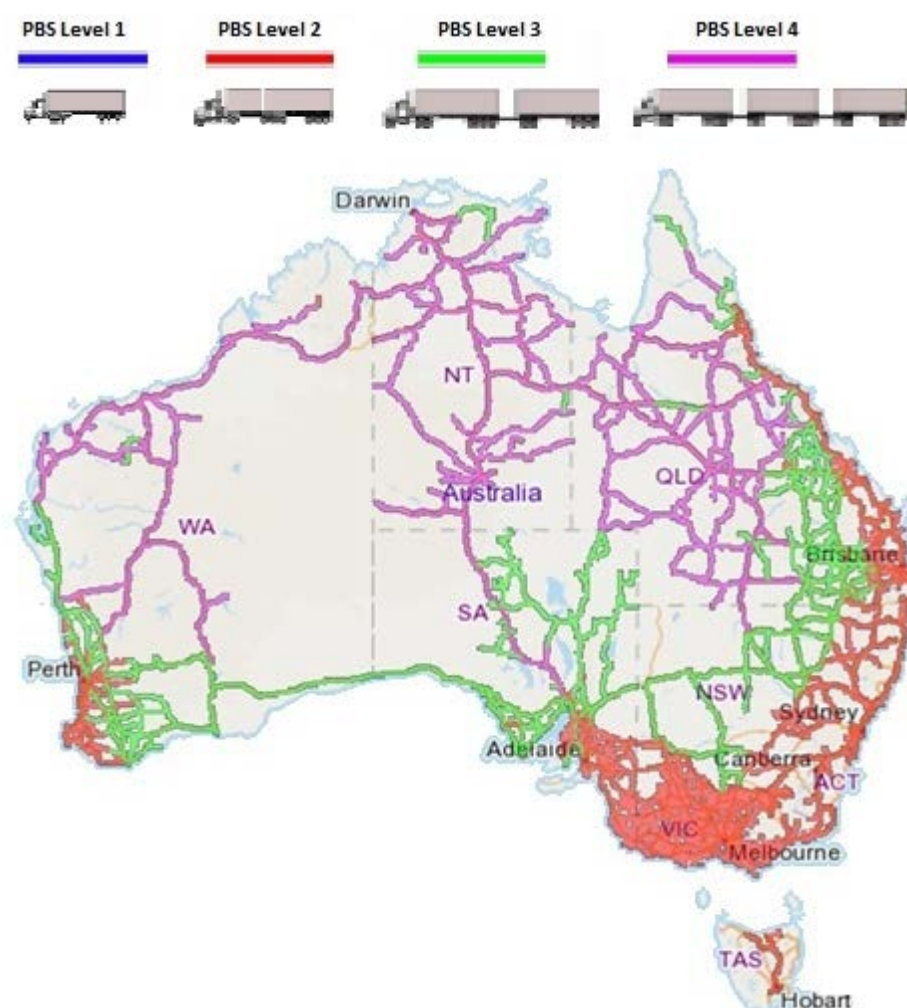
*Sources:* NTC (2008); ATA (sub. 8).

Those parts of the road system that are under the control of state governments (basically, state roads, highways and roads in unincorporated areas) have mostly been assessed for their suitability for use by large freight vehicles, with a hierarchy of routes continually being developed. Accordingly, all states and territories have maps of the parts of their road network which are suitable for particular categories of vehicles (figure 8.2). Queensland and the Northern Territory have the greatest road length accessible to the widest range of vehicles. Generally, the Northern

<sup>4</sup> Some non-standard larger vehicles (up to 20 metres and 50 tonnes) have been approved for general access under the performance based standards scheme (sub. 8; NTC, pers. comm., 13 December 2011).

Territory does not regulate heavy vehicle access — meaning that road trains have ‘as of right’ access across the road network.<sup>5</sup> In New South Wales, there are no road trains east of the dividing range; in Victoria, only type I road trains are permitted in the north of the state; and Tasmania allows no road trains at all. In those areas where road trains are not permitted, they need to be broken down outside the restricted road network area, with transportation continuing on smaller approved truck combinations.

Figure 8.2 Road access as specified by PBS road class



<sup>a</sup> PBS = performance based standards. Most roads satisfy PBS level 1 (although some are not suitable for heavy vehicles). PBS level 2 roads will allow B-doubles and vehicles allowed in level 1. PBS level 3 roads will allow type-I road trains and vehicles allowed in levels 1 and 2. PBS level 4 roads will allow type-II road trains and vehicles allowed in levels 1, 2 and 3.

Source: NTC (2011a).

<sup>5</sup> Some restrictions do apply where road train travel is limited to ‘Recommended Road Train Routes’. Nevertheless, Darwin is the only capital city which allows general access to road trains.

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## The role of local government

### *Regulatory responsibilities relating to road access and use*

Access of heavy vehicles to the Australian road network is regulated at a national and state level. Since 1996, national uniform heavy vehicle mass and dimension limits have applied, set through state legislation based on national model legislation. These model laws are included as schedules to regulations under the *National Transport Commission Act 2003*. States enact their own legislation with the model laws as guides. The NTC's regulation impact statement for national heavy vehicle legislation indicates that despite the model laws, there remains some inconsistency between state heavy vehicle legislation (NTC 2011b). For example, in relation to road access and usage:

- consistency in 'higher mass limits' regulation has not been achieved because of infrastructure (mainly bridge) limits in some states
- Victoria has diverged from the model law to broaden its definition of 'special purpose vehicle' to cover any vehicle built primarily for a purpose other than carriage of goods or passengers (for example, drilling-rig trailers; amusement rides). The Victorian definition is to be adopted in national law to recognise special purpose trailers
- Victoria has explicitly defined 'agricultural task' and thereby removed ambiguity on the status of silage trailers in the model law. A similar definition has now been included in the model law to prevent farmers from being penalised for towing silage trailers on the road.

There are also a number of nationally agreed schemes for heavy vehicles – such as the Higher Mass Limits (also referred to as the Higher Vehicle Limits) scheme and the PBS scheme. Participation in these schemes can more easily facilitate the process of obtaining road access approval. As noted earlier, PBS is a COAG reform that provides more flexible regulation for heavy vehicles that meet 'outcomes' based national safety and infrastructure standards. A memorandum of understanding between the NTC and ALGA in 2003 outlined a process for LGs to investigate and come to agreement with their state government, for the introduction of a PBS approach to local roads.

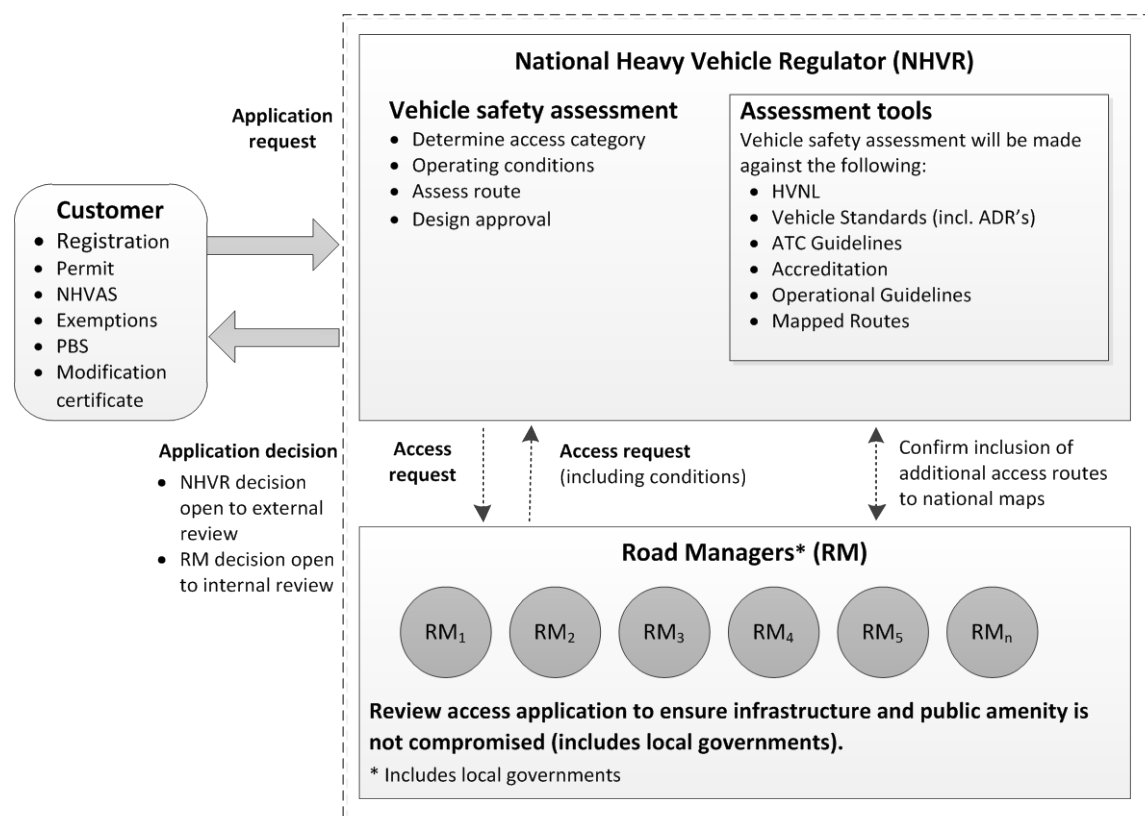
To improve the national consistency of heavy vehicle regulation, COAG (2009) agreed to the establishment of a single national heavy vehicle regulator to regulate all vehicles over 4.5 gross tonnes. The National Heavy Vehicle Regulator (NHVR) is expected to become operational on 1 January 2013 and will handle the approval process for all road access requests across Australia. Under the proposed NHVR



model law, the NHVR will process access applications and coordinate access requests across relevant road managers, including LGs (figure 8.3). As such, LGs will continue to be the responsible authority for determining road access to heavy vehicles on local roads in all states except Western Australia. Until that time, for vehicles subject to restricted access (the RAVs), there are essentially two means of gaining approval to access the road network:

- by complying with the conditions of a state/territory notice scheme
- by applying to a state/territory road agency for an access permit.

**Figure 8.3 Decision making relationship between the National Heavy Vehicle Regulator and the road manager**



Source: NTC (2011b).

All states allow some specific types of heavy vehicles to operate under 'gazettal notice'<sup>6</sup> — a scheme under which a part of a road network is declared suitable for particular types of vehicles, subject to specified operating conditions (NTC 2009). For local roads to be included under gazettal notice, an assessment of their capacity must be undertaken by LGs. Notice schemes do not require operators to register or apply for a permit where their vehicles satisfy weight and length requirements as set

<sup>6</sup> Gazettal notices are referred to as 'Guidelines' in Queensland.

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out in the notice. Heavy vehicles which commonly operate under gazettal notice include: B-doubles; road trains; longer or heavier truck-trailers; heavy vehicles carrying livestock or hay; long refrigerated trailers; and special purpose vehicles such as mobile cranes, agricultural equipment and front-end loaders.

Every state provides documentation and forms on its website to initiate a request for RAVs use of a part of the road network. If the proposed route includes local roads, then the applicant is required to include written evidence of permission from the relevant LG with their application.

To assist LGs in making assessments of applications for heavy vehicle access to local roads and bridges, the Austroads (2010b) and National Road Transport Commission (NRTC 2002) have each produced a set of guidelines. The guidelines essentially provide LGs with a checklist to follow in assessing applications for access and are meant to complement state based guidelines. More recently, the Australian Road Research Board (ARRB) Group has developed, in conjunction with the Municipal Association of Victoria, the *PBS Network Classification Guidelines for Local Government* which are ‘intended to provide local governments with the direction and framework to allow consistent classification of their road network for the operation of the PBS Scheme’ (ARRB Group 2012, p. 1).

### *The role of LGs in regulating road access and use*

LG has no formal role in the development, implementation or administration of heavy vehicle regulation (DITRDLG 2009). However, in all states, LGs are able to erect signs to declare certain roads or bridges inaccessible to particular vehicle types (such as trucks over 4.5 tonnes) or inaccessible under certain conditions (such as in emergency situations or at certain times of the year). Further, as noted above, heavy vehicle operators often need to apply to LGs, as road owner and manager, for access to some roads, bridges and associated structures except in Western Australia where LGs have no regulatory responsibilities relating to restricted access vehicles (Western Australian Government, pers. comm., 16 March 2012). As such, further references to LGs in this section do not include Western Australia.

For many LGs, applications for access to their local roads are infrequent and the processes for assessment are consequently not always well developed. Most LGs do not have a formal process or documentation in place to receive applications for heavy vehicle access to local roads. Rather, access requests in most states tend to go to LGs in the form of letters from the business requesting access. In New South Wales and South Australia, the state government road authority coordinates access requests with LGs on behalf of applicants. From January 2013, the NHVR will coordinate access requests on behalf of all applicants.

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Information that applicants may be required to provide with an application for access to local roads includes: contact details; route details; vehicle details (such as: configuration of vehicle, PBS assessment); operational details (frequency of trips, time of travel, type of loads, seasonal variation); origin and destination details; and other supporting information (details of similar routes used in other councils; local benefits; industry accreditation schemes) (Austroads 2010b).

Applications for route access which are denied by a LG, can be appealed through an internal review to the road manager (NTC, sub. 35). However, the AARB Group reported that ‘applicants for PBS access do not use the appeal mechanisms available to them when local government rejects their application’ (Ogden 2010, p. 14). This raises the question of whether there is a need for an independent external review and appeal mechanism for decisions on road access by responsible authorities as has been proposed in consultations and submissions by industry to this study. A graduated review framework for road access decisions has been proposed as part of reforms associated with the establishment of the NHVR but it is unclear whether such a review mechanism will be adopted.

LG permits for road access are generally approved on an annual basis and can have a range of conditions attached. Austroads provides that:

These conditions should be realistic and enforceable. Access conditions should only be applied where the circumstances clearly show that they are necessary. If access is not approved, a defensible reason should be provided to the operator. If access is not approved the operator may request that council or the appropriate authority review the reason for the refusal and identify if the barriers to access are ones that can be overcome. (2010b, p. 36)

Table 8.8 illustrates the range of instruments that have been applied in different situations where LGs have approved access but included local conditions with the approval.

Apart from regulating access to roads for non-standard heavy vehicles, most LGs are also empowered to:

- implement clearways to improve traffic flow at particular times of the day
- introduce road features such as dedicated bus or truck lanes or one-way streets
- turn public roads into malls or pedestrian zones
- close local roads to certain vehicles on a temporary basis for entertainment, sporting events, parades and other events.

LGs are also able to permanently close local roads to public thoroughfare (with the land returning to the original land holder), but only in consultation with the relevant state government road agency.

**Table 8.8 Conditions on road access**

<i>Access instrument</i>	<i>Example</i>
Time limits	<ul style="list-style-type: none"> <li>• Limit operations past schools for safety or noise purposes; limit operations along a school bus route at the times that match the pickup and delivery of school children.</li> <li>• Daylight hours, weekends only or peak period turn bans.</li> </ul>
Speed limits	<ul style="list-style-type: none"> <li>• Lower speed limits on roads considered to be below the standard normally appropriate for the sort of vehicles proposing to use it.</li> <li>• Low speed limits on some bridges to allow heavy vehicles to use them without damage.</li> </ul>
Vehicle priority	<ul style="list-style-type: none"> <li>• Give way at intersections: Vehicles must slow down or stop and give way to other road users at intersections or cross roads where the vehicle may be undertaking a turning manoeuvre that will require the whole road.</li> <li>• Overtaking opportunities: Vehicles must slow down and allow other vehicles to pass if overtaking or passing opportunities are limited.</li> </ul>
Seasonal/weather	<ul style="list-style-type: none"> <li>• Commodity linked: Specified primary products allowed to be moved at peak harvest times.</li> <li>• Time of year related: In areas with high rainfall restrict access during times when pavements are likely to be weakest, such as in winter in southern areas or monsoons in the north.</li> <li>• Road condition: Restrict operation on unsealed road segment when they are visibly wet.</li> </ul>
Notification	<ul style="list-style-type: none"> <li>• Vehicle identification: Flashing lights or other devices to improve the visibility of the vehicle.</li> <li>• Community advice: Advice through local media or letterboxing of vehicle operations.</li> </ul>
Land access	<ul style="list-style-type: none"> <li>• Rural access: Improve gateway or paddock entry and exit points to protect infrastructure and reduce pavement scrubbing and rutting.</li> <li>• Urban access: Improve entry, exit and turning areas to ensure vehicles leave and enter the road in a forward direction, and undertake all activities on site rather than the road.</li> </ul>
Operating conditions	<ul style="list-style-type: none"> <li>• Air break limits: Restrict the use of air brakes at night when passing houses and other sensitive land uses, such as hospitals.</li> </ul>
Route access	<ul style="list-style-type: none"> <li>• Limit the number of RAVs on the road at any one time.</li> <li>• Limit route use to vehicles which have a destination along the route (Local Access Only). Through traffic must use an alternate route.</li> </ul>
Communication	<ul style="list-style-type: none"> <li>• Requirements for maintaining radio contact with the vehicle or GPS tracking of the vehicle.</li> </ul>
Management	<ul style="list-style-type: none"> <li>• Maintenance grading of gravel pavements at specified rate.</li> </ul>

*Source:* Austroads (2010b).

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## **Excessive burdens on business**

There are long-standing concerns by industry in relation to regulatory barriers to road access and use imposed by LGs. For example, the NRTC in 2002 reported that:

The road transport industry has for some time expressed concerns arising when dealing with local government about access to local roads. In particular, they consider that Councils lack objectivity and consistency in assessing their applications or impose inconsistent and ‘unfair’ restrictions on access to the local road network. (2002, p. iv)

More recently, the Australian Trucking Association (ATA) contended that:

Any business that uses road freight to move goods is affected by local government decisions. The costs or burden incurred by poor local government decision making which seeks to limit the movement of these productive heavy vehicles affects the productivity, price and future of businesses which need to access these vehicles. (sub. 8, p. 4)

The ATA also outlined the main regulatory costs imposed on business by inefficient heavy vehicle access regimes. The uncertainty associated with the varying application of heavy vehicle regulations across states and LGs leads to increased costs and may restrict investment in higher productivity transport fleets.

Allen Consulting Group (2010b) identified the main users of road freight services in Australia as:

- retailers (Woolworths, Coles Group, Shell, Caltex)
- distributors (Metcash)
- manufacturers (Cadbury-Schweppes, Ford, Holden)
- mining and resources (BHP Billiton, Blue Scope Steel)
- primary producers (GrainCorp, Murray Goulburn Cooperative, and various livestock feedlots and abattoirs).

Key costs to business associated with road access regulation and their respective sources are listed in table 8.9. These sources often reflect a complex mix of limitations associated with the quality and location of physical infrastructure, community or social priorities and regulatory arrangements, which relate not just to transport but to other policy areas such as town planning or to financial issues (such as the funding of road maintenance). Therefore, the sources of these road access related costs to business may also generate considerable benefits to communities, the environment and to business; and these benefits could outweigh the listed costs to a particular business.

**Table 8.9 Sources of ‘road access related’ costs to business**

<i>Cost</i>	<i>Sources</i>
<b>Increased costs associated with LG interactions</b>	
Cost of determining suitable freight route	<ul style="list-style-type: none"> <li>• Lack of transparency/information on road suitability for different types of vehicles</li> <li>• Charges for, or delays in, LG consideration of road access</li> <li>• Ineffective LG consultation on implications for road access of revisions to local plans</li> </ul>
<b>Increased business operating costs</b>	
Increased delivery costs as suppliers have to use smaller or non-optimal trucks	<ul style="list-style-type: none"> <li>• Limits on road access due to physical impediments to truck access, including: <ul style="list-style-type: none"> <li>- parked vehicles</li> <li>- traffic islands, round-a-bouts and median strips</li> <li>- unsuitable corner radius or road width</li> <li>- low strength footpaths to be traversed</li> <li>- power poles, low overhead wires and lighting</li> <li>- bridge height/width/capacity</li> <li>- other height barriers</li> </ul> </li> <li>• Limits on road access due to social limits (eg. noise and public amenity, public safety)</li> </ul>
Increased delivery costs as suppliers restricted on time of day for deliveries	<ul style="list-style-type: none"> <li>• Curfews on road use</li> </ul>
Increased operating costs due to changes in vehicle operation or load treatment	<ul style="list-style-type: none"> <li>• Conditions on transport of dangerous goods</li> <li>• Restrictions on use of brakes &amp; speed limits</li> <li>• Requirements for vehicle tracking or monitoring</li> </ul>
Increased costs of road restoration	<ul style="list-style-type: none"> <li>• Conditions on road access</li> </ul>
<b>Lost business opportunities</b>	
Loss of potential customers or suppliers	<ul style="list-style-type: none"> <li>• Customer/supplier unable to access business because of restrictions on road access/use (eg. rural businesses)</li> </ul>

Business concerns regarding road access and use at the LG level are primarily related to the first and last mile problem and the resultant tension that LGs face from the competing interests of business and the wider community. The main regulatory burdens include:

- variations and ongoing inconsistencies despite the introduction of national standards
- delays in route assessments and the refusal of some LGs to undertake assessments
- costs associated with conditions imposed by LGs on road access.

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*Variations and ongoing inconsistencies persist despite the introduction of national standards.*

Variations in road access between LGs can impose significant costs on business operating across multiple jurisdictions which may not be able use the most efficient transport configuration as a result of heavy vehicle road access restrictions.

The Australian Logistics Council noted the discrepancy in approaches to road access among nearby rural and regional LGs in New South Wales, Victoria and South Australia:

Councils vary in their approach to approving B Double access. Mildura Rural City Council has given a blanket approval for B Double access to all Council roads. Most other municipalities vary in their approach, approval time and conditions. (2009, p. 49)

The Australian Livestock Transporters Association reported that LGs often do not interact with neighbouring LGs to bring about regional benefits in road networks:

... local councils (and some state bodies) seem unduly reticent about their capacity to form coalitions (say of several councils or industry bodies) to overcome the free rider problem. They appear to be unfamiliar with taking such a broad perspective and have provided themselves with limited resources for generating and evaluating big-picture proposals which might benefit their constituents. In ALTA's experience, local governments in particular take an unnecessarily reactive approach to upgrading and appear locked into a tradition of not proactively identifying worthwhile upgrading programs that would yield net benefits'. (sub. 38 to PC 2006b, p. 35)

This diversity is reflected in the proportion of local roads where access has been granted with some LGs not allowing any access while others provide access to almost all local roads (table 8.10). LG respondents to the Commission's local government survey reported that they not only restrict access on community amenity and safety grounds but also because they consider the quality of the road to be not suitable for heavy vehicle use (Transport survey 2011–12).

There are also significant variations in the attitudes of LGs towards supporting innovative transport models. While some rural LGs are active proponents of heavy vehicles with new technologies using their roads, LGs in transport-intensive urban areas (for example, ports, industrial areas, shopping centres and supermarkets) often have more difficulty managing community perceptions (sub. 35).

A number of participants advised the Commission that, despite national and state agreements on reforms such as higher mass limits and PBS, at a LG level, businesses are often expending considerable time and money negotiating with road managers for access for supposedly compliant vehicles.

**Table 8.10 Per cent of local roads with restricted heavy vehicle access**  
By local government and road length

<i>Per cent of local roads with restricted access</i>	<i>Per cent of responding LGs</i>
0	17
1-10	38
11-30	7
31-50	10
51-70	7
71-90	12
91-99	7
100	2

*Source:* Productivity Commission survey of local governments — transport survey (2011–12, unpublished).

In particular, the ATA (sub. 8) noted that, while higher mass limits on road friendly suspension for articulated vehicles were endorsed by the Australian Council for Transport in 2000, many local governments have still not agreed to this arrangement.

In relation to PBS, the NTC (sub. 35) reported that a Queensland business, which had vehicles endorsed by the national PBS Review Panel as meeting PBS standards, was required to expend significant time and money approaching 15 LGs individually for road access. A review of the PBS reform in 2009 found that this problem is not unique, with 21 per cent of approved vehicles denied access or facing additional regulatory burdens (NTC, sub. 35).

Part of these implementation problems could be the result of poor stakeholder consultation, particularly at the local government level. The ARRB Group advised that the freight industry could: do more to clarify what it needs in terms of access and why; take advantage of appeals mechanisms; build relationships with LGs; and partner with other organisations that the community trusts (such as motoring clubs). In particular, they reported freight customer's concerns that:

... there has been insufficient engagement of local government in the development of the PBS concept — PBS was considered to be technical, and stakeholder involvement was overlooked. (Ogden 2010, p. 11)

Transport industry representatives have raised concerns that LGs will continue to be reluctant to grant access under the NVHR regime resulting in ongoing inconsistency between LGs and unnecessary regulatory burdens for business:

Industry has had some involvement in the consultations with the NHVR, but there are fears industry could be left with unmet expectations. This exposes concerns of the model chosen to implement the NHVR concept will never be able to enforce uniformity with best practice regulation as states and local governments will fight hard for their parochial approaches to regulation. (ATA, sub. 8, p. 9)



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***The National Heavy Vehicle Regulator should seek to actively engage LGs and respond to their needs in the development of national heavy vehicle standards to moderate the inconsistent application of PBS-compliant vehicle access across local roads in different LG areas.***

#### ***Delays in route assessments or refusal to undertake route assessments***

There can be significant delays for transporters looking to gain ‘first and last mile access’. Most heavy vehicle road access requires the assessment and approval of some local roads along a designated route and this is usually undertaken on a case-by-case basis by LGs, except in Western Australia and the Northern Territory.

While the first and last mile concerns of business may be legitimate, LGs have to balance their regulatory responsibilities to business with their responsibilities to the wider community. There is a misalignment of incentives for LGs to approve heavy vehicle access where they incur the costs of road maintenance but do not derive any direct benefits from allowing access. In this context, ALGA considered that:

Local government support for access for freight efficient vehicles is constrained by the lack of any direct funding for the use of local roads by heavy vehicles and the need to balance a wide range of responsibilities to the community, including access to homes, safety and amenity of its citizens. (2010b, p. 14)

Ogden identified a disconnect between the payment of heavy vehicle access fees to state agencies and damage to local roads as a source of problems:

... local government fears that if the PBS [vehicle] causes the road to deteriorate, they will not be compensated - the higher fees paid by PBS vehicles do not automatically flow to the road agency which bears the cost. (2010, p. 12)

And that:

... local road funding is not guaranteed, so councils feel exposed to a financial risk if they approve PBS vehicles which place extra stress on local roads. (2010, p. 14)

This view was supported by the Western Australian Local Government Association:

Unforeseen structural damage to the local road network is a major issue and can impose a huge financial burden on Local Government. Rural access roads are particularly susceptible and have a far greater sensitivity to structural damage than higher order roads. (sub. DR47, p. 2)

Similarly, the Australian Livestock Transporters Association (sub. 38 to PC 2006b) suggested that a LG may be reticent to upgrade its roads for general access if a significant proportion of the benefits of the investment accrue to road users originating in other LG areas.

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Resources are also reported to be inadequate in many LG authorities for the assessment of route access applications by heavy vehicle operators. An industry round table held to clarify the actions needed for more road freight transport found that a key issue was that:

... the resources available to local government for processing PBS access (and other) heavy vehicle related requests are not sufficient for the task at hand. (Ogden 2010, p. 3)

They concluded that one consequence of this lack of resourcing is that LGs tend to err on the conservative side and reject more applications than they otherwise would.

A review of LG capacities in Victoria similarly reported that:

Councils are often ill equipped technically and structurally to deal with freight related matters that are becoming increasingly complex and which span many areas of council responsibility. (Geoff Anson Consulting 2010, p. 5)

A lack of LG resources to conduct road and bridge assessments also means that a number of LGs have not yet undertaken the local road mapping necessary for implementation of the PBS system that has been operational since 2007 (sub. 8). Only around half of LGs that responded to the Commission's local government survey indicated that they had contributed to the national program to identify routes which comply with the PBS system (Transport survey 2011–12).

***In areas where the lack of local road mapping is particularly severe because LG road managers have not identified and published PBS-compliant routes, vehicle operators are constrained by applying individually to LGs for permission to use the road network, rather than being able to access the network through compliance with gazettal notices.***

The ARRB Group and the Municipal Association of Victoria are developing an online tool to facilitate the consistent and timely assessment of road access routes by LGs (Zivkusic 2011). This tool, in conjunction with *PBS Network Classification Guidelines for Local Government* (ARRB Group 2012), is intended to assist LGs in assessing and classifying their road networks, thereby reducing the regulatory burden to transport businesses.

Almost all LGs that responded to the Commission's local government survey reported using in-house engineering expertise to assess heavy vehicle access requests and supplementing this with advice from qualified state agency employees and/or external consultant reports (Transport survey 2011–12).

In addition, the financial costs of assessment are generally borne by local governments. In some cases, LGs charge applicants for route assessments (for example, Maitland City Council and Campbelltown City Council charge \$654.08

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and \$2343 per route respectively) but the majority of LGs do not charge anything (Transport survey 2011–12; Maitland City Council 2011; Campbelltown City Council 2011).

The Queensland Department of Transport and Main Roads (TMR) has funded all PBS route assessments on both state and LG roads in that state. They have also funded some other types of route assessments depending on the importance of the route (Queensland Government, pers. comm., 21 March 2012). Funding has been made available through the Roads Alliance — a joint initiative between TMR and LGs (box 8.6). While this may not resolve the tensions within LGs of balancing business and community interests, it does facilitate the timely determination of access applications and greater access for PBS vehicles than would otherwise be the case.

By contrast in South Australia, applicants for new road access routes are required to engage an independent authorised assessor to undertake an analysis of the proposed route; obtain from LG a clearance regarding community safety, social, amenity, environmental and local issues; and lodge the final report (including clearances) with the South Australian Department of Planning, Transport and Infrastructure (DPTI) for approval and gazettal (SA DTEI 2008). Under this model, the DPTI may provide technical assistance to authorised route assessors, which means that each LG does not have to maintain a level of technical expertise.

#### LEADING PRACTICE 8.2

*In order to facilitate the development of maps indicating which roads can be accessed by compliant vehicles, state and the Northern Territory governments or the National Heavy Vehicle Regulator (when operational) could provide support, including technical and financial resources, to local governments in identifying and gazetting suitable roads according to the Performance Based Standards Classification.*

The Queensland Department of Main Roads provides financial assistance to LGs undertaking road assessments for routes deemed to be of importance. The ARRB Group and the Municipal Association of Victoria is pursuing an alternative approach by developing an online tool to facilitate consistent and timely road access assessments. This tool is supported by guidelines for undertaking local government route access and network classification, which is also aimed at increasing consistency across local governments.

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### Box 8.6      **Queensland's Roads Alliance**

Established in 2002, the Roads Alliance is a partnership between the Queensland Department of Transport and Main Roads, and LGs, including the Local Government Association of Queensland. The Roads Alliance objectives are to:

- improve collaboration between TMR and LGs
- increase the overall investment in Queensland's transport infrastructure
- improve the transport stewardship and delivery capability of TMR and LGs
- improve the safety of Queensland's transport network.

Under the Alliance, LGs and TMR regional representatives voluntarily work together through Regional Road Groups, of which there are currently 19 across Queensland. TMR provides technical support and funding to Regional Roads Groups to implement the Roads Alliance strategies and develop the capability and capacity of RRG engineers and technical staff.

*Source:* Queensland Government (sub. DR51, p. 4).

### *Conditions imposed by LGs on heavy vehicle access*

Unnecessary regulatory burdens typically arise in the form of access restrictions, such as those listed earlier in table 8.9. The ATA said that:

While access restrictions cause the industry to lose productive potential, when access is granted there are cases where excessive and unnecessary costs are forced onto operators in order to access local government jurisdiction routes. For instance, the use of permits for carrying dangerous goods vary in cost and the number needed in some local governments. This means operators capable of carrying dangerous goods are priced out of the market or simply find the system too complex to make sure all requirements are met. (sub. 8, p. 3)

In its submission to the Commission's Retail Inquiry, Woolworths discussed the impact of conditions on transport time and vehicle type on its business (see also box 8.7 for further detail):

Time of transportation and type of transportation restrict retailers' ability to efficiently move products around and between states/territories, a challenge that is exacerbated by remote locations, longer distances, climate fluctuations and the topographical challenges of Australia. These transportation restrictions impact on customers by increasing the price of products and preventing stock from being available when stores open. (2011, attach. 6, sub. 110 to PC 2011d, p. 6)

This view was endorsed more broadly by the Australian Logistics Council who reported that 'the operational efficiency and cost effectiveness of retailers' logistics networks can be diminished by local government restrictions on the times during

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which goods can be transported and loaded/offloaded’ (sub. 15, p. 4). Similarly, the NTC noted that community concern regarding noise and emissions in built-up areas has constrained off-peak commercial freight deliveries (NTC, sub. 35).

An outcomes based approach to regulation may go some way towards addressing the concerns raised by business. While the Commission generally supports outcomes based regulation in principle, it does acknowledge that there are circumstances where targeting outcomes will not be feasible in practice. For example, it is unlikely that outcomes based regulation will be able to meet community expectations in relation to noise levels for trucks making deliveries in residential areas in the early hours of the morning. In such circumstances, the only practical regulatory measure available to LGs is to restrict hours when deliveries can be made.

The ATA detailed other ways in which LG constraints add to transporters’ costs:

Often larger heavy vehicle combinations have to de-couple in order to pass into local government areas in order to reach a destination, or when coming away from an origin. First and last mile constraints interfere with the freight task, as it can mean operators have no option but to use less productivity heavy vehicle combinations for the whole journey. In other cases time and money are wasted while operators have to de-couple at designated depots in order to meet the requirements set by local governments. (sub. 8, p. 5)

***The imposition of conditions on heavy vehicles accessing local roads can place unnecessary burdens on transport operators, their customers and the broader community.***

#### LEADING PRACTICE 8.3

*It is more efficient for local governments to target the outcomes of transport activities (such as safety and road damage) where this approach can meet community expectations, rather than placing restrictive conditions on vehicle dimensions. That said, there may be times where the appropriate regulatory approach is to impose restrictive regulatory conditions (such as defined hours of operation to restrict noise levels).*

***LGs should consider whether suitable infrastructure is required to facilitate freight movement in areas where local road access to heavy vehicles is restricted. Where such infrastructure is required, LGs should work with transport operators and state governments to develop infrastructure solutions (such as transport hubs) that best meet the needs of the transport industry, clients and the community.***

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### Box 8.7      **Impacts on retailers of logistics regulations**

Retailers heavily rely upon an efficient logistics network where third-party road carriers, shipping and airfreight operators undertake the majority of their product transportation. The operational efficiency and cost effectiveness of retailers' logistics networks are impacted by two key transportation restrictions: the time of day at which transportation may be undertaken and the type of transportation which may be used.

The time of day for transportation to retail outlets is restricted by some local councils through local laws. Restrictions on the time of transportation are aimed at reducing noise and light disturbances at night for local residents. Time of transportation restrictions differ between local council areas, often take the form of curfews and restrictions on night time deliveries — typically from 6pm to 7am.

These curfews and night time delivery restrictions affect retailers' ability to remove vehicles from the roads during peak times and move stock efficiently. This is further exacerbated by the need for additional vehicles in a fleet to meet tighter delivery windows. In addition, delivery runs are organised according to curfew restrictions rather than the preferred geographical groupings.

Woolworths reported that 57 per cent of its Sydney stores and 31 per cent of its Brisbane stores have curfews on night-time deliveries. It claims these curfews reduce the operational efficiency of its transport and logistics network through:

- increasing transit time due to greater congestion on roads
- raising unload time due to greater congestion at stores
- increasing kilometres travelled
- increasing fleet requirement as deliveries are not able to be spread out through the day and evening
- reduced efficiency in the operation of distribution centres as retailers need to keep trucks and trailers idle at distribution centres during curfew restriction times.

The type of transportation to retail outlets is restricted by the freight capacity delivery trucks. State-based regulation limits the size of vehicles used for store deliveries and line haul operations. Australian retailers are unable to transport goods using Super B-Doubles or B-Triples and in the absence of optimal rail infrastructure, existing trailers are limited to moving a maximum of 36 pallets per vehicle. Woolworths estimated that using the existing B-Double trailers, rather than the Super B-Doubles, limits freight capacity by 10 to 12 per cent.

The time of transportation and type of transportation can impact on retailers' ability to efficiently move products around, within and between states and territories, a challenge that is exacerbated by remote locations, longer distances, climate fluctuations and the topographical challenges of Australia.

*Source:* Woolworths (2011, attachment p. 50).

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## 9 Food safety

### Key Points

- Significant progress has been made by all levels of government in implementing a consistent national approach for food safety.
- Within the national approach, local governments are generally responsible for registering premises and undertaking inspections and enforcement action as required.
- Excessive burdens on business in the area of food safety can arise from registration requirements, the need for multiple registrations, inspection frequency and duration, fees and enforcement actions.
  - The use of risk management approaches that align the food safety requirements of a business to their level of risk can assist with minimising these burdens.
- While some food businesses highlighted negative impacts from their regulatory dealings with local governments, most food businesses considered their dealings to be neutral or positive.
- Local government enforcement officers tend to rely on less burdensome enforcement tools to remedy food safety breaches, with more serious enforcement tools used sparingly. This may be evidence of escalating enforcement principles being used in this area.
- The collection and publication of information on the regulatory activities of local governments can improve public confidence both in the food safety system and in the food they consume from individual food businesses.
  - Any lack of public confidence in the food safety system can be costly for business as consumers can be discouraged from frequenting all food businesses.
- Some leading practices for food safety include:
  - national guidelines for classifying the public health risks of individual food businesses — which are used to determine inspection frequency and fees
  - excluding negligible risk businesses from being registered, inspected or paying fees
  - automated tools that develop a food safety program tailored to the specific needs of a business and the risks present
  - arrangements that address the need for businesses to undertake multiple registrations
  - providing templates or online tools to assist businesses with developing food safety programs in jurisdictions that require them.

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This chapter provides an overview of the framework for local government (LG) regulation of food safety (section 9.1) and a discussion of the nature of business burdens flowing from the regulations (section 9.2). Specific elements of food safety regulation are then explored, namely: registration processes (section 9.3), inspection activities (section 9.4) and enforcement measures (section 9.5).

LG regulatory responsibilities in each of the specific areas as well as the scope for such regulations to impose excessive burdens on business are examined.

This chapter also explores the important role that LGs play in maintaining public confidence in the food safety system (section 9.6) and issues of specific relevance to supermarkets and mobile food vendors (section 9.7).

## **9.1 Overview of the regulatory framework**

LGs play a prominent role in the regulation of food premises. Across Australia, the types of business regulated under food safety provisions can include:

- restaurants
- cafes
- mobile food vendors
- supermarkets
- businesses selling meat or seafood
- aged care facilities and child care centres that prepare food for their clients
- other businesses that provide food as part of their activities (such as hotels, accommodation providers, caravan parks, cinemas and convenience stores).

In some states, LGs have an even wider role in food safety, such as regulating or inspecting food manufacturers.

As well as generating significant benefits, food safety regulations administered by LGs impose direct and indirect costs on businesses. The chapter presents some significant regulatory burdens imposed on food businesses and identifies where wider adoption of leading practices could reduce unnecessary burdens on business.

The role that LGs play in food safety regulation is established by state government Acts and regulations (table 9.1). In addition, in all states and territories, the Australia New Zealand Food Standards Code (Australia New Zealand Food Authority 2001) is enacted either through legislation or regulation.



**Table 9.1 State Acts and Regulations conferring a food safety role on local governments**

<i>State</i>	<i>Act</i>	<i>Regulation</i>
New South Wales	<i>Food Act 2003</i>	Food Regulation 2010
Victoria	<i>Food Act 1984</i>	Food (Forms and Registration Details) Regulations 2005
Queensland	<i>Food Act 2006</i>	Food Regulation 2006
Western Australia	<i>Food Act 2008</i>	Food Regulation 2009
South Australia	<i>Food Act 2001</i>	Food Regulation 2002
Tasmania	<i>Food Act 2003</i>	Food Regulations 2003

*Sources:* Productivity Commission survey of state governments (2011–11, unpublished); state government websites.

There are broad similarities in the food safety functions undertaken by LGs across Australia. These similarities flow from national co-ordination that has taken place on food safety — including the development of a Model Food Act in 2000, subsequent intergovernmental agreements between the Australian and state governments and a national Food Standards Code.

## **National streamlining and harmonisation**

As responsibility for food safety policy setting primarily rests with state governments, uniform reform of food safety regulation requires co-operative arrangements, such as intergovernmental agreements (PC 2009a).

In November 2000, an Intergovernmental Food Regulation Agreement was concluded between the Commonwealth and the states and territories to deliver a more streamlined, efficient and nationally focussed food regulatory system to enhance public health and safety. This agreement outlined the objectives for the implementation of such a system, including:

- providing safe food controls for the purpose of protecting public health and safety
- reducing the regulatory burden for the food sector
- providing cost effective compliance and enforcement arrangements for industry, government and consumers
- providing a consistent regulatory approach across Australia through nationally agreed policy, standards and enforcement procedures (Department of Health and Ageing 2005).

One of the steps in implementing the Food Regulation Agreement was the development of the Australia New Zealand Food Standards Code (Australia New Zealand Food Authority 2001). Aspects of the Food Regulation Agreement were

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revised in December 2002 and July 2008, but the objectives of the agreement remained unchanged.

In 2011, a new intergovernmental agreement on food reforms was reached (COAG 2011). While most of the actionable items from that agreement relate to the food safety functions of state and territory governments, the agreement also offers a platform for greater standardisation of LGs' food safety functions in the future. A review of progress of the agreement is scheduled to occur in 2013. As part of that review, all parties have agreed to examine the introduction of consistent reporting and enforcement frameworks. In the interim, officers from the Australian, state and territory governments are developing model reporting and enforcement frameworks that could be adopted nationally.

## **Main food safety functions**

While there are similarities in the food safety functions undertaken in each jurisdiction, the types of bodies responsible for carrying out the functions differ. In the Northern Territory, all food safety functions are undertaken by the territory government. In New South Wales, high risk food businesses<sup>1</sup> are regulated by the NSW Food Authority, while in the remaining states, LGs are delegated that responsibility.

The main food safety regulatory functions undertaken by LGs can be grouped into three categories:

1. registration processes
2. inspection activities
3. enforcement measures.

### *Risk classification of food businesses*

A strength of the food safety regulatory system is that the approach to regulation of different businesses is often graduated. For example, many elements of food safety regulation vary depending on the risk category of businesses — which is based on

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<sup>1</sup> The Priority Classification System for food businesses provides a process for classifying food businesses into one of three categories — low, medium or high risk (Australia and New Zealand Food Authority 2001). This classification is based on the nature of the food business. Some jurisdictions have expanded the classification to include negligible risk businesses — typically those selling foods with limited safety risks such as prepacked food. Risk classifications can then be used in conjunction with compliance history to determine inspection frequency and fees.

the inherent risks involved in the different types of food and different approaches to preparation.

In addition to influencing the registration process, the risk categorisation of food businesses can determine the fees they pay and the frequency of food safety inspections, as well as the scope of regulation applied.

There are two main approaches used to classify the risks posed by different types of food businesses:

- the *Priority classification system for food businesses* with ratings of high, medium and low (Australia New Zealand Food Authority 2001)
- the *Business sector food safety risk priority classification framework* with priority 1 to 4 (Department of Health and Ageing 2007).

While the two systems have a slightly different approach to the categorisation, priority 1 can be considered high risk and priority 2 equivalent to medium risk. Priorities 3 and 4 are reasonably consistent with the categorisation of low risk food businesses. Of these, businesses in priority 4 can be considered negligible risk businesses — as only businesses that serve food with no realistic hazard meet this categorisation. Table 9.2 provides examples of different types of food business that are likely to be considered in each risk categorisation and priority ranking.

**Table 9.2 Examples of risk categorisations of food businesses**

Priority rating	Risk categorisation <sup>a</sup>	Examples	
1	High risk	<ul style="list-style-type: none"> <li>• hospitals</li> <li>• sushi restaurants</li> </ul>	<ul style="list-style-type: none"> <li>• aged care facilities</li> <li>• some restaurants and take away businesses<sup>b</sup></li> </ul>
2	Medium risk	<ul style="list-style-type: none"> <li>• some restaurants and take away businesses<sup>b</sup></li> <li>• delicatessens</li> </ul>	<ul style="list-style-type: none"> <li>• bakery serving cream based cakes</li> <li>• juice bars</li> </ul>
3	Low risk	<ul style="list-style-type: none"> <li>• bakeries (not serving cream or custard based products)</li> </ul>	<ul style="list-style-type: none"> <li>• service stations and convenience stores</li> </ul>
4	Negligible risk	<ul style="list-style-type: none"> <li>• soft drink vending machines</li> </ul>	<ul style="list-style-type: none"> <li>• fruit stores selling whole uncut fruit</li> </ul>

<sup>a</sup> Risk categorisation that the Commission considers most closely aligns with each priority rating. <sup>b</sup> A difference between the two categorisation systems is that restaurants are more likely to be categorised as high risk under the *Business sector food safety risk priority classification framework*.

Source: Victorian Department of Human Services (2010).

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## 9.2 Impact on business

The Commission has gathered information about the burdens imposed by LG food regulations from submissions to this and other studies, and from meeting with businesses. The main concerns that have been raised by business are:

- inconsistent interpretation of food safety regulations
- arbitrary and excessive use of enforcement powers
- unnecessary and/or duplicative components of food regulation
- some businesses unnecessarily being subjected to food safety regulation.

The concerns raised by businesses focus on a subset of the regulatory burdens that the operators of food businesses could experience via their interaction with food safety regulation (table 9.3).

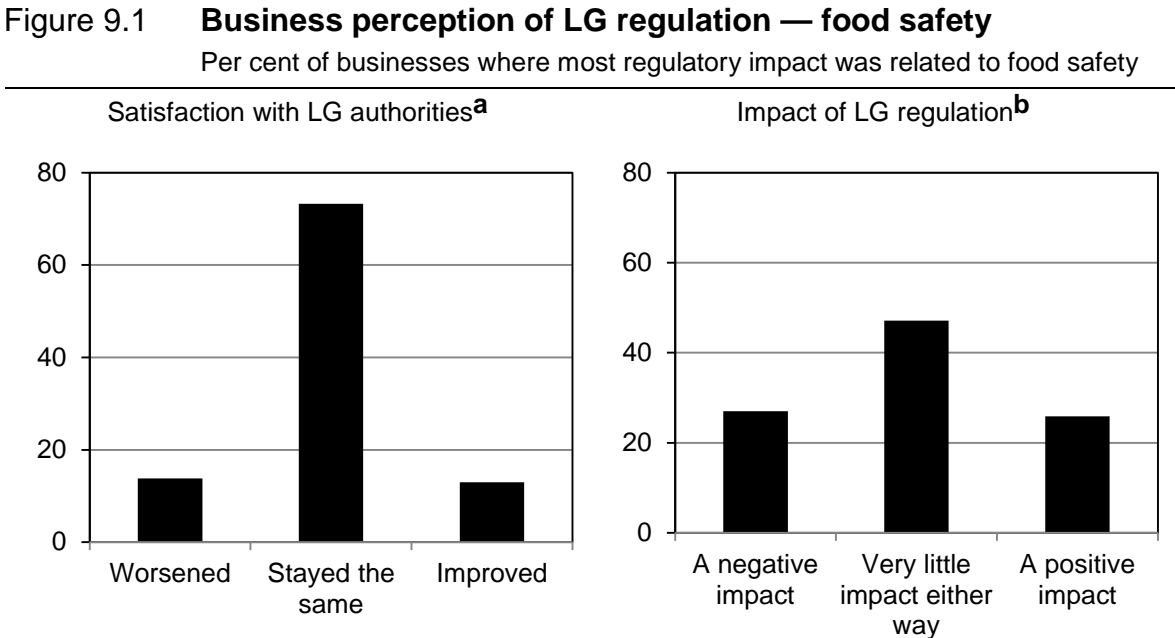
**Table 9.3 Sources of food regulation costs to businesses**

<i>Cost</i>	<i>Sources</i>
Increased costs associated with LG interactions	<ul style="list-style-type: none"><li>• Time taken to register and update details</li><li>• Diversion of staff to interact with Environmental Health Officers (EHOs) — particularly during inspections</li></ul>
Increased business operating costs	<ul style="list-style-type: none"><li>• Maintaining the physical premises in accordance with requirements</li><li>• Need to alter standard equipment or shop fittings due to divergent interpretations of regulatory requirements</li><li>• Purchase and maintenance of equipment (refrigeration, temperature monitoring, cleaning)</li><li>• Complying with record keeping requirements</li><li>• Inspection and monitoring fees</li></ul>
Lost business opportunities	<ul style="list-style-type: none"><li>• Temporary or permanent business closure due to enforcement actions</li><li>• Onerous initial approval process discouraging establishment of new businesses (especially small business operators or businesses where food is not the main activity)</li><li>• Limiting the range of services offered by businesses</li><li>• Caravan parks and tourism businesses finding the regulatory requirements for serving food too difficult</li><li>• Lack of mutual recognition or restriction of trading locations for mobile food vendors</li></ul>

Through interacting with food businesses, the Commission has become aware of specific regulatory practices that are negatively impacting some food businesses, although that process has not indicated how common it is for businesses to be concerned about the role LG has in food safety regulation.

To gauge broader business perceptions, the Commission organised for questions on the regulatory role of local government to be included in a regular survey of small and medium sized businesses undertaken by SENSIS (appendix B). Of the businesses in the survey that had a regulatory dealing with a LG in the past three years, around 24 per cent indicated that their dealings relating to food safety had the most impact on their business.

Among businesses that identified food safety as having the most impact on their business, the majority considered that their regulatory dealings with LGs were neutral or positive — both in terms of the perceived impact of their regulatory dealings with LG and their overall satisfaction with LG (figure 9.1).



<sup>a</sup> Wording of survey question was: Thinking about all your past regulatory dealings with local (or Territory) government, would you say that over the last three years your satisfaction levels have worsened, stayed the same or improved? <sup>b</sup> Wording of survey question was: What impact did your regulatory dealings with local (or Territory) government in the last three years have on your business?

Data source: Survey of small and medium businesses (2011).

### 9.3 Registration process

The process of registering a food business includes administrative requirements — such as notifying regulatory bodies about the business name and address — paying a registration fee and for some food businesses, developing an acceptable ‘food safety program’ and/or nominating a ‘food safety supervisor’ (FSS). The role LGs play in registering food businesses varies across states.

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## Regulatory role of local governments

### *Administrative requirements*

In most states, food businesses are required to register with, or notify their business to, LGs in each area in which they will operate. Some variation occurs because of differences in:

- the types of food businesses required to be registered
- whether businesses need to register with a LG or a state government agency.

For example, businesses providing services to vulnerable populations<sup>2</sup> or serving or preparing identified high risk foods need to be licensed with the NSW Food Authority. In South Australia, all food businesses need to notify LGs of their intention to operate in the relevant LG area, but do not need to be registered.

Recent changes in Victoria have excluded premises selling only negligible risk foods (see table 9.2 for examples) from needing to register or being charged registration or inspection fees by LGs. Businesses classified as undertaking negligible risk activities are also not required to be registered in Western Australia, Queensland or Tasmania. Low risk food businesses in New South Wales only need to notify the NSW Food Authority of their operation.

#### LEADING PRACTICE 9.1

*It is a leading practice to exclude businesses selling food with negligible risk from requirements to register or notify their business as a food business, as currently provided for in Victoria, Tasmania and Western Australia.*

### *Food safety program*

Under the Ministerial Policy Guideline on Food Safety Management in Australia (Food Regulation Standing Committee 2003), food businesses operating in a high-risk sector need to develop and maintain a food safety program. The four high risk sectors are:

- those serving potentially hazardous food to vulnerable populations (such as hospitals, aged care and child care operators)

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<sup>2</sup> Defined by the Australia New Zealand Food Authority as children under age five, adults aged over 65, the sick and immunocompromised and pregnant women (2001).

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- caterers<sup>3</sup>
  - those producing or manufacturing fermented meat
  - those businesses involved in harvesting, processing or distributing raw oysters or other bivalves.

For businesses which have a food safety program, it becomes one of the benchmarks in monitoring and inspecting the business.

Victoria went further than the Australia New Zealand Food Code and extended the need to prepare a food safety program to all food businesses in that state, except those selling negligible risk foods. In this regard, Victorian food safety regulations impose additional administrative burdens on a range of food businesses compared to other states. While Victoria imposes additional burdens on some food businesses, there appears to be support for additional risk management tools. In 2010, the Food Safety Management Working Group — the body providing advice to the Australia and New Zealand Food Regulation Ministerial Council<sup>4</sup> — noted that:

The 2003 Policy Guideline may not provide the guidance needed to develop an effective food safety management approach for retail/food service.

The guideline identifies four high-risk industry sectors where implementation of Standard 3.2.1 *Food Safety Programs* would be justified. These sectors included catering operations to the general public. A fifth sector – eating establishments — was also identified as high-risk, but the benefit-cost ratio of implementing Standard 3.2.1 was considered insufficiently high.

Requirements are now in place nationally in three of these sectors. This potentially leaves a gap in risk management in the retail/food service sector. (Food Safety Management Working Group 2010, p. 6)

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<sup>3</sup> While agreement has been reached on including caterers in the list of food businesses requiring food safety programs, to date, no agreement has been reached on a national standard for such programs. Caterers serving non-shelf-stable food receive are considered high risk ‘because they prepare and serve food at different locations. The time delay between serving the food and the potential for temperature abuse increases the food safety risks associated with these businesses’ (Australia New Zealand Food Authority 2001, p. 5).

<sup>4</sup> This body has now changed to The COAG Legislative and Governance Forum on Food Regulation.

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## Scope for excessive burdens

Typically, the scope for excessive burdens on food businesses from registration requirements can stem from:

- unnecessarily complex registration processes or forms (which add to labour costs)
- requiring negligible risk food businesses to be registered (requiring more food businesses than necessary to interact with the regulatory system)
- the scope for duplication in the registration process (such as occurs for mobile food vendors needing to be registered with multiple LGs in some states).

### *Administrative requirements*

Uncertainty can contribute to the burdens faced by businesses in complying with food safety regulation. Food businesses in Western Australia and New South Wales are required to either register or notify their food business — but not both. The need for a business to determine if they must register or notify their business could lead to confusion — making the process more burdensome than necessary. This appears to be the case in Western Australia with at least 35 per cent of food businesses being both registered and notified in 2009-10 (WA Department of Health 2010).

In contrast, the procedures established by the NSW Food Authority should mitigate the potential for confusion and potentially reduce the burden involved in notifying a food business. The NSW Food Authority has established a website for the notification of food businesses in New South Wales. It provides information on what businesses need to be licensed and which need to notify their operations. It also provides standard electronic forms that can be used to notify or register their business. Based on the stated location of the food business, this information is shared with the relevant LG.

An interested party to the study highlighted the scope for unnecessary burdens on business that arise from inconsistency in forms used by LGs. The South Australian Government provides standardised forms for LGs in that state and the Municipal Association of Victoria prepares standardised forms for their members.

Another way that business burdens could be significantly reduced is if state governments, when enacting new provisions to be enforced by LGs, provided clear guidance on the rationale for, and expected operation of, the regulations along with standardised forms. The NSW Food Authority website is particularly helpful in this regard as it outlines the rationale behind the decision on which food businesses need



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to notify their activities and which need to be licensed, while also providing standardised notification forms.

#### LEADING PRACTICE 9.2

*Burdens on businesses and local governments can be reduced if standardised forms are made available to local government regulators. This is currently done for food safety regulation by the NSW Food Authority, the South Australian Government and the Municipal Association of Victoria.*

Multiple registrations can also be a burden for mobile food vendors — for example, vendors based in New South Wales currently need to be registered in every LG area they operate in. As the NSW Small Business Commissioner notes, the approach in New South Wales:

... imposes burdens on mobile food vendors in terms of multiple registrations fees, multiple inspection fees, and multiple safety inspections by different councils. This also inhibits the potential for growth, as extending the service into a new area means additional time and costs for registration. (sub. DR44, p. 4)

But some jurisdictions are addressing this burden. In Victoria, South Australia and Queensland, mobile food vendors only need to be registered with one LG (but vendors in Victoria need to notify all LGs of their intention to operate in their area). The Western Australian Government has provided guidance to LGs recommending that mobile food vendors should only need to be registered by one LG.

The Australian Government Department of Resources, Environment and Tourism highlight that tourism businesses often need to be registered with a number of government bodies based on some components of their business — including registering with LGs for food safety purposes. They highlight the benefits of a streamlined registration process allowing a single registration to be made covering all aspects of tourism operations to all relevant government agencies, regardless of the level of government who has responsibility for any function (sub. 37).

#### LEADING PRACTICE 9.3

*Burdens on business can be reduced if administrative arrangements only require food businesses to register with one local government. Victoria, Queensland, South Australia and Western Australia have introduced such arrangements (for example, in respect of mobile food vendors not having to register with multiple local governments).*

A further issue concerns the definition of a food premises for registration and inspection purposes. Coles Supermarkets Australia (sub. 5) highlighted that some

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LGs in Western Australia are considering different departments of a given supermarket as separate food businesses, and applying fees to each department.

A similar situation arises for businesses operating multiple mobile food vendor vehicles. In some jurisdictions, each vehicle operated by the same businesses needs to be separately registered. However, Victoria permits businesses to register multiple food vending vehicles as a single business.

Whether you operate at a single site or have multiple food vans, stalls or vending machines at different locations, the registration certificate granted by your principal council will allow you to trade ... (Victorian Department of Health 2011, p. 2)

***An approach similar to that used for mobile food vendors in Victoria is worthy of investigation with a view to clarifying what should be considered a single food business and when and why separation of lines of business is considered appropriate.***

#### *Fees for registering, notifying or licensing a food business*

In addition to the administrative burden of completing a registration process, charging registration fees imposes a direct financial cost on business. For the Productivity Commission survey of local governments (2009 unpublished), 99 Australian LGs completed a survey on food safety regulation — which included information on fees charged to notify, license or register a food business. A number of the responding LGs reported not charging such fees. When fees were charged, the lowest reported fee was \$30 for each process, with the highest reported being \$50 for notification, \$560 for registration and \$700 for a license fee.

Unfortunately, given substantial variation in fee setting policies, the collected survey data do not provide sufficient information to compare underlying differences in administration costs. For example, some LGs:

- charge a separate administration charge for processing a notification, registration or license application
- include the cost of routine inspections in the license or registration fee.

Drawing on information available on LG websites, some examples of the different approaches taken to setting food registration or licensing fees include:

- Cardinia Shire Council differentiated the registration fee based on the risk category of the business (\$139 for class three premises — low risk — and \$436 for class one and two premises — high and medium risk) which included one routine inspection for all businesses and an assessment of audit or compliance

check for class one and two businesses. New registrations were liable for a 50 per cent higher registration fee

- Brisbane City Council renewal fees for licence certificates do not include any audits or inspections. Renewal fees vary by the size of the premises and prior compliance with food safety regulations (table 9.4)
- Rockhampton Regional Council charges different licence renewal fees depending on the size of the business and the risk categorisation — ranging from \$140 to \$765. They charge an additional \$445 for businesses that require a food safety program
- the City of Stirling charges \$50 for a notification of food businesses or a transfer of ownership fee
- Coffs Harbour City Council charges a \$110 registration fee for any food business including low risk businesses that do not require an inspection
- Hobart City Council charges new food businesses that register in the second half of the financial year 50 per cent of the standard registration fee.

**Table 9.4 Brisbane City Council licence renewal fees for food businesses**  
For 2011-12

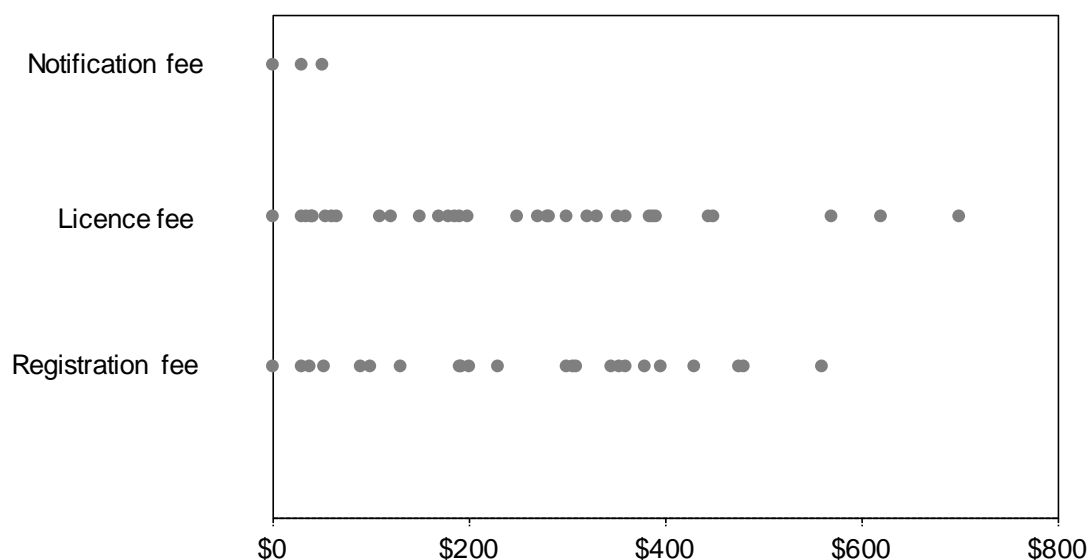
<i>Size</i>	<i>Limited</i>	<i>Minor</i>	<i>Medium</i>	<i>Major</i>
<i>Compliance history</i>	<i>0-5m<sup>2</sup></i>	<i>&gt;5-250m<sup>2</sup></i>	<i>&gt;250-1 000m<sup>2</sup></i>	<i>&gt;1 000m<sup>2</sup></i>
5 star rating	\$197	\$313	\$428	\$1 338
4 star rating	\$296	\$469	\$642	\$2 006
3 star rating	\$375	\$595	\$815	\$2 630
0 & 2 star rating	\$395	\$626	\$856	\$2 676

Source: [www.brisbane.qld.gov.au](http://www.brisbane.qld.gov.au).

Given the variation in the regulatory actions required to process a registration, license or notification application across jurisdictions and the differences in business criteria used to differentiate fees charged by LGs, it is difficult to assess whether registration, license or notification fees impose an unnecessary burden on food businesses.

To be consistent with good regulatory practice, fees should typically recover the administrative cost of processing the notification, registration or licensing application. Average fees were \$27 for notification and around \$250 for licensing and registration. However there was substantial variation in the fees charged by reporting LGs (figure 9.2). It is therefore reasonable to question if the variations in fees do reflect differences in administrative costs.

**Figure 9.2 Fees charged to notify, register or license a food business**  
Range of annual fees reported by responding local governments for 2009



Data source: Productivity Commission survey of local governments (2009, unpublished).

### *Food Safety Program*

The main ways that food safety program requirements can impose an unnecessary burden on businesses are if:

- some types of food businesses can be required to develop and implement food safety programs even though there is insufficient evidence to justify the need
- the food safety program requirements are unnecessarily complicated for food businesses where a clear public need for food safety programs can be demonstrated.

The decision to exclude the retail/food service sector from the national standard for food safety programs (standard 3.2.1) was taken in 2003. Since that time, Victoria has implemented a range of tools and guides that substantially reduce the administrative burden associated with developing food safety programs. For example, the Victorian Department of Human Services has prepared a template food safety program for one off events held by voluntary groups or community organisations (Victorian Department of Human Services 2007).<sup>5</sup> In addition, an online tool has been developed where food proprietors can generate a complete food

<sup>5</sup> South Australia also provides food safety plan templates for sectors serving vulnerable populations.

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safety program based on a small number of questions about their business (Victorian Department of Health 2010b).

South Australia has also prepared template food safety programs for some businesses covered by standard 3.2.1, including hospitals, aged care facilities and child care centres (SA Health 2010). While food safety templates have not been made available for all businesses covered by standard 3.2.1, an initial focus on assisting hospitals, aged care facilities and child care centres appears warranted as such businesses may have staff with limited experience and training in food safety.

In 2009, the NSW Food Authority rejected the adoption of mandatory food safety programs for all businesses on the basis of two studies that questioned the relative costs and benefits of introducing food safety programs to the food service sector — including cafes and restaurants (NSW Food Authority 2009a). However:

- those studies predated the introduction of standard 3.2.1
- they were an assessment of the likely impact of a possible future policy
- good regulatory practice would be to undertake a follow up study of the impact of the policy after implementation.

Given the identified gap in the risk management of retail food regulation, it may be appropriate to review the cost benefit analysis of extending mandatory requirements for food safety programs to all high risk food activities taking into account the cost and efficacy of the Victorian arrangements. Such a review could also explore alternative means of addressing the perceived gap in the risk management framework.

The provision of template food safety program tools in Victoria and South Australia represent leading practice. The availability of templates not only reduces the administrative burden on businesses — particularly small businesses — but can also reduce the administrative burden on local governments.

#### LEADING PRACTICE 9.4

*In instances when states require food businesses to have food safety programs, it would assist local governments, which usually administer and enforce the food safety programs, if they also provided either templates for different types of business (as in South Australia and Victoria) or online tools that allow businesses to generate food safety templates (as is available for Victorian businesses).*

In other regulatory areas, such as building codes, the introduction of outcomes-based regulation has been overlayed on the existing ‘deemed to comply’ provisions. If applied to food safety, such a regulatory combination provides the

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certainty typically valued by smaller businesses, while still providing larger and better co-ordinated food businesses the opportunity to explore alternative means of achieving food safety outcomes (PC 2009a). The South Australian Government recently stated their support for ‘a national approach to develop “deemed to comply” provisions (or equivalent) within outcome based standards’ (South Australian Government 2011, p. 3).

While the food safety templates and tools developed in Victoria and South Australia are not explicitly consistent with a ‘deemed to comply’ approach, the Commission considers that they are likely to be equivalent in practice. As such, they can, for the most part, be considered to represent leading practice at present. However, explicit ‘deemed to comply’ arrangements are still desirable because they would provide food businesses that use the food safety templates or tools greater certainty and legal protection.

*The value of food safety programs templates or tools to develop templates could be improved if food businesses that adhere to the procedures outlined in those templates are ‘deemed to comply’ with food safety regulations.*

## **9.4 Inspection activities**

One of the most prominent food safety functions for LGs is inspections. When performing inspections, environmental health officers (EHOs) have direct contact with food businesses and their staff. The impact on business stems from the frequency and duration of inspections, the fees charged as well as the approach taken to enforcement.

### **Regulatory roles**

LGs in all states are expected to undertake inspections of food businesses as part of their food safety regulation responsibilities — with those responsibilities outlined in state acts and regulations (table 9.2). One of the outcomes of the National Food Standards code was codification of food safety offences in state laws or regulations — resulting in greater consistency in categorising offences and enforcement penalties that can be applied (PC 2009a).

In addition, guidance on inspection activities is provided through the national Food Standards Code and advice from the Australia New Zealand Food Authority (2001). A key component of the national code concerns encouraging a more risk based approach to food safety regulation — including a methodology for assessing the risk categorisation of food businesses.

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LGs typically have discretion over the fees they charge for inspections, the frequency of inspections and the use of enforcement tools.

## **Scope for excessive burdens**

Where LGs are responsible for undertaking food safety inspections, they determine the frequency and duration of inspections and the fees to be charged. These two factors, along with the duration of food safety inspections contribute to variations in the burden faced by different food businesses.

### *Frequency of inspections*

The purpose of food safety inspections is to reduce the instances of food related illnesses. This can be achieved by ensuring that good food safety and hygiene practices are adhered to by relevant businesses and their staff.

Unnecessary burdens on business could occur if food safety inspections are undertaken too frequently. But is there any way to determine an appropriate frequency of inspections?

Environmental Health Australia (2003) provides guidance on the desirable frequency of food safety inspections when local legislation does not prescribe the required frequency. Environmental Health Australia recommends adopting an inspection frequency consistent with *The priority classification system for food businesses* (Australia New Zealand Food Authority 2001).<sup>6</sup>

Under the ‘Food Regulation Partnerships’ in New South Wales<sup>7</sup>, medium and high risk retail food businesses are expected to be inspected at least once every year — with low risk businesses only subject to inspection if complaints are received or if a food safety incident occurs. Based on state reporting for 2010-11, 127 councils in New South Wales met or exceeded the minimum expected inspection frequency, while 25 (or 16 per cent) were below the minimum expected inspection frequency (NSW Food Authority 2011). The NSW Food Authority asks councils who do not

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<sup>6</sup> While the guidance on inspection frequency is based on frequency of food safety audits, it is appropriate to assess the frequency of inspections against this regime because:

While it is recognised that that the Priority Classification System was intended to support a framework of auditing, the model has been developed upon the view that the System provides an appropriate risk basis for traditional inspection regimes. (Environmental Health Australia 2003, p. 6)

<sup>7</sup> New South Wales is in the process of reviewing the first three years of operation of the Food Safety Partnership to improve the effectiveness of food safety regulation.

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meet the minimum expected inspection frequency to provide an explanation for that occurrence and to put in place actions to achieve targets.

Victoria has legislated minimum compliance checks, but additional information would be needed to identify if inspection frequencies by LGs are consistent with legislated requirements. For businesses with an approved food safety program, legislation permits the use of audits by approved food safety auditors in lieu of food safety inspections.

The frequency of inspections in other states can be compared to the priority classification approach. That approach bases the inspection frequency on the risk classification of food businesses and on how well the business has complied with food safety requirements. For example, the guidance for low risk food business is that, in the absence of information on previous compliance history, they should be inspected every 18 months. If they have maintained a high level of compliance over at least two inspection cycles, they could be subject to less frequent inspections (but at least one inspection every two years). If poor compliance history is established, inspections should occur more frequently (table 9.5). In fact, Environmental Health Australia notes that ‘compliance history may demonstrate a need for higher frequency of inspection than indicated under heading “Maximum”’ (2003, p. 6).

**Table 9.5 Recommended frequency of food safety inspections**

<i>Risk classification</i>	<i>Recommended time period between inspections (months)</i>		
	<i>Starting point</i>	<i>Maximum</i>	<i>Minimum</i>
Low	18	12	24
Medium	12	6	18
High	6	3	12

*Source:* Australia New Zealand Food Authority (2001).

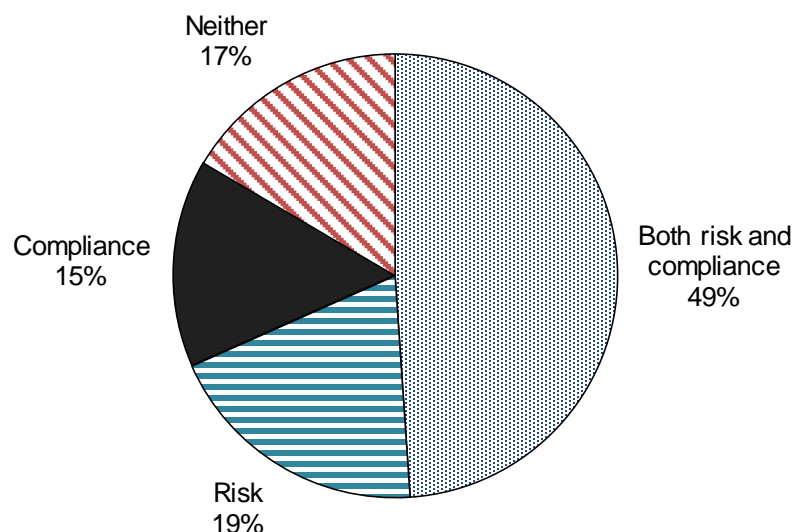
Around two thirds of LGs who responded to food safety surveys — both for this study and to the Commission’s 2009 study on food safety regulation — indicated that they based the frequency of food safety inspections on the risk classification of businesses (figure 9.3).



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**Figure 9.3 Basis of food safety inspection frequency**  
Per cent of responding local governments

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*Data sources:* Productivity Commission survey of local governments — food safety survey (2011–12, unpublished); Productivity Commission survey of local governments (2009, unpublished).

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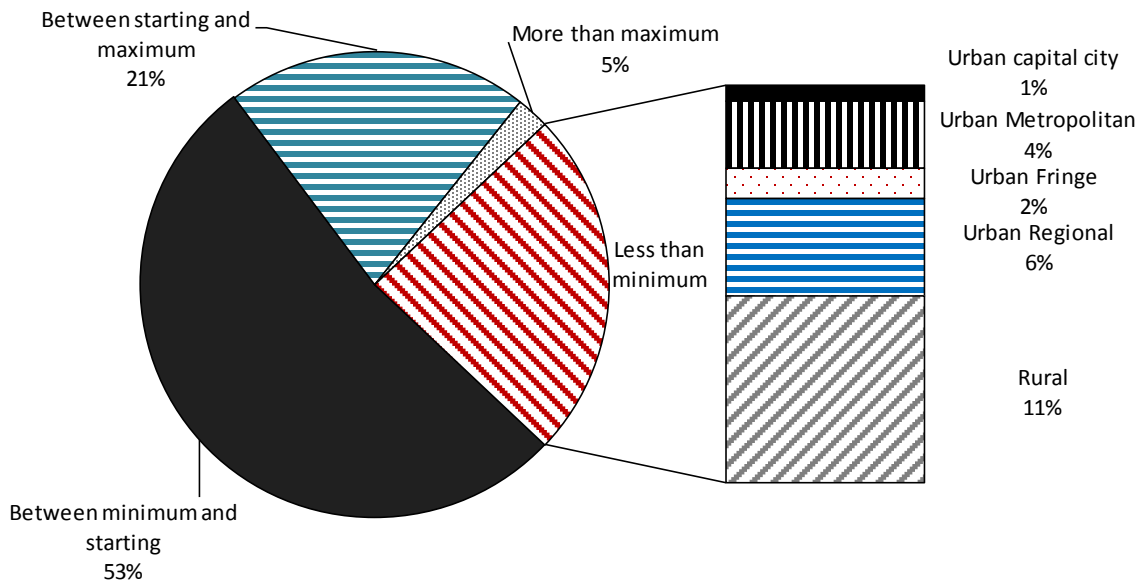
#### LEADING PRACTICE 9.5

*If local governments systemically collect and use information on risk and the compliance history of individual food businesses to inform their regulatory practices — such as inspection frequency and fee setting — it should both improve outcomes and reduce burdens on low-risk and compliant businesses. This is already done by most local governments.*

To determine if LG inspection activities are consistent with the recommended practice, it is necessary to have information on the number of businesses by risk category and the number of routine inspections. Combining data from the two surveys and using a state based collection for New South Wales, sufficient data is available to examine 215 LGs. About three quarters of those LGs had a reported inspection rate between the minimum and maximum recommended rate (figure 9.4).

While all inspection rates between the minimum and maximum recommended must be considered to be a reasonable burden on business, available evidence suggests burdens are towards the lower end of reasonable — as over three quarters of LGs reporting food safety inspection frequency within the recommended range are closer to the minimum recommended frequency than the maximum frequency.

**Figure 9.4 Inspection rates compared to recommended frequency**  
Per cent of responding local governments



Data source: PC calculations.

Only five LGs reported undertaking a higher than recommended frequency of routine inspections in 2009. For three of these, the number of inspections undertaken only slightly exceeded the maximum recommended (by less than 10 per cent). Only one of those three authorities reported having a worse than average compliance history — 50 per cent non-compliance compared to 32 per cent for all authorities.

While a limited number of LGs reported undertaking a higher than recommended rate of food safety inspections, around one in five reported undertaking less than the minimum frequency of food safety inspections. Given that low and medium risk food businesses may not need to be inspected each year, it is possible that such LGs may be adhering to the recommended frequency of inspections, but only if most businesses not subject to annual inspections were not due to be inspected in the survey year. As such, this pattern is suggestive of — but does not necessarily demonstrate — a large proportion of LGs performing less than the recommended number of food safety inspections.

A possible reason for a lower than recommended number of food safety inspections is the difficulty LGs have in attracting and retaining the services of EHOs. However, chapter 4 indicates that shortages of EHOs are more commonly reported by urban fringe LGs, yet low frequency of inspections are found in all geographic classifications except remote (figure 9.4).

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*Analyses of inspection activities indicate that there is a greater likelihood that LGs are performing less than the recommended number of routine inspections than that they are unnecessarily burdening businesses by performing more than the recommended number of inspections.*

### *Inspection fees*

Recognising that food safety inspections are a necessary component of an efficient food safety system and that it is reasonable for regulatory agencies to recover costs for necessary inspections — it is reasonable that businesses are charged for food safety inspections.

LGs use a range of different approaches for determining fees for food safety inspections. As noted earlier, some LGs include the cost of one or more inspections in the fees charged to register or licence food businesses. When fees are charged, they are sometimes on the size or risk profile of the business. Some scheduled fees are on a per inspection basis while others are based on the duration of the inspection. For example:

- Esperance Shire reported charging \$210 to inspect a premise with 4 or less tables and \$260 if there are more than 4 tables
- the City of Charles Sturt reported inspection fees of \$88 if a business had less than 20 full time equivalent staff or \$200 otherwise
- Rockhampton Regional Council reported not charging for initial inspections, but re-inspections attract a fee of \$80 an hour.

As part of the Commission's 2009 food safety survey, information on the inspection fees charged by 44 LGs was collected (not including authorities who reported charging no fees). For 28 authorities, the same inspection fee was reported for all food businesses, while 16 indicated charging different fees based on the risk category of the food businesses.

When inspection fees were charged, the minimum reported fee was \$36, while the maximum fee varied from \$317 for low risk businesses up to \$635 for high risk businesses. While there is a wide variation in fees charged, most authorities reported charging less than \$90 per inspection — indicating that relatively high inspection fees were uncommon.

A complicating factor when comparing fees is that some LGs do not charge for registering food businesses, but may have a higher fee for inspection. The three most common approaches to fee setting are:

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- a registration/notification fee that does not include the cost of inspections and separate fees for each inspection
  - a registration/notification fee that includes one or all regular inspections, but businesses are charged for follow up inspections
  - no fee for registration or notification of a business, but larger inspection fees.

Transparency is a major advantage of a fee model based on separate registration or notification fees and inspection fees. When fees relate to a single regulatory function, it is easier to determine if the charge reflects the cost of LGs providing that service, or if it is excessive. Transparency of fee setting could be an important consideration for LGs, food businesses and state-based price regulation bodies. More transparent fee setting arrangements should reduce the risk of unwarranted increases in fees.

Given that the frequency of inspections is at the discretion of LGs, charging a separate fee for each inspection could encourage over-provision of inspections, although the Commission has no evidence that this is occurring or is widespread. While not commenting on the activities of LG, Woolworths noted problems with potential over-servicing by private food safety auditors. Private auditors were identifying a higher proportion of what they considered to be major non-compliance issues — but Woolworths considered that these non-compliance issues were ‘in some instances for seemingly trivial matters’ (2009, p. 5). The identified non-compliance issues would result in follow up audits being undertaken, with the businesses being charged for those additional audit inspections.

In contrast, combining inspection fees with registration or notification fees can provide businesses with greater certainty over the fees they will be charged throughout the year. It may also reduce the administrative burden on businesses that would only need to process a single payment. Under this model, LGs could have an incentive to under provide food safety inspections.

A number of states are already addressing the scope for under provision of food safety inspections by developing guidelines for, or agreements with, LGs on inspection targets — such as the Food Regulation Partnership in New South Wales.

The development of food inspection targets should overcome any actual or perceived bias that fee structures may have on inspection frequency. As such, the relative merits of charging combined or separate fees for registration and inspection depend on the impact on business. If it is more important to business to have greater transparency in fee increases, separate fees would be advantageous. However, if greater certainty about charges throughout the year is more important — a combined fee would be preferable. As this is a question of preference — and one

where the answer is likely to change depending on the type of business and the regulatory history, as well as changing circumstances over time — no definitive leading practice can be identified.

### *Duration of inspections*

In addition to inspection fees, businesses will also incur costs of participating in food safety inspections. Even an effective and efficient food safety inspection will interfere with the usual operation of a food business. Collecting food samples, inspecting equipment and surfaces will require some staff to be interrupted. Officers performing the inspections are also likely to spend time talking to staff about their food safety practices — particularly for those businesses that have food safety programs.

One way of approximating the indirect costs on businesses of participating in food safety inspections is to examine the time it takes to complete an inspection. Based on survey responses from 99 LGs in 2009, reported inspection times in New South Wales and Western Australia were the shortest, while those in Victoria and Queensland were the longest (table 9.6).

**Table 9.6 Average duration of routine food safety inspection**

Minutes per inspection by state and category, 2009

	<i>Urban Capital City</i>	<i>Urban Metropolitan</i>	<i>Urban Fringe</i>	<i>Urban Regional</i>	<i>Rural</i>	<i>Remote</i>	<i>All categories</i>
New South Wales	..	35	45	33	33	20	33
Victoria	..	73	65	41	65	..	60
Queensland	60	56	45	60	75	..	60
Western Australia	30	34	43	30	60	45	41
South Australia	60	49	60	60	38	..	52
Tasmania	45	..	38	45	45	..	43
<i>Average</i>	<i>49</i>	<i>51</i>	<i>50</i>	<i>49</i>	<i>51</i>	<i>37</i>	<i>50</i>

.. Not estimated, as either no survey responses were received from a specific category of LGs and/or that responses were received, but no answer was provided in relation to average duration of inspection.

Source: Productivity Commission survey of local governments (2009, unpublished).

One reason for longer inspection times in Victoria in 2009 was that all food premises in that state (except those selling negligible risk foods) needed to have a food safety program. It is likely that greater staff interaction was required when performing an inspection when food safety plans are in use. Other reasons for differences in average inspection time include:

- differences in the type of businesses being inspected
- differences in the risk profile of businesses.

While information has not been collected on the inspection experience of individual businesses, the type of business is used as one of the criteria when determining the risk categorisation of businesses. Information on LG inspection activities by risk categorisation was not collected as part of the 2009 survey, but the Commission included the risk categorisation of inspection activities in the survey carried out for this report. The limited responses from that survey indicate a strong relationship between inspection duration and risk category, with substantially longer inspection times for relatively higher risk businesses (table 9.7).

**Table 9.7 Inspection duration by risk categorisation of food business**

For LGs who varied inspection frequency based on classification of business risk, 2011

<i>Inspection times</i>	<i>Units</i>	<i>Negligible risk</i>	<i>Low risk</i>	<i>Medium risk</i>	<i>High risk</i>
Shortest	minutes	10	10	15	30
Median	minutes	15	30	45	60
Longest	minutes	30	60	90	120
LGs reporting inspection times	number	6	29	34	34

Source: Productivity Commission survey of local governments — food safety survey (2011–12, unpublished).

*The current practice of subjecting higher risk food businesses to relatively longer inspections – presumably also more onerous — appears appropriate. However, it is not possible to determine if the inspection times generally are appropriate. The (possibly limited) practice of subjecting negligible risk food premises to food safety inspections appears unwarranted.*

## 9.5 Enforcement measures

Enforcement of food safety regulations has a direct impact on food businesses. Depending on the type of enforcement measure used, the impact on food businesses may be minimal (or even positive) or in the extreme, could result in the closure of a food business.

The scope to apply enforcement measures rests in state acts and regulations (table 9.2), but has become increasingly harmonised through the Food Standards Code. EHOs can also draw upon the national enforcement guidelines. This

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guideline is intended to promote an enforcement culture with a prime focus on food safety outcomes.

## **Regulatory role of local government**

When non-compliance with food safety regulations is detected, LG officials have a progressive range of enforcement measures that they can use (box 9.1).

### **Box 9.1      Progressive range of enforcement outcomes**

During inspections of food businesses it is not unusual to identify breaches of the food safety standards. The vast majority of food safety breaches identified by officers are minor in nature, however, more serious breaches that can have an impact on public health are identified from time to time.

A range of compliance tools are available to deal with non-compliance. For minor breaches verbal or written warnings are often used. Where a serious public health risk is identified, premises can be ordered to close or receive a 24 hour Improvement Notice.

Depending on the severity, some breaches may warrant a re-inspection to ensure the matter is rectified. Minor breaches may be rectified at the time of the inspection or within a defined timeframe and do not necessarily have an impact on ongoing food safety.

Most councils use a graduated escalation approach to enforcement, consistent with the Australian & New Zealand Food Regulation Enforcement Guideline (National Enforcement Guideline). This allows an officer to exercise discretion to apply a proportionate response based on the risk to food safety. This results in a higher number of warning letters, fewer improvement and penalty notices, and even fewer applications of punitive tools, such as seizure, prohibition orders and prosecution.

*Source:* NSW Food Authority (2011, p. 5).

## **Scope for excessive burdens**

An objective for the national enforcement guideline is to foster ‘a cooperative and collaborative approach with business ... and one that does not place unnecessary imposts on business’ (ISCEGWG 2009, p. 4) while still ensuring that the food sold is safe.

Enforcement penalties can be costly for food businesses. In addition to the cost of complying with improvement notices or monetary fines, businesses can also suffer significant revenue loss if their reputation is diminished because of food safety

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enforcement. As such, excessively harsh or arbitrary use of food safety enforcement tools can impose substantial excessive burdens on business. Does any evidence exist to indicate food safety enforcement is overly burdensome?

Some broad generalisations about food safety enforcement can be made without examining the merits of individual food safety enforcement decisions. Part of the approach of the national enforcement guideline is to use the least burdensome enforcement tools that are likely to result in the regulatory objective of food safety being achieved. Applying the least burdensome penalties required to encourage or ensure compliance is consistent with the Braithwaite enforcement approach to responsive regulation (appendix I) — often referred to as ‘escalating enforcement’.

### *Graduated use of food safety enforcement tools*

A number of states publicly release information on the food safety enforcement measures undertaken by LGs. For example, New South Wales and Western Australia provide information on the progressive range of adverse enforcement outcomes, while South Australia publishes statistics on warnings, improvement notices and expiations<sup>8</sup> and Queensland publishes information on infringement notices. Victoria is planning on releasing their first annual report on state wide food regulation in early 2012.

In New South Wales, information on enforcement activities is only available for the 37 916 high and medium risk food businesses notified as operating in the state in 2010-11. The most common type of enforcement action related to warning letters concerning 6914 issues — 18 per cent of high and medium risk businesses. In the same year, there were 1455 improvement notices and 1374 penalty notices issued, 61 prohibition orders and 12 prosecutions for food safety breaches in New South Wales (NSW Food Authority 2011).

In Western Australia, compliance tools were used on 481 occasions in 2009-10 — equivalent to 3 per cent of food businesses in operation (although, only 37 per cent of LGs have compliance and enforcement policies in place). Improvement notices were the most common tool used (409 occasions), followed by infringement notices (44 times), seizures (20 times), prohibition orders (6 times) and legal action was taken twice (WA Department of Health 2011).

The relative use of enforcement tools in New South Wales and Western Australia is consistent with the ‘escalating enforcement’ approach. Responsive regulation encourages the use of the least burdensome disciplinary tool likely to achieve the

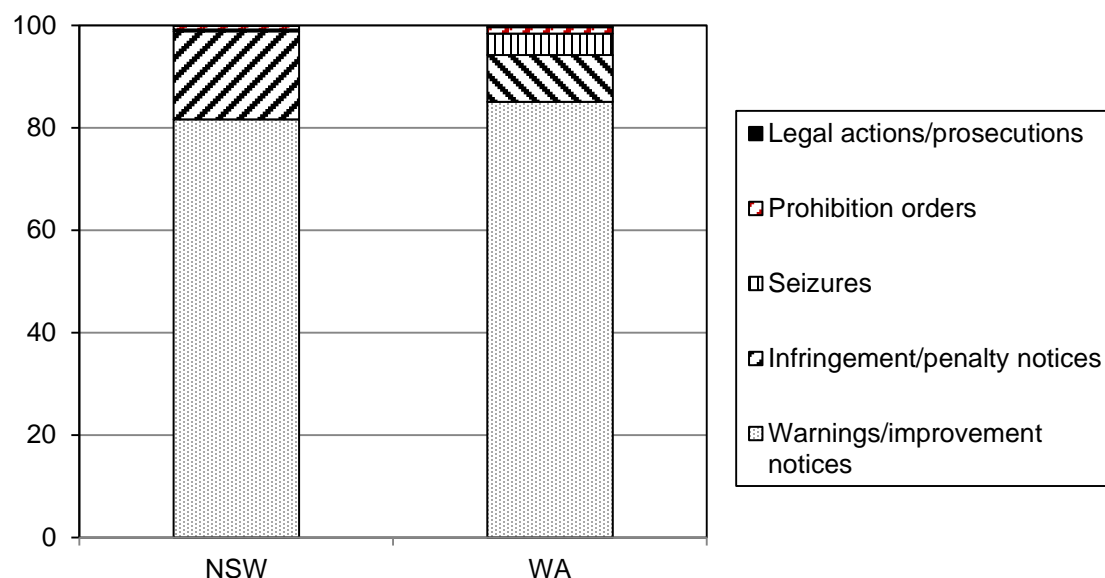
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<sup>8</sup> Used in more serious instances of non-compliance than improvement notices.



regulatory outcome in the first instance, with escalating enforcement activity only undertaken if ongoing non-compliance occurs. As such, over 80 per cent of enforcement activities in New South Wales and Western Australia were warnings or improvement notices, with each more stringent enforcement tool being used less often than the preceding tool (figure 9.5).

**Figure 9.5 Escalating use of food safety enforcement measures**  
Per cent of enforcement measures used in New South Wales<sup>a</sup> and Western Australia<sup>b</sup>



<sup>a</sup> For medium and high risk food businesses in 2010-11. <sup>b</sup> For food businesses operating under food safety enforcement agencies that had implemented enforcement policies in 2009-10.

Data sources: Western Australian Department of Health (2011); NSW Food Authority (2011).

For South Australia, the most recent information available on the use of enforcement actions by LGs is for 2010-11. In that year, there were 2440 warnings (or 8 per cent of food businesses in the state), 861 improvement notices and 63 expiations (SA Health 2011). In Queensland, there were 266 infringement notices issued in 2009-10 — representing 1.1 per cent of licensed food business (Queensland Health 2011).

*The available evidence indicates that when EHOs identify non-compliance with food safety regulations, they most frequently use the least burdensome enforcement tools at their disposal (including informal or formal warnings and/or improvement notices). In contrast, the most serious enforcement tools (including prohibitions and legal action) are used relatively sparingly.*

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### *The role of education in food safety enforcement*

An important adjunct to enforcement activities is education. None of the states systematically collect data on LG education activities, but anecdotal information highlights the education role played by some LGs:

- a number of South Australian LGs included information on education activities when reporting on their food safety highlights for 2009-10
- Western Australia is planning on including education as part of the 2010–11 food safety activity report.

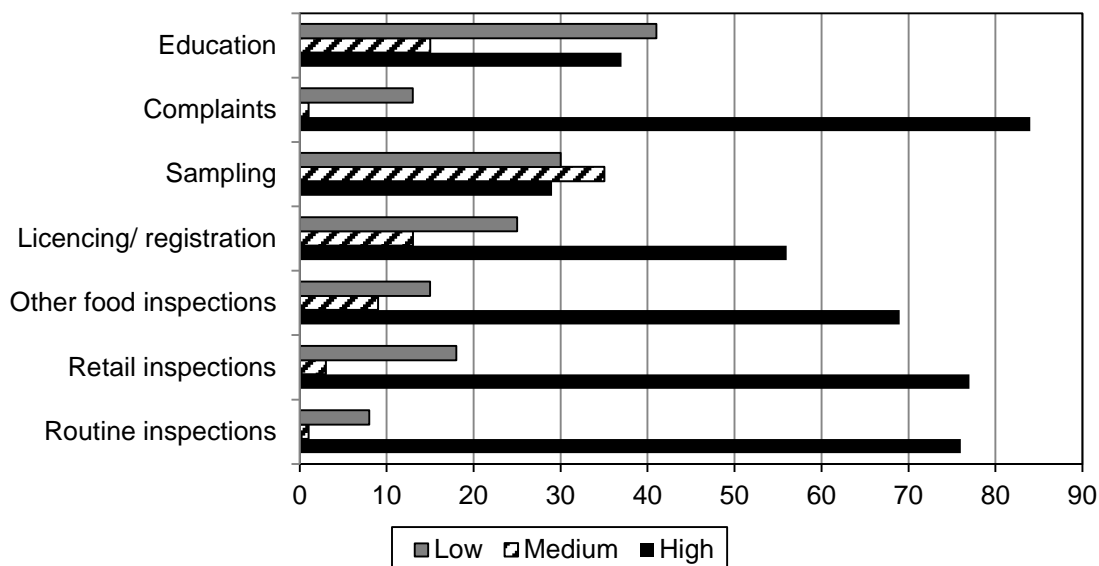
Having regulators fulfil an educative function is an important part of the national enforcement guideline. For businesses who are responsive to education and guidance, having EHOs explain and/or demonstrate improved food safety practices is likely to be the most effective means of improving food safety outcomes. However, it is very difficult to quantitatively assess the commitment to education.

While the Commission did not collect information on the number of food safety education activities undertaken by LGs, a question on the importance LGs place on different regulatory roles was included in the 2009 survey. Responses indicated that education was the activity rated as a low priority by the most LGs and a high priority by the second least number of LGs (figure 9.6).

This pattern of LGs placing a relatively low priority on education is found across all states and for all categories of LGs. A number of LGs are actively involved in educating local food businesses about food safety practices and regulation (for example, 74 councils in NSW organised or facilitated food handler training in 2011 — NSW Food Authority 2011). While LGs indicated education was a relatively low priority compared to other food safety functions, this may, in part, reflect that education is often provided during routine inspections.

Figure 9.6 **Relative priority of food regulation activities<sup>a</sup>**

As rated by responding local governments, 2009



<sup>a</sup> LGs could also nominate an 'other' category. As only 2 of the 99 responding LGs used the other category, it has been excluded from this figure.

Data source: Productivity Commission survey of local governments (2009, unpublished).

## 9.6 Public confidence in the food safety system

One way that LG regulation of food safety can have an indirect impact on food businesses is via the impact on public confidence. If the public has confidence in the food safety system, they are more likely to purchase food from a range of providers, but poor confidence in the system can reduce their willingness to purchase, adversely impacting on the profitability of all food businesses.

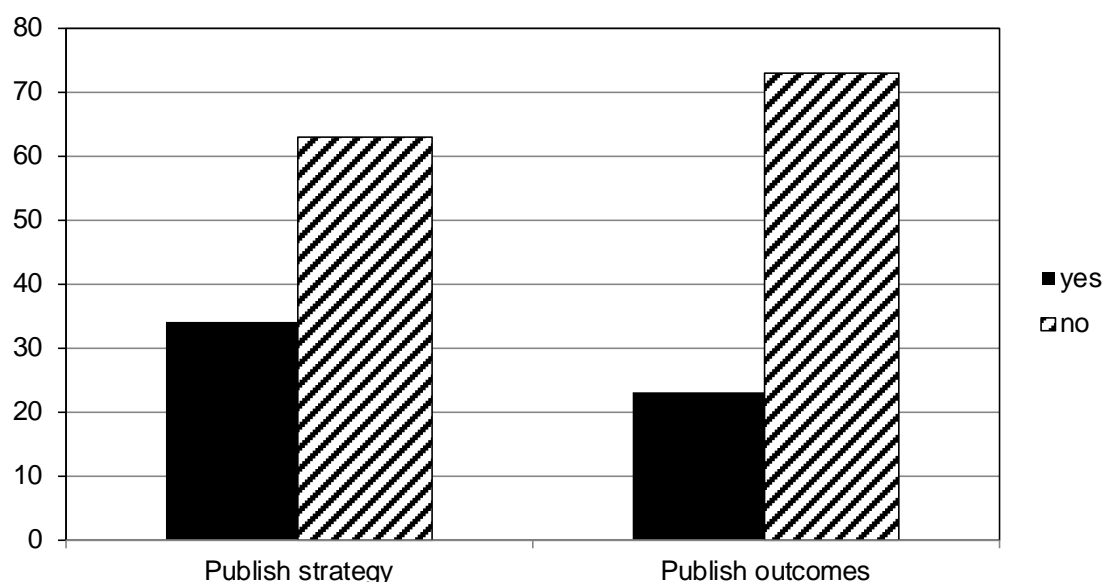
A number of factors are likely to improve public confidence in the food safety system, including:

- transparency — clear statement of processes and making the outcomes of regulatory actions publicly available
- responsiveness — complaints are acted on.

The majority of LGs that responded to the 2009 food safety regulation survey undertaken by the Commission indicated they did not publish their food safety strategy or the outcomes of food safety enforcement activities (figure 9.7).

**Figure 9.7 Did local governments publish food safety strategies or inspection outcomes?**

Per cent of responding local governments, 2009



*Data source:* Productivity Commission survey of local governments (2009, unpublished).

While most LGs have not made the results of their food safety surveillance publicly available, there has been a marked improvement in the transparency of food safety outcomes nationally — with local governments contributing to that process.

The development of the OzFoodNet in 2000 has improved the identification of the causes of foodborne illnesses and strengthened the evidence base for determining appropriate food safety policy. The development of a reliable and trusted means of investigating outbreaks of potentially foodborne illnesses also provides consumers with greater certainty about the risks of patronising retail food premises. The evidence base amassed by OzFoodNet highlights that most gastrointestinal illnesses are unrelated to commercial food businesses — but some outbreaks, especially *Salmonella*, are most commonly identified from commercial settings (OzFoodNet Working Group 2010). As such, these arrangements should increase consumer confidence in retail food businesses which maintain high food hygiene standards.

This information informs state and local governments about evolving food safety risks, the relative risk categorisation of different food businesses (table 9.8) as well as storage, handling or preparation factors. Such evidence is then used in:

- educating food businesses about safe food practices
- determining the risk categorisations of food businesses which in turn
  - affects the frequency of inspections undertaken by LGs, and

- identifies issues to be addressed in food safety plans for those businesses required to prepare them.

**Table 9.8 Food preparation settings implicated in disease outbreaks**  
Australia, 2009

<i>Setting for food preparation</i>	<i>People affected</i>	<i>Outbreaks</i>	
		<i>Number</i>	<i>% of all outbreaks</i>
Restaurant	921	64	39
Aged Care Facility	294	20	12
Commercial caterer	343	18	11
Private residence	74	11	7
Primary produce	471	10	6
Takeaway	149	9	5
Other	128	8	5
Bakery	51	4	2
Camp	59	4	2
Military	23	2	1
School	37	1	1
Child Care	18	1	1
Fair/festival/mobile service	3	1	1
National franchised fast food	3	1	1
Unknown	75	9	5
<b>Total</b>	<b>2 679</b>	<b>163</b>	<b>100</b>

Source: OzFoodNet Working Group (2010).

While OzFoodNet is a joint initiative of the Australian, state and territory governments, local government plays an essential role in the operation of OzFoodNet. Most LGs are involved in providing samples from businesses that may be the cause of outbreaks of food related illness. In order to accurately identify the cause and source of food outbreaks, samples need to be collected and analysed while the pathogens are still present.

As such, any delay or failure by LGs in following up food safety complaints would undermine the OzFoodNet system, reduce public confidence in the safety of retail food premises generally and impair the evidence base for food safety policy.

It appears that LGs are reasonably responsive to food safety complaints. Recent information from New South Wales indicated a 99 per cent follow up rate on food safety complaints in 2010-11 (NSW Food Authority 2011). The Commission also collected data on the follow up to complaints both as part of this study and in 2009. While the survey data does not cover all LGs, it indicates a generally high response rate to food safety complaints, with the lowest response rate for any category of LG being 40 per cent of complaints investigated (table 9.9).

**Table 9.9 Response to food complaints by local governments**

Inspections initiated by complaints as a per cent of complaints received<sup>a</sup>  
(Number of responding local governments)

	New South Wales	Queensland	South Australia	Tasmania	Victoria	Western Australia
Urban	—	40	132	100	—	117
capital city	(0)	(1)	(1)	(1)	(0)	(1)
Urban	92	64	64	—	120	40
metropolitan	(5)	(6)	(8)	(0)	(9)	(11)
Urban fringe	84	114	132	100	100	117
	(4)	(1)	(5)	(3)	(3)	(6)
Urban	79	103	51	105	55	57
regional	(7)	(9)	(3)	(3)	(7)	(1)
Rural	76	100	74	97	72	100
	(8)	(2)	(7)	(7)	(4)	(8)
Remote	50	61	103	—	—	100
	(1)	(1)	(1)	(0)	(0)	(3)
State	86	61	103	100	94	105
average	(25)	(20)	(25)	(14)	(23)	(30)

<sup>a</sup> Response rates weighted by reported number of complaints received by each LG. As a complaint can lead to multiple inspections (either at the same premises or across a number of potential sources of foodborne illness, the number of follow up inspections can exceed the number of complaints).

Sources: Productivity Commission survey of local governments — food safety survey (2011–12, unpublished); Productivity Commission survey of local governments (2009, unpublished).

*Collecting and publicly disseminating information on LGs food safety regulatory activities can improve public confidence in both the food safety system and in the food they purchase and consume from food businesses. While LGs in all states collect relevant information, not all such information is made publicly available. However, a number of states are providing the public with an increasing array of information on LGs' regulatory roles.*

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#### LEADING PRACTICE 9.6

*Food businesses and consumers benefit from a transparent food regulation process. Examples include:*

- *providing information explaining the basis for food safety policy — particularly the reasons why some businesses are treated differently — to assist local governments and other parties in understanding the food safety system. The NSW Food Authority makes this information available to the public*
- *state governments providing information on various food safety regulatory activities of local governments, including fees and charges imposed, the frequency of inspection activities and the results of food safety enforcement actions, as is the case in New South Wales, Queensland, South Australia and Western Australia.*

## 9.7 Issues concerning specific food businesses

Interested parties from two industries — supermarkets and mobile food vendors — have raised concerns that the current approach to food safety regulation poses particular difficulties for their industries.

### Supermarkets

Given the prominent role that LGs play in food safety regulation, there are invariably differences of opinion and interpretation from EHOs from different LGs — despite efforts to implement a national approach to food safety. Both major supermarket chains have attempted to establish a national business model, including production, storage and handling procedures as well as the fitting out of their stores. Coles Supermarkets Australia provided a range of examples of how the differences of interpretation of food safety requirements are having an adverse impact on their profitability (box 9.2).

COAG is due to consider the introduction of consistent reporting and enforcement frameworks and wider use of food safety interpretations in 2013. Such initiatives should improve the national consistency of food safety regulation and would be of particular benefit to supermarkets and other food businesses that operate a common business model in stores throughout the country.

In South Australia, a range of initiatives are in train to improve the consistent application of food regulation and support the professional development of EHOs

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working in that state (LG ASA and SA Health 2010). These actions should directly target many of the areas of concern raised by Coles Supermarkets Australia.

**Box 9.2 Food safety issues raised by Coles Supermarkets Australia**

Despite significant progress at a national and state level to improve consistency of food policy, there are still differences in the interpretation of regulation between those responsible for developing it and those responsible for enforcing it. For example, between Food Standards Australia & New Zealand and relevant Food Authorities and between Environmental Health Officers (EHOs) on issues such as food safety and food borne illness/poisoning bacteria.

Recently our supermarkets have received mixed advice from councils about the regulatory requirements for open fish displays. In Brisbane, for example, we can display fish fillets, but not in Cairns where only the whole fish is permitted. In Victoria, our Werribee store is required to put plastic cloches over fish on ice (impacting on sales) whereas our Donvale store does not require plastic cloches.

In those supermarkets in New South Wales where we have removed the fish box displays from front area of the fish slab display, certain councils have requested additions or modifications to the sneeze guards currently in place (e.g. adjustments, height requirements etc.). In many cases, our supermarkets have been treated differently to others (e.g. fish markets and wholesalers) who operate the same fish display standards.

While independent food safety data has been provided on open fish display on ice demonstrating food safety compliance, certain councils have still opposed the displays on the basis of risk that smaller retailers who may not have the same robust procedures and controls may copy. We believe the overall objective should be for councils to ensure that any retailer who offers the concept is doing so in a way that is safe.

*Source:* Coles Supermarkets Australia (sub. 5, p. 2).

## **Mobile food vendors**

Mobile food vendors face particular challenges in dealing with LGs, mainly because they are capable of operating in multiple locations (including in different LG areas). Some LGs apply restrictions to mobile food vendors that they do not apply to fixed food premises.

The Commission investigated the fees charged to mobile vendors and the conditions placed on their operation by a random subset of LGs (appendix H).

Mobile vendors face a range of restrictions on their activities. These include operating in residential areas, what music they may play (or at what volume) and



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the types of streets they may operate on. While some of these restrictions may be considered common sense — such as banning mobile food vendors from trading on highways — others are clearly aimed at minimising mobile vendors' ability to compete with fixed food premises. Some of the trading restrictions include:

- not permitting mobile food vans that prepare food
- restricting trading to certain streets
- not permitting trading in or near public parks
- not permitting trading in residential areas
- not permitting trade within certain distances (200 metres is common) of fixed food business offering similar products
- not permitting vendors near shopping centres
- restricting trading times — such as only permitting mobile food vendors to open late at night or after the typical closing times of fixed food premises
- issuing itinerant trading permits which require food business to move on shortly after serving customers
- restricting the number of permits issued to trade in public areas
- restricting the number of days a year on which vendors can trade.

LGs also impact on the operation of mobile food vendors in other ways. Vendors selling from community land must obtain street trading permits for each of the LG areas in which they operate. Some inner-city councils require street trading permits for specific locations with fees starting at several thousand dollars annually. They also restrict the number of vendors that can use these sites, running annual tendering processes:

Mobile food vendors must apply for development approvals if they want to operate from a private property. The approval process includes an environment assessment — which incorporates an assessment of waste handling procedures. Vendors may also need local government approval:

- for garaging or maintaining the mobile food vending vehicle at a premises, especially where the premises are used for storing food supplies. (NSW Food Authority 2009b, p. 7)

Some LGs are actively reducing the administrative burdens on mobile food vendors. For example, as part of the 'Splash Adelaide' initiative, mobile food vendors (and other targeted businesses) had the opportunity to use a simplified application and processing of permits was expedited (Adelaide City Council, sub. DR43).

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Mobile food vendors may also be subject to multiple inspections, not only by different LGs, but also by the same LG. For example, a participant in this study gave an example that one of the company's mobile food vendor vehicles was inspected twice on the same day by officers from the same LG — with the company liable for fees for each inspection.

Some LGs apply additional registration requirements for mobile food vendors than those required for fixed premises. For example, a Tasmanian LG requires mobile food vendors to submit to a police check and to have the support of three residents as a precondition for applying for a food hawker's licence.

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## 10 Public health and safety

### Key Points

- Responsibility for public health and safety regulation is shared across the three levels of government in Australia — except in the Northern Territory where local governments (LGs) play no role and the ACT where there is no system of local government.
- Public health and safety regulation is a major task for local governments in Australia.
  - A wide array of businesses are regulated by local governments under public health regulations.
- Small and medium businesses indicated that the main public health and safety dealings they had with local government were seeking advice, approvals or being subject to inspections.
  - Overwhelmingly, businesses were satisfied with their public health and safety dealings with local government (71 per cent).
  - The main concerns raised by business related to uncertain approval times and the length of time required to comply with regulations.
- Efforts to increase transparency and to establish a risk-based and responsive enforcement approach for public health functions have been occurring.
  - However, as there is divergence in public health responsibilities delegated to local governments in different jurisdictions, such coordination is occurring at the state level.
  - Given the greater progress in coordinating food safety regulation, many of the leading food safety practices can be used as a template for good regulatory practice for other public health functions.
- Some leading practices for public health regulations include:
  - comprehensive annual reporting of the safety regulatory activities undertaken by local governments
  - for state governments to use the improved information base to assess the efficacy of regulatory practices and guide local government about the relative priorities among health and safety functions
  - informing prospective liquor licence applicants of the local government approvals they may require for a successful application.

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The chapter provides an overview of the regulatory framework for local government (LG) regulation of public health and safety (section 10.1) and a discussion of the nature of business burdens flowing from the regulations (section 10.2). A selection of public health and safety regulatory functions are then examined, including those in place for cooling towers and warm water systems (section 10.3), ensuring the sanitary conditions of publicly available swimming pools (section 10.4), the regulation of brothels in some states (section 10.5), skin penetration premises (section 10.6) and the role LGs play in liquor licencing (section 10.7).

Each section has the same structure. The regulatory roles that LGs have are examined, and then the scope for such regulations to impose excessive burdens on business is detailed. Where relevant, issues faced by specific types of businesses are explored before leading regulatory practices are identified.

Other public health areas that some LGs have a regulatory responsibility for, but which are not addressed in this chapter include:

- food safety (addressed in chapter 9)
- tobacco sales
- storage of hazardous materials
- fire safety responsibilities.

## **10.1 Overview of the regulatory framework**

All levels of government in Australia share responsibility for public health and safety. Some of the major roles for LG that impose a regulatory burden on business include registering the operation of air conditioning systems in commercial and retail centres and regulating businesses that entail an identified risk in the transmission of communicable diseases (table 10.1).

LGs do not have sole responsibility for any public health and safety functions. While actual arrangements vary, typically the state and/or Australian governments are responsible for establishing the public health policies and standards, with LG responsibility largely restricted to registration, monitoring and enforcement activities.

**Table 10.1 Regulatory public health responsibilities of LG**

Functions or activities that local governments enforce, monitor or register

	<i>Victoria</i>	<i>Western Australia</i>	<i>Queensland</i>	<i>South Australia</i>	<i>New South Wales</i>	<i>Tasmania</i>
Cooling towers in publicly accessible buildings	x	✓	x	✓	✓	✓
Warm water systems in publicly accessible buildings	x	✓	x	✓	✓	✓
Hygiene and health standards in publicly accessible swimming pools	✓ <sup>a</sup>	✓	✓	✓	✓	✓
Premises performing skin penetration procedures	✓	✓	✓	✓	✓	✓
Hairdressing premises	✓	✓	✓	✓	✓ <sup>b</sup>	✓ <sup>c</sup>
Brothels	✓	x	x	x	x	x

<sup>a</sup> LG does not have any explicit responsibility in this area but does have a legislated duty to 'remedy as far as practical all nuisances'. <sup>b</sup> Hairdressing premises are only regulated in relation to skin penetration activities. <sup>c</sup> Only if they also have a solarium.

Source: Productivity Commission survey of state governments (2011–12, unpublished).

## 10.2 The impact on business

LG interactions with business on public health regulation tend to occur either in relation to routine inspections or in response to complaints about health risks arising from business activities. In the 2011 Sensis survey of small and medium sized businesses undertaken for the Commission, around 24 per cent of respondents who had a regulatory dealing with LG indicated that they had dealings with LG over the past three years was on public health or professional matters (table 6.4). For a third of those businesses, the main impact of regulatory dealings with LG related to health and safety issues (survey of small and medium businesses — 2011).

Of the businesses who reported having health and safety dealings with LGs over the last three years:

- 71 per cent were satisfied with their dealings with LG
- 31 per cent had sought advice from a LG
- 29 per cent had applied for a licence or approval
- 20 per cent had received a routine inspection from a LG

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- the most common concerns raised were over uncertain approval times (47 per cent) and the length of time it took to comply with regulations (40 per cent).

### **Is local government public health regulation a problem for business?**

Of businesses which indicated that their main dealing with LGs related to public health or professional matters, nearly three quarters indicated that they were satisfied with their dealings with LG. Some of the areas where LG involvement in public health regulation can have negative impacts on business include:

- inconsistency in, or lack of, enforcement of regulatory requirements
  - including inconsistent requirements or enforcement between and within states and individual LGs
- poorly targeted regulatory requirements
- lack of publicly available or clearly articulated regulatory requirements.

These burdens increase the cost of doing business, sometimes to the point of discouraging the establishment of a new business in a particular LG. In relation to regulating public health, the scope to discourage the establishment of businesses can sometimes relate to the discretion that individual LG staff have in making decisions. Particular impacts on business and examples associated with specific areas of public health regulation are discussed later in the chapter.

## **10.3 Cooling towers and warm water systems**

The main public health risk associated with cooling towers and warm water heating systems is Legionnaire's disease. Legionella bacteria commonly occurs at low levels in many environments. The risk of contracting Legionnaires' disease increases when the concentration of Legionella bacteria is at very high (or dangerous) levels; the bacteria becomes airborne and then people with compromised immune systems are exposed (Comcare nd).

There are many potential sources of Legionellosis infection (including other facilities such as spa pools that are subject to registration and inspection by LGs). In contrast to cooling towers and warm water systems, other sources of Legionella bacteria are subject to less stringent regulation because they represent a lower level of risk.

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A major factor affecting the rate of growth of *Legionella* bacteria is water temperature. Water temperatures of 60 degrees or higher kill the bacteria. While the bacteria can survive in all temperatures below this level, the highest concentrations of bacteria are found in water between 20 and 45 degrees. Cooling water systems and warm water systems are high risk systems because they store water in or near this dangerous temperature range.

Cooling water systems are heat exchange systems which provide cooled water for a variety of applications (ranging from air conditioning of buildings to a variety of industrial processes). Warm water systems recirculate or reticulate warm water (at a nominal temperature of 45°C) primarily to service facilities for personal hygiene.

Australian and New Zealand standards (AS/NZS 3666 Air-handling and water systems of buildings – Microbial control) have emphasised the need for:

- performance based regulation
- technological solutions for limiting both the risk of dangerous *Legionella* levels occurring and limiting the vectors for possible exposure if dangerous levels occur
  - even after technological solutions are implemented, ensuring effective outcomes requires continuous maintenance and regular testing
  - as such, it is considered that building owners and operators are better placed to carry out such an ongoing program rather than relying on an inspection regime
  - standards strongly support a risk and compliance based approach for regulatory inspection regimes.

## **Regulatory role of local governments**

The approach to regulating high risk warm water systems and cooling towers varies across Australia. LGs in all states except Victoria and Queensland are responsible for registering cooling towers in their LG area. South Australia and Tasmania also require LGs to register warm water systems. In Western Australia, the onus is on the operators of warm water systems and cooling towers to notify their local government. The Victorian and Queensland Governments are responsible for the registration and inspection of cooling towers and warm water systems. In the Northern Territory, the Department of Construction and Infrastructure monitors all government buildings while private building owners have a duty of care to maintain their systems. The laws and regulations conferring responsibility on LGs in relation to warm water systems are outlined in table 10.2.

**Table 10.2 State Acts and Regulations conferring role for LGs in regulating warm water or cooling systems**

<i>State</i>	<i>Act</i>	<i>Regulation</i>
New South Wales	<i>Public Health Act 1991</i>	Public Health (Microbial Control) Regulation 2000
Western Australia	<i>Health Act 1911</i>	Health (Air Handling and Water Systems) Regulations 1994
South Australia	<i>Public &amp; Environmental Health Act 1987</i> <i>Public Health ACT 2011<sup>a</sup></i>	Public and Environmental Health (Legionella) Regulations 2008
Tasmania	<i>Public Health Act 1997</i>	Public Health Act 1997: Guidelines for Legionella 2001

<sup>a</sup> The *Public Health Act 2011* was approved in June 2011, but comes into force over a two year period.

Sources: Productivity Commission survey of state governments (2011–12, unpublished); state government websites.

In states where LGs are involved in the regulation of warm water systems or cooling towers, the main role played by LGs is identifying the systems covered by the regulations and monitoring the testing, cleaning and maintenance records kept by the operators. While businesses can be charged a fee when LGs perform inspections, the largest costs faced by businesses are in cleaning and maintaining their systems, and in documenting their regulatory compliance (table 10.3).

**Table 10.3 Sources of warm water system and cooling tower regulation costs to business**

<i>Cost</i>	<i>Sources</i>
Increased costs associated with LG interactions	<ul style="list-style-type: none"> <li>• Assessing legislative requirements</li> <li>• Lack of clarity or duplication in roles of different government agencies</li> </ul>
Increased business operating costs	<ul style="list-style-type: none"> <li>• Cost of testing, cleaning and maintaining systems</li> <li>• Staff time in maintaining records of regulatory compliance</li> <li>• Inspection and monitoring fees</li> </ul>

## Scope for excessive burdens on business

The regulation of warm water systems and cooling towers in part reflects a risk based regulatory regime. These systems inherently pose a higher risk of contraction of Legionnaires' disease but the risks posed by individual systems varies depending on their age, maintenance history and the inclusion of technical solutions to minimise the spread of the bacteria.

While prime responsibility for ensuring the safety and maintenance of warm water systems and cooling towers rests with the owners of those systems, there is still an



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important role for regulators to ensure appropriate maintenance and testing is undertaken. If warm water systems and cooling towers that are relatively higher risk are inspected more frequently while systems that are found to be well maintained and incorporate technical solutions to minimise the risk of contagion from Legionnaires' disease are inspected less frequently, the risk based approach to regulation can be enhanced.

***It is not clear whether a sufficiently graduated risk and compliance based approach for regulatory inspection regimes has been consistently established in all jurisdictions. Hence, the first step in identifying and rectifying potential excessive burdens on business from regulating cooling towers and warm water systems is to conduct a risk analysis and identify whether current strategies are tailored to the spectrum of risk, with the greater risks receiving more attention.***

It is clear that risks vary. For building owners, maintaining their heating or cooling systems in a safe and hygienic state can be a complex and onerous task. However, for many, simple preventative based maintenance procedures will be sufficient. In these circumstances, ***it may be more appropriate for regulatory oversight to provide timely guidance and assistance in developing and implementing appropriate practices with more focus on systems where the risks are identified as being the greatest.***

***Consistent with leading practice 4.6, if regulatory administration and enforcement strategies for cooling towers and warm water systems were based on risk management and responsive regulation, they would be consistent with best practice approaches to regulation administration and enforcement, as well as the relevant Australian standard.***

South Australia has taken some first steps in this direction, as information on the public health activities of all LGs has been collected and made publicly available.<sup>1</sup> In 2009-10, slightly less than one in two cooling towers in South Australia were inspected by or on behalf of LGs while for warm water systems, an average of 1.2 inspections per facility were recorded.<sup>2</sup> Results of a survey of public health activities of LGs (Productivity Commission survey of local governments — public health and safety survey 2011–12, unpublished) indicate a lower rate of inspections for warm water systems outside South Australia (0.84 inspections). The frequency of cooling tower inspections in other states (0.82 inspections per cooling system)

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<sup>1</sup> Information was collected under the *Public and Environmental Health Act 1987*. Reporting arrangements for the replacement Act are being prepared — but may differ from past practice.

<sup>2</sup> As regulations were phased in over a twelve month period concluding on 1 October 2009, these results may be unrepresentative of more recent regulatory activities.

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was higher than in South Australia. If the City of Sydney was excluded from the analysis, there was no difference in inspection rates (based on responses from 57 LGs for 2010-11, excluding Victoria where no information was collected).

*For other jurisdictions, which have delegated a role to LGs in registering and monitoring high risk warm water and cooling systems, no data on regulatory activities is collected and made publicly available. Tasmania is in the process of collecting such information with the intention of collating and publishing the results in an annual report.*

*As the South Australian data is not currently collated into a statistical report on the public health regulation activities of LGs, the identified leading practice that allows state governments to assess both the effectiveness of LG regulatory activities and the relative priority that should be placed on those activities is a combination of the current South Australian practice (universal reporting of LG activities to the responsible state agency) and the intended Tasmanian approach of preparing an annual report on activities — which is similar to what most states produce in relation to food safety regulation.*

#### LEADING PRACTICE 10.1

*When states collect data on the regulatory public health functions undertaken by local governments on their behalf, it is leading practice for that information to be published with information on each local government's performance. Most states do this for food safety and two states — South Australia and Tasmania — are moving towards this for public health and safety functions.*

*South Australia's regulatory strategy is guided by risk management. While it does not publish statistical reports of the health and safety activities of LGs, Department of Health officers have reviewed the information submitted under the Public and Environmental Health Act 1987 and based decisions about support and education policies on the information.* For example, when reviews identify lower than expected inspection frequencies, circulars would be issued by the Public and Environmental Health Council emphasising the importance of regular inspections. In addition, when inspection data indicate systemic non-compliance with particular regulatory requirements, education materials are prepared both for industry and LGs (South Australian Government, pers. comm., 13 March 2012).

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#### LEADING PRACTICE 10.2

*To identify areas requiring more focused risk management and responsive enforcement approaches, states could review local government performance data. Appropriate actions to improve local government capacity can include articulating the expected performance of local governments (along with relative priorities), providing additional assistance to local governments or education and training.*

***Given the variation in approach taken to regulating warm water and cooling systems, the costs (including risks) and benefits of having LG versus state government enforce the regulations and monitor outcomes should be explored and changes made in accordance with the findings.***

## 10.4 Public swimming pools

LGs in some jurisdictions have the responsibility for ensuring that public swimming pools are safe and do not represent a public health risk. Many LGs own or operate public swimming pool services. LGs can also be responsible for regulating privately operated swimming pools — particularly those operated by tourism businesses, fitness centres, and spa and swimming pool retailers.

### Regulatory role of local governments

The legal basis for any involvement that LGs have in the regulation of public swimming pools is outlined in table 10.4. While relevant regulations specify the role LG has in regulating the operation of public swimming pools in New South Wales, South Australia and Western Australia, the basis for the role in other states is less definitive.

In Queensland, there is no state legislation or regulation relating to the operation of public swimming pools. However, LGs are permitted to regulate the water quality of public swimming pools under the *Public Health Act 2005*. For example, the Gold Coast Council has a subordinate local law (made under the *Local Government Act 2009*) to address the public health risks in public swimming pools. Of the six Queensland LGs which responded to the Commission's survey of public health activities, four indicated that they inspected swimming pools.

**Table 10.4 State Acts and Regulations conferring role for LGs in public swimming pools**

<i>State</i>	<i>Act</i>	<i>Regulation</i>
New South Wales	<i>Public Health Act 1991</i>	Public Health (Swimming Pool and Spa Pools) Regulations 2000
Victoria	<i>Public Health and Wellbeing ACT 2008</i>	Public Health and Wellbeing Regulations 2009
Queensland	<i>Public Health Act 2005</i>	
Western Australia	<i>Health Act 1911</i>	Health (Aquatic Facility) Regulations 2007
South Australia	<i>Public &amp; Environmental Health Act 1987</i>	Public and Environmental Health (General) Regulations 2006
	<i>Public Health ACT 2011<sup>a</sup></i>	
Tasmania	<i>Public Health Act 1997</i>	Guidelines for Places of Assembly (Public Health Act 1997)

<sup>a</sup> The Public Health Act 2011 was approved in June 2011, but comes into force over a two year period.

Sources: Productivity Commission survey of state governments (2011–12, unpublished); state government websites.

In Victoria, the requirement in the *Public Health and Wellbeing Act 2008* that LGs have a duty to ‘remedy as far as is reasonably possible all nuisances existing in its municipal district’ has been interpreted as allowing LGs in that state a role in maintaining the health and hygiene standards in public swimming pools if the LG wishes to do so. This uncertainty has led to uneven regulatory practices. Of the five Victorian responses to the public health activities survey, three LGs indicated undertaking inspection of swimming pools, with an average number of inspections per swimming pool ranging from one inspection for every four pools per year for one authority and exceeding 10 per year in another authority.

In Tasmania, LGs have the ability to regulate local swimming pools because they are places of public assembly under the *Public Health Act 1997*. However, under neither the Act nor the *Guidelines for Places of Public Assembly* is there any explicit guidance to LGs about inspecting or testing the aquatic components of public swimming pools — but explicit requirements relating to occupancy rates and access to emergency exits are included.

In contrast, LGs in Western Australia have specific instructions on the role they are expected to perform in regulating public swimming pools. Regulations require LGs to perform water sampling each month for public swimming facilities. Of the eight LGs from Western Australia that have responded to the health and safety survey distributed by the Commission the inspection rate varied from no inspections, through to over 14 inspections per pool per year.

In the Western Australian response to the state government survey for this study, they indicated that the role LGs play in the hygiene and health standards in public

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swimming pools should be considered the equal highest priority public health task along with regulating retail food outlets.

#### LEADING PRACTICE 10.3

*Some states do not provide explicit guidance on what role — if any — local government should have in regulating public swimming pools. This can lead to uncertainty for affected businesses. Western Australia has addressed this by clearly enshrining the responsibilities that local governments have in relation to regulating public swimming pools in their regulations.*

In most jurisdictions, the regulatory requirements for operating a public swimming pool include:

- maintaining the pool in a clean and safe state
- perform regular checks to ensure pool water is safe
- keep records outlining maintenance and testing procedures
- be subject to routine inspection (which typically can be undertaken while the business continues operating)

Some potential key costs to business associated with public swimming pool are listed in table 10.5. Many of these sources of costs are necessary to bring about regulatory benefits to the local community. As such, the main scope for excessive costs on businesses arises from uneven enforcement.

The dual role that many LGs can play in both regulating and owning or operating public swimming pools may be a cause for concern. Where LG owned swimming pools are directly competing with privately run services, there is scope for a potential or perceived conflict of objectives to arise — however, no business has approached the Commission with such concerns during this study. Some measures that could reduce the potential for such a conflict of objectives include:

- the use of independent EHOs to undertake pool safety inspections (which is occurring in some LG areas)
- the use of audit rather than inspection systems for publicly available swimming pools.

**Table 10.5 Sources of public swimming pool regulation costs to business**

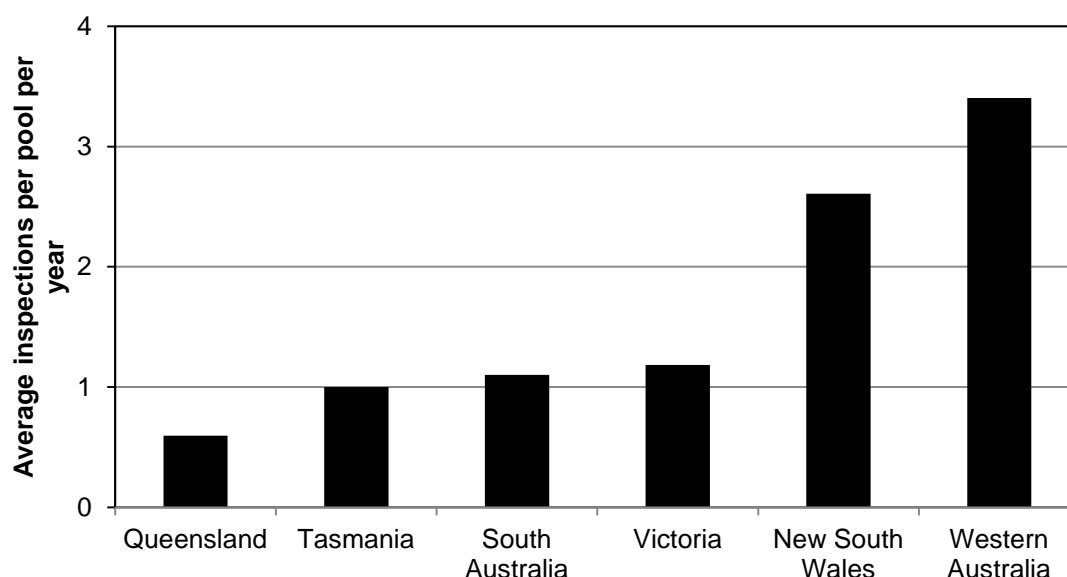
<i>Cost</i>	<i>Sources</i>
Increased costs associated with LG interactions	<ul style="list-style-type: none"> <li>• Keeping abreast of evolving legislative requirements</li> <li>• Lack of clarity in roles of different government agencies</li> </ul>
Increased business operating costs	<ul style="list-style-type: none"> <li>• Staff time to record compliance activities</li> <li>• Inspection and monitoring fees</li> </ul>
Lost business opportunities	<ul style="list-style-type: none"> <li>• Discourage inclusion of swimming pools in new or expanding business operations (particularly for tourism operators)</li> </ul>

## Scope for excessive burdens on business

The frequency with which publicly accessible swimming pools are inspected represents a potential burden on such businesses. Based on responses to the public health activities survey, an average of 1 to 3 inspections per pool per year was reported for most states (figure 10.1). The average inspection rates in New South Wales and Western Australia are heavily influenced by a response from one large LG in each state. If the results from those LGs are excluded, the averages are 0.9 and 1.8 inspections per pool per year respectively — similar to the other states.

**Figure 10.1 Pool inspection frequency**

Based on limited survey responses for all jurisdictions except South Australia



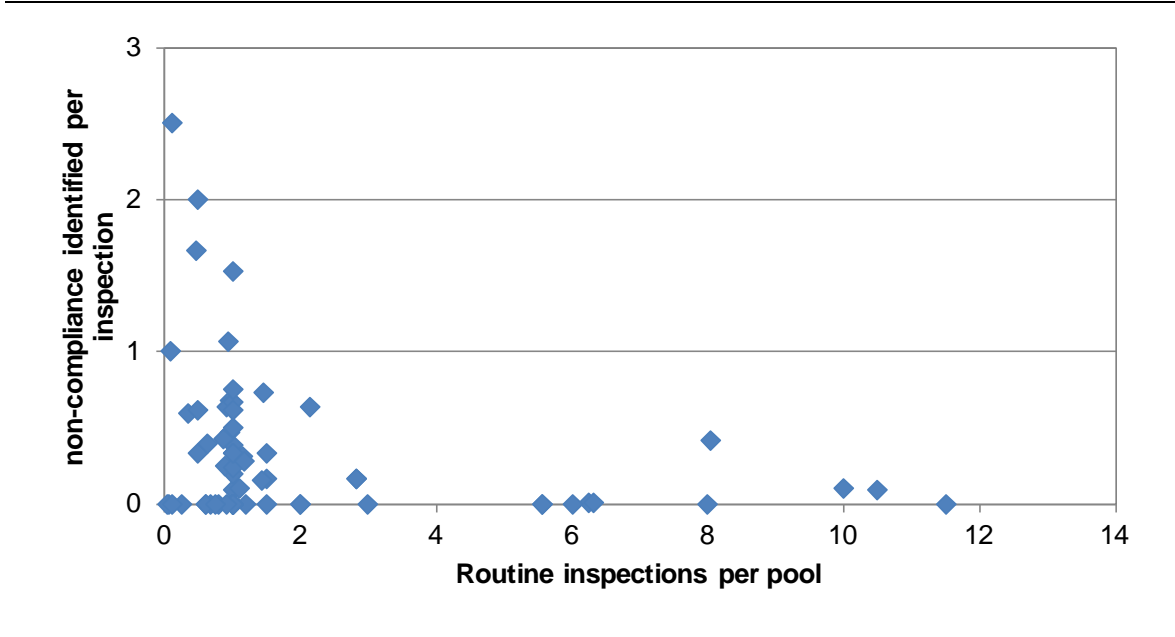
*Data sources:* Productivity Commission survey of local governments — public health and safety survey (2011–12, unpublished); South Australian Department of Health data.

For LGs which undertook routine inspections, the average number of non-compliance issues identified ranged from 0 to over 2 per inspection. However, most

councils which undertook a high rate of routine inspections had a slightly lower than average rate of non-compliance (figure 10.2).

*Given the weak relationship between inspection frequency and identified non-compliance, doubts could be raised about the efficacy of the current approach to determining inspection frequency. The identified leading practice for food safety regulation is to determine the frequency of inspections based on a risk categorisation of the business and on past compliance history. Of the 29 LGs which responded to the Commission’s public health activities survey, nine indicated basing inspection frequencies on prior compliance history and risk categorisation, two used risk categorisation (but not compliance history) and six used compliance history but not risk classification.*

Figure 10.2    **Relationship between frequency of routine inspections of public swimming pools and identified non-compliance**  
Only for local governments reporting having publicly accessible pools in their area



Data sources: Productivity Commission survey of local governments — public health and safety survey (2011–12, unpublished); South Australian Department of Health data.

LEADING PRACTICE 10.4

*If local governments base the frequency of swimming pool inspections on both the identified risk categorisation and compliance history, this would reduce the unnecessary compliance burden on businesses subject to swimming pool regulations.*

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## 10.5 Regulation of brothels

The establishment of brothels (usually defined as a building where more than two sex workers operate) is only legally permitted in Victoria, New South Wales, Queensland and the ACT. While not legal, brothels have to some extent been tolerated in other jurisdictions — for example in Western Australia, the Attorney General noted that ‘a certain number of brothels were tacitly permitted to operate within predefined areas’ (Porter 2010, p. 1).

The regulatory approach to brothels taken across Australia typically differs to the regulation of independent sex workers. For example, independent sex workers are required to be registered in Victoria and the ACT, but are permitted to operate without registration or licence in other states, including Tasmania and South Australia where brothels are not legally permitted.

### Regulatory role of local governments

LGs are only involved in the regulation of brothels in the three mainland eastern states. At the time of the writing of this report, there was a bill before the Western Australian Parliament to permit legal brothels in limited circumstances and require LGs to play a limited role in their regulation. As noted by the Western Australian Local Government Association, the extent of the role to be played by LG ‘will be determined through the future preparation of specific regulations’ (sub. DR47, p. 3). Tasmania released a discussion paper on the regulation of the sex industry in 2012 which includes a recommendation to allow for the legal operation of brothels (Wightman 2012).

The two main roles that LGs play in the regulation of brothels in Victoria, New South Wales and Queensland are determining planning and zoning approval for brothels — which could include requiring additional development controls — and the identification of unregistered brothels<sup>3</sup> operating within their LG area. When undertaking inspections of brothels — whether to determine if the brothel is operating legally, to identify compliance with planning controls or some other function such as fire safety inspections — authorised LG officers are typically also empowered to ensure that the brothel is complying with workplace health and safety and public health regulations.

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<sup>3</sup> An unregistered brothel is an establishment where a number of sex workers (typically three or more) are operating without a licence or planning permission (depending on the jurisdiction). An illegal brothel is a brothel operating in states that do not permit brothels or where the sex workers are not registered or are operating in contravention to relevant laws. The terms are frequently used interchangeably.



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A number of state and Australian Government agencies are interested in the activities of brothels because of previously identified breaches of immigration, tax and criminal law in relation to such establishments. LGs have operated, or still act as the lead agency, responsible for identifying the presence of unregistered brothels and co-ordinating enforcement action with state and Australian Government officials. However, LG officers are not necessarily well equipped to deal with the range of illegal activities that may arise as part of the investigation. During the Commission's consultations, a senior LG official highlighted his concerns that LG officials who investigate brothels are the least well paid, least well trained in enforcement and typically have the least support or supervision. This increases the risk that brothels will not be well regulated with adverse consequences for social objectives as well as adversely impacting on the competitiveness of fully compliant brothels.

Given the limited geographic area that each LG covers, it is not clear that they are best placed to deal with unregistered brothels. A representative of the Australian Adult Entertainment Industry — which represents the operators of legal brothels — highlights that even when an unregistered brothel is effectively shut down, they are capable of opening new premises quickly often in an adjacent LG area.

It caused us to go back and have a look at the brilliant work the City of Greater Dandenong had done in February and March of 2000 when they brought over two days, 10 applications to proscribe property each as an illegal brothel before a Magistrate and succeed in every application.

And when we looked back what we discovered was the emergence of the 10 illegal brothel businesses from Dandenong all now happily re-established in Monash. (Albon 2006, pp. 4-5)

Albon (2006) highlights the difficulty of effectively regulating illegal brothels via planning provisions. Typically, operators of illegal brothels do not own the premises in which they are operating. As such, prosecuting illegal brothels through planning provisions will invariably target the owners of the premises, allowing the operators of the brothels to re-establish their business in other locations.

Limited evidence from a Productivity Commission survey suggests that LGs do not place a high priority on regulating brothels. Of 20 LGs surveyed in states that regulate brothels, only two in New South Wales indicated inspecting brothels and giving a high priority to complaints about brothels (Productivity Commission survey of local governments — public health and safety survey 2011–12, unpublished). Most councils either indicated regulating brothels was the lowest priority or did not answer questions on the priority of regulating brothels.

In 2011, Victoria introduced legislative change to give Victoria Police sufficient power to be the lead agency in investigating brothels. Given the difficulties faced by LG in identifying and effectively regulating illegal brothels, the lack of appetite for the function expressed by LGs and the health, safety and corruption risks for LG officers, it appears that LGs are not best placed to be the lead agency for regulating brothels.

However, when commenting on the proposed regulation of brothels in Western Australia, the Scarlet Alliance (an organisation representing sex workers) has opposed the use of police for regulating a decriminalised sex industry (2011). Instead, they nominate authorities responsible for planning, occupation health and safety and industrial regulators as alternative bodies who could jointly regulate the sex industry.

While LGs in most states are not involved in the regulation of brothels, in states where LGs are involved, businesses face direct and indirect costs arising from that regulation (table 10.6). The scope for the largest costs to business arise from the uneven approach to regulation — particularly the identification of unregistered brothels.

A lack of strict enforcement and monitoring of unregistered brothels discourages legitimate brothels from being established. In addition, the uneven enforcement of brothel regulations could lead to more stringent requirements being introduced into state law. However, such additional requirements are most likely to be adhered to by legitimate brothels in LGs where regulations are closely enforced.

**Table 10.6 Sources of brothel regulation costs to business**

<i>Cost</i>	<i>Sources</i>
Increased costs associated with LG interactions	<ul style="list-style-type: none"> <li>• Assessing legislative requirements</li> </ul>
Increased business operating costs	<ul style="list-style-type: none"> <li>• Requirements to comply with development assessment conditions</li> <li>• Scope for legitimate businesses to be subject to additional conditions largely aimed at curtailing unregistered operators</li> </ul>
Lost business opportunities	<ul style="list-style-type: none"> <li>• Lack of enforcement of unregistered brothels creates unfair competition for legitimate operations</li> </ul>

## Scope for excessive burdens on business

The operators of legal brothels have been at the forefront in the campaign to more stringently regulate unregistered brothels (Albon 2006). Failure to adequately

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regulate brothels can lead to an increase in unregistered brothel numbers and illegal practices within registered brothels. The presence of unregistered brothels and non-compliant registered brothels can negatively impact on the profitability and reputation of legal brothels because illegal brothels:

- advertise in ways that legal brothels are not permitted to
- do not necessarily meet health, safety and planning requirements
  - resulting in a lower cost base, thereby placing legal brothels at a competitive disadvantage
- provide services that cannot be legally offered by legal brothels (particularly unsafe sex practices) resulting in:
  - an unfair competitive advantage
  - poor health outcomes for sex workers and their customers which can often lead to more stringent regulation of legal providers.

***The Commission has examined the three states and the ACT that currently permit registered brothels to identify leading practices. It is apparent that any leading practice should not have LG as the lead agency. Further, planning laws do not seem to be the regulatory instrument to prosecute unregistered brothel operators and non-compliant registered brothels.***

#### LEADING PRACTICE 10.5

*Local governments are not well placed to be the leading agency for brothel regulation. Two jurisdictions have alternative lead agencies: in the ACT, the Office of Regulatory Services is responsible for registering and regulating legal brothels and the police are responsible for regulating unregistered brothels; recent changes have allowed Victoria Police to take the lead role in investigating brothels, allowing effective collaboration between regulatory agencies.*

## 10.6 Skin penetration activities

Skin penetration procedures entail a risk of transmitting blood borne viruses — such as hepatitis B and C and HIV — as well as a range of bacterial pathogens and infections. Skin penetration procedures are typically regulated in two streams — one stream covers medical, dental and pathology services (where there is no direct role for LGs) and the second covers what is referred to as personal appearance services in some states.

## Regulatory role of local governments

In each state, LGs have a role in regulating non-medical skin penetration procedures. The regulatory role for LGs is provided for under state law, regulations and/or enforceable codes or guidelines (table 10.7). The role of LGs can include licencing or registering premises, inspecting businesses to ensure that appropriate processes are undertaken and educating proprietors, staff and clients about the risks of skin penetration activities and how those risks can be minimised.

**Table 10.7 State Acts and Regulations conferring role for LGs in regulating skin penetration activities**

<i>State</i>	<i>Act</i>	<i>Regulation</i>
New South Wales	<i>Public Health Act 1991</i>	Public Health (Skin Penetration) Regulation 2000
Victoria	<i>Public Health and Wellbeing Act 2008</i>	Public Health and Wellbeing Regulations 2009
Western Australia	<i>Health Act 1911</i>	Health (Skin Penetration Procedures) Regulations 1998 Hairdressing Establishment Regulations 1972 Skin penetration Code of Practice
Queensland	<i>Public Health (Infection Control for Personal Appearance Services) Act 2003</i>	Public Health (Infection Control for Personal Appearance Services) Regulation 2003 Public Health (Infection Control for Personal Appearance Services) (Infection Control Guideline) Notice 2004
South Australia	<i>Public and Environmental Health Act 1987</i> <i>Public Health ACT 2011<sup>a</sup></i>	
Tasmania	<i>Public Health Act 1997</i>	Public Health Act 1997 Guidelines for Tattooing Public Health Act 1997 Guidelines for Ear and Body Piercing Public Health Act 1997 Guidelines for Acupuncture

<sup>a</sup> The Public Health Act 2011 was approved in June 2011, but comes into force over a two year period.

Sources: Productivity Commission survey of state governments (2011–12, unpublished); state government websites.

The range of skin penetration activities that LGs are required to regulate differs in each state. Most states explicitly outline the activities covered in the relevant regulations, codes or guidelines (table 10.8). In contrast, Western Australia and South Australia do not list the broad activities that are covered by skin penetration regulation, instead relying on a definition of skin penetration. The definition used in Western Australia is:

Skin penetration procedure means any process involving the piercing, cutting, puncturing, tearing or shaving of the skin, mucous membrane or conjunctiva of the eye. (WA Health 2006, p. 3)

While the coverage of skin penetration regulation in Western Australia is based on a definition, the *Skin penetration code of practice* contains explicit instructions for acupuncture, tattooing, body piercing and beauty therapy procedures (which would include electrolysis, waxing, hair removal and manicurist/nail salons).

**Table 10.8 Skin penetration activities regulated by local governments**

State	New South Wales	Victoria	Queensland <sup>a</sup>	Tasmania
Acupuncture	✓	✗	✗	✓
Body piercing	✓	✓	✓	✓
Colonic irrigation	✓	✗	✗	✗
Ear piercing	✓	✓	✓	✓
Electrolysis	✓	✓	✓	✗
Hairdressers	✗	✓	✓	✗
Hair removal	✓	✓	✓	✗
Manicurists, nail salons	✗	✓	✓	✗
Tattooing	✓	✓	✓	✓
Waxing	✓	✗	✓	✗

<sup>a</sup> Skin penetration services provided by all types of businesses are regulated by LGs in Queensland either under 'hairdressing' or 'beauty therapy'.

Sources: Productivity Commission survey of state governments (2011–12, unpublished); state government websites.

Skin penetration business operators face a range of costs in complying with health and safety regulations (table 10.9). While the regulations are largely targeted towards minimising the risk of infections, costs to individual businesses can vary based on the enforcement decisions taken by different LGs.

Part of the variation in regulatory outcomes stems from the divergent approaches in state law and regulation. For example, Queensland is using outcomes based performance criteria to guide the regulation of various skin penetration activities (Brisbane City Council, sub. DR64). However, it is also clear that EHOs in different LG areas have varying approaches to enforcing skin penetration regulations.

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**Table 10.9 Sources of skin penetration regulation costs to business**

<i>Cost</i>	<i>Sources</i>
Increased costs associated with LG interactions	<ul style="list-style-type: none"><li>• Assessing legislative requirements</li><li>• Uncertainty of requirements due to uneven enforcement</li><li>• Need to seek development assessment approvals</li></ul>
Increased business operating costs	<ul style="list-style-type: none"><li>• Capital and labour costs associated with implementing LG requirements for:<ul style="list-style-type: none"><li>- cleaning equipment</li><li>- use of protective and preventative equipment</li><li>- disposal of contaminants</li><li>- inspection and development fees</li></ul></li></ul>
Lost business opportunities	<ul style="list-style-type: none"><li>• Discretion in development approvals or interpretation of enforcement requirements could discourage the establishment or operation of skin penetration businesses in some LG areas</li></ul>

### **Scope for excessive burdens on business**

Given that some types of business are required to be licensed or registered in some jurisdictions, but not others — an argument could be mounted that requiring such businesses to be registered or licensed in any state is an unnecessary burden.

For many skin penetration activities, a clear health risk can be identified. However, the evidentiary basis for determining how large the risks are and what approaches can be implemented to best mitigate those risks may be limited, particularly for services that have expanded rapidly. In these instances, states are making an assessment of how to respond based on incomplete information. In such instances, good regulatory practice would involve reviewing the outcomes of the chosen regulatory approach and comparing results with jurisdictions that have adopted alternative regulatory models. Using this approach, leading regulatory practices that effectively mitigate risks may be identified and adopted.

Regulatory approaches used outside of Australia may also provide a basis for leading practices. For example, when examining the tattoo and body piercing industry in 2005, a Select Committee of the South Australian Parliament had to rely on anecdotal information from medical professionals and skin penetration operators about the frequency of post procedure infections as there is no requirement for skin penetration operators or medical practitioners in Australia to report or record instances of the most common types of infections<sup>4</sup> (SCTBPI 2005). In contrast, some jurisdictions in the United States require skin penetration operators to

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<sup>4</sup> Medical professionals are required to report on identified cases of hepatitis and HIV.

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maintain a register of all clients who report post procedural complications including infections (New Jersey Department of Health and Senior Services nd).

***A stumbling block in identifying appropriate leading regulatory practices for skin penetration activities is the lack of data on efficacy of differing regulatory approaches used by LGs.***

For food safety, most states collect, analyse and disseminate information on the regulatory role that LGs undertake on behalf of state governments. As noted earlier, only South Australia makes available information on the public health related activities undertaken by LGs<sup>5</sup> — but has not published analysis of that information. Tasmania is in the process of establishing an annual reporting framework that will collect, analyse and disseminate such data.

Brisbane City Council has suggested an alternative means of identifying leading practices in this sphere:

Council encourages the need for a national review of the regulation surrounding skin penetration activities ... In considering the context for the review, other leading practices, particularly international standards, should be considered as alternatives other than to replicate the food industry audit framework. (sub. DR64, p. 8)

It is important for policy makers in any field to review alternative regulatory approaches being used domestically and internationally. One such approach is to regulate different activities based on the available evidence of risks. Internationally, research is providing a growing evidence base on the relative infection risks of different activities (Jafari et al. 2010).

However, there is also value in analysing how effective a policy has been in meeting the intended objective. While the Commission has identified alternative regulatory approaches to regulating skin penetration activities internationally (Papameletiou, Zenié and Schwela 2003), the Commission was not aware of any overseas jurisdiction other than New Jersey that routinely collected information on the efficacy of the regulatory approach being used. Should information on the efficacy of skin penetration regulation become available, it should be drawn on when reviewing regulatory approaches to skin penetration activities.

The Commission has been provided with information on the regulation of skin penetration premises for 87 LGs (Productivity Commission public health and safety survey). Of those 87 authorities, 29 had completed a Commission survey on public health functions and information was publicly available on the public health

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<sup>5</sup> Information was collected under the *Public Health Act 1987*, but reporting arrangements may differ under the new legislative arrangements.

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functions of 64 South Australian LGs — of which, six also completed the Commission survey.

Of those 87 LGs where data was available, 52 indicated that skin penetration premises were operating in their area. For reporting LGs, the number of skin penetration premises operating in their LG area ranged from 1 to 230 (table 10.10) — reflecting not only the higher concentration of such businesses in urban areas, but also differences in the range of activities requiring regulation in each jurisdiction.

**Table 10.10 LG regulation of skin penetration premises**

For LGs reporting skin penetration premises in their area

	<i>Minimum</i>	<i>Maximum</i>	<i>Average</i>
Number of premises	1	230	41.7
Number of inspections	0	160	26.5
Average inspections per premises per year	0	2	0.8
Average inspection time per premises (minutes)	15	158	46.5

*Source:* Productivity Commission survey of local governments — public health and safety survey (2011–12, unpublished).

There was substantial variation in the inspections undertaken by LGs. Of the 52 LGs which reported the presence of skin penetration premises, seven did not undertake any inspections of those premises in the preceding year. All LGs reporting the presence of four or more skin penetration premises undertook an inspection of at least one business in the preceding year. The highest frequency of inspections reported was an average of two inspections for every skin penetration premise in the LG area — which is not suggestive of an excessive burden.

The reported average inspection time varied considerably. Of the 40 LGs reporting undertaking inspections, 21 reported an average inspection time not exceeding half an hour, while four reported that average inspections took two hours or more.

***One way of minimising the regulatory burden on well managed skin penetration premises is for a risk based approach to regulation to be adopted.***

If the frequency and duration of inspections is linked both to the type of activities performed and the businesses' demonstrated compliance histories, more regulatory attention can be focused on businesses undertaking riskier practices and/or which have poor or unknown compliance histories. Information on risk based classification of skin penetration premises was only available for 57 LGs which responded to the Commission survey. Of those authorities, 23 indicated using risk



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based classification for these premises (although an additional LG indicated it considered all skin penetration activities to be high risk).

*Like food safety, the public health risks associated with skin penetration activities are closely linked to the nature of the tasks undertaken and the safety and hygiene practices implemented by businesses. The development of a priority classification system for skin penetration businesses (along the lines of the that developed by the Australia New Zealand Food Authority for food), could provide LGs with a better basis for exercising their regulatory activities — including frequency of inspections — using a risk based approach.*

There is insufficient evidence to draw upon to conclude if the current duration and frequency of inspections of skin penetration premises are appropriate. However, the dramatic variation in inspection times is suggestive of substantially varying inspection practices and, as a result, the burdens on businesses are also likely to vary. An improved evidence base could be used to identify a more effective approach to skin penetration inspections and thereby contribute to reduced burdens on some businesses.

For food safety, a co-ordinated national approach has been used to compare the efficacy of differing approaches to regulating food safety activities in order to identify and adopt appropriate leading practices. There is merit in progressing a similar strategy for skin penetration regulation.

Information collected on a state or national level would be particularly useful for LGs with a small number of skin penetration premises. Wider analysis of business practices and compliance history would facilitate a more accurate risk assessment, thereby increasing the likelihood of determining an appropriate inspection regime.

#### LEADING PRACTICE 10.6

*Some local governments use a risk-based approach to determine the frequency of inspections of skin penetration premises taking into account the inherent risks of the activities undertaken and the prior compliance history of the business. There are merits in adopting such a system if the risk approach is based on state or nationwide data and supported by a rigorous testing regime to ensure the robustness of the approach.*

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## 10.7 Liquor licensing

The regulatory approach adopted by LGs can impact on the operation of licensed premises. However, primary responsibility for liquor licensing issues rests with state and territory governments.

### Regulatory role of local governments

In contrast to the situation in the United Kingdom and New Zealand, LGs play no direct role in liquor licensing in Australia. However:

- some states take into account LG concerns when assessing a liquor licence application
  - documented council complaints about violence, noise, intoxicated patrons or other breaches of licence conditions are taken into consideration by state licencing bodies when determining renewal of licences or whether to impose sanctions on a business
- LGs have included trading restrictions (such as number of patrons and operating hours) as part of planning approval conditions
- most state governments allow LGs to be parties to agreements (such as liquor licensing accords in South Australia, liquor accords in New South Wales and liquor licensing forums in Victoria)<sup>6</sup> which could impose limits on the operation of licensed venues.

### Scope for excessive burdens on business

As planning conditions are attached to developments when they are approved, the inclusion of trade restrictions (such as opening hours or approved number of patrons) mainly arises during the establishment of a new business. The Australian Hotels Association has raised concerns about the impact of trading hours restrictions in New South Wales and the impact these restrictions entail.

The formation of Development Control Plans by councils in NSW specifically restricts the ability of affected hotels and therefore restricts competition. The AHA submits that the relevant state/territory liquor licensing authority should have sole responsibility to determine trading hours for licensed premises. This process would ensure all businesses in the industry can operate on a level playing field, remove unnecessary red tape and

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<sup>6</sup> Queensland government advised that *The Liquor Act 1992* only ‘recognises’ liquor accords, but the Queensland Office of Liquor and Gaming Regulation strongly encourages licensees to include local councils in such accords.

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provide for certainty for investors that will help facilitate improvements in existing venues to the benefit of local amenity. (sub. 56 to PC 2011b, p. 4)

A major impost on business can occur if businesses are unaware of the restrictions that may be imposed on them, or the conditions that a LG may place on businesses in order to support their application for a liquor licence to the state based authority. A simple way of overcoming such uncertainty is for a LG to have a written policy indicating the planning conditions that they place on licensed premises and what criteria they have for supporting a liquor licence application, such as the publicly available policy maintained by Byron Shire Council (2011a).

#### LEADING PRACTICE 10.7

*Businesses have a better basis for determining the viability of proposed licensed premises if they have clear information about likely operational requirements at the project inception stage. Some local governments have a clear and publicly accessible policy indicating the conditions they will place on development approvals for licensed premises and the criteria they have for supporting applications to the relevant state regulator for a liquor licence — as is done by Byron Shire Council.*

By having a clear policy from LGs about the trading conditions they support for licensed premises, proprietors have a better basis for determining business profitability before committing to the costly processes involved in establishing new licensed premises.

The Office of the Liquor and Gambling Regulator in South Australia and the Office of Liquor and Gaming Regulation in Queensland also provide clear advice to prospective liquor licensees on the approvals they should seek from LGs. The South Australian regulator includes ‘evidence of development approval’ and ‘any other necessary Council consents’ in their list of requirements for a valid hotel licence application (OLGR SA 2009) while the Queensland regulator requires applicants for new liquor licences to provide town planning consents (OLGR Qld 2012).

#### LEADING PRACTICE 10.8

*State licensing regulators providing explicit advice to prospective liquor licence applicants of the approvals that they need to get from local governments — as is done by the Office of the Liquor and Gambling Commissioner of South Australia — would assist applicants.*



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# 11 Environmental regulation

## Key Points

- The Commonwealth, and each state and territory, has a range of environmental legislation and regulatory requirements — much of which requires consideration or monitoring of environmental outcomes at a local level.
- Local government interactions with business on environmental regulation tend to occur either in relation to development applications or in response to complaints about a business's impact on an aspect of the environment.
- Around one third of those small and medium businesses surveyed had dealings with a local government on environmental regulation, but few reported that this was an area of major impact on their business.
- While the impacts of environmental regulatory activity by local government on business overall may be small, some businesses in agricultural industries as well as land developers and environmental tourism operators may experience significant impacts.
- Leading practice principles in the implementation of environmental regulation include:
  - better targeting of environmental information requests with development applications and preventing local governments from using development assessment to control environmental matters that relate to construction and other regulators
  - removing ineffective and costly investment requirements aimed at environmental objectives
  - clarity on cost recovery associated with implementing environmental regulation
  - clear links between state government requirements for local government environmental administration and related funding, avoidance of cost shifting and efficient cost recovery by local governments
  - using various cooperative arrangements to share skilled staff resources to undertake environmental regulation, provide training and mentoring.

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Environmental regulation covers a broad range of issues — from the use of natural resources such as water and land, to unintended outcomes associated with their use, to appropriate disposal of waste. Consequently, all levels of government in Australia are involved in environmental regulation to some extent. This has resulted in a plethora of legislation (not necessarily with environmental regulation as its focus), requiring the consideration or monitoring of environmental outcomes.

This chapter focuses on the impacts of local government (LG) environmental regulation on business. It presents an overview of the regulatory framework before focusing on the regulatory impacts on business and related issues concerning the resources available to LG for environmental regulation. It then examines a number of key areas of environmental regulation including: water; coastal management; vegetation and weeds; waste disposal; and air quality and noise and their specific impacts on business.

## 11.1 Overview of the regulatory framework

The primary responsibility for environmental regulation rests with the states and territories. Each state has a range of environmental legislation — some of which is implemented by state level agencies, but much of which requires consideration or monitoring of environmental outcomes by LG. Also, LGs in most states have developed local laws to tailor environmental requirements to local circumstances.

Although it has no explicit Constitutional power in relation to the environment, the Australian Government has implemented a range of environmental legislation, such as the *Environment Protection and Biodiversity Conservation Act 1999* (the “EPBC Act”) and the *Great Barrier Marine Park Protection Act 1975*, through its Constitutional powers relating to external affairs, trade and commerce, corporations and fishing in Australian waters beyond territorial limits (DEWHA 2009).

There are broad level agreements between the Australian Government, state and territory governments and local government as to respective roles and responsibilities for the environment, including:

- Heads of agreement on Commonwealth and state roles and responsibilities for the Environment (COAG 1997a)
- Intergovernmental agreement on the environment (see box 11.1).

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## Box 11.1      **Agreements on environmental regulation**

### **Intergovernmental Agreement on the Environment**

The Australian, states and territories and local governments signed an Intergovernmental Agreement on the Environment in May 1992. Among other aspects, the agreement (which is not legally binding):

- defines the roles, responsibilities and interests of respective levels of government and aims to facilitate a cooperative national approach to the environment
- sets out principles to guide the development and implementation of environmental policy including the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms
- requires that measures should be cost effective and not disproportionate to the significance of the environmental problem being addressed.

Under the Intergovernmental Agreement, the responsibilities and interests of LG are defined as:

- LG has a responsibility for the development and implementation of locally relevant and applicable environmental policies within its jurisdiction in co-operation with other levels of Government and the local community.
- LG units have an interest in the environment of their localities and in the environments to which they are linked.
- LG also has an interest in the development and implementation of regional, Statewide and national policies, programs and mechanisms which affect more than one Local Government unit.

The role of LG under the agreement was reviewed and endorsed by COAG in 1996.

### **Heads of agreement on Commonwealth and State roles and responsibilities for the Environment**

ALGA, and all heads of governments, through COAG, agreed in 1997 that, amongst other matters:

- reform was needed in the following areas for effective intergovernmental relations on the environment: (i) Matters of National Environmental Significance; (ii) Environmental assessment and approval processes; (iii) Listing, protection and management of heritage places; (iv) Compliance with state environmental and planning legislation; and (v) Better delivery of national environmental programs.
- A national partnership between all levels of government should be based on: co-operation; effectiveness; efficiency; seamlessness; simplicity; and transparency.
- Policy development, program delivery and decision-making should be the responsibility of the level of government best placed to deliver agreed outcomes.
- Environmental assessment and approval processes relating to matters of national environmental significance should be streamlined.

*Sources:* Department of the Arts, Sport, Environment and Territories (1992); COAG (1997b).

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LG does not undertake any regulatory activities on behalf of the Australian Government, but the Australian Government does engage with LGs in environmental regulation via the national agreements through which the states utilise LGs to deliver the agreed outcomes.

LGs are not required explicitly to list or protect the specific matters of national environmental significance protected by the EPBC Act in their local plans. Matters of national environmental significance are defined by law to be world heritage properties; national heritage places; listed threatened species and ecological communities; wetlands of international importance; migratory species protected under international agreements; nuclear actions; the Great Barrier Reef Marine Park and Commonwealth marine areas.

Nevertheless, LGs face legal risks (under the Act) if they, or their employees, take an action that is likely to have a significant impact on the matters protected by the Act as well as the environment of Commonwealth land, unless they have the approval of the Australian Government's environment minister. Also, the Act does not require a LG to make a referral to the Minister on behalf of applicants or of its own approval of a project (DSEWPC 2012a).

LG may also be involved in the strategic assessment process under the EPBC Act whereby state and territory governments, their agencies, individuals and/or LGs put forward a policy, plan or program for assessment by the Australian Government's environment minister. These policies, plans and programs usually relate to large scale, complex activities such as urban development programs, fire management policies and water use policies. From a regulatory perspective, the strategic assessment process can assist in reducing red tape and provide long term certainty for local communities, developers and decision makers in the planning process as further approval under the EPBC Act is not required for activities that comply with the plan, policy or program endorsed by the Australian Government environment minister (DSEWPC 2012b) (see box 5.2).

LG is heavily involved in undertaking environmental regulation on behalf of the states. This is due to its role in considering and monitoring environmental outcomes at the local level as required under a range of state government legislation and regulation (appendix F). Based on the responses to the Commission's survey of LG<sup>1</sup>, LGs indicated that state laws are the main regulatory tools used to improve environmental outcomes from business activities (Productivity Commission survey of local governments — Environment module 2011-12, unpublished).

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<sup>1</sup> The environment module of the Commission's LG survey was sent to 150 LGs across Australia with 53 (35 per cent) LGs responding.



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### Box 11.2 Strategic assessment of the Perth and Peel regions

In August 2011, the Western Australian Government and the Australian Government Minister for Sustainability, Environment, Water, Population and Communities announced that a strategic assessment of the Perth and Peel regions of Western Australia would be undertaken in accordance with section 146 of the EPBC Act. This enables the Australian Government environment minister to approve actions under the EPBC Act which relate to an endorsed plan, policy or program.

The strategic assessment will assess the impacts of development outlined in the Western Australian Government policy, *Directions 2031 and Beyond — Metropolitan planning beyond the horizon*, developed to meet the needs of the growing population in the Perth and Peel regions. This policy guides planning and the delivery of housing, infrastructure and services in the Perth and Peel regions. The strategic assessment will assess a plan for the protection of matters of national environmental significance in the Perth and Peel regions being developed by the Western Australian Government (the MNES plan) to be implemented in conjunction with *Directions 2031 and Beyond*.

Under the strategic assessment process, following the release of a draft terms of reference and a period of public consultation, the Minister is required to assess the impacts of the policy. If endorsed by the Minister, individual proponents will not be required to seek approval under the EPBC Act as long their actions are undertaken in accordance with the endorsed policy. This provides for greater certainty for local communities, developers and decision makers, such as LG, in the planning process.

To date, there has been uncertainty for decision makers and developers seeking to implement *Directions 2031 and Beyond* and a lack of clear policy criteria in relation to certain matters of national environmental significance, such as the Black Cockatoo and the Graceful Sun Moth. Endorsing *Directions 2031 and Beyond* under the strategic assessment process will also provide for clear identification of matters of national environmental significance in the Perth and Peel regions, provide a long term development strategy for the region and remove the need for assessment on a project by project basis.

Sources: DSEWPC (2012b), WA Department of Environment and Conservation (2011); Lavan Legal (2011).

Most general LG Acts also require LGs to at least consider the environment in the exercise of their regulatory (and service) functions. The South Australian *Local Government Act 1999*, for example, requires that its LGs ‘manage, develop, protect, restore, enhance and conserve the environment in an ecologically sustainable manner’. However, in most states, LG environmental responsibilities and obligations primarily come from planning legislation and/or environmental specific legislation.

In addition to its role in monitoring and enforcing state legislation and regulations, LGs in most states have developed local laws to address local environmental issues.

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For example, Queensland has 69 local laws on the protection of vegetation, 183 on parks and reserves and 155 on the control of pests. New South Wales local requirements are not called ‘local laws,’ but may nevertheless be binding, such as ‘tree preservation orders’ and restrictions on vegetation clearing in local environment plans (local laws and policies in each jurisdiction are discussed in detail in chapter 3).

LGs also develop environmental strategies or plans specific to their area or incorporate environmental objectives into their broader land use planning frameworks.

While many of the environmental functions undertaken by LGs could be considered ‘regulatory’, only some are likely to have a direct impact on business. For example, the regulation of activities that can be undertaken on beaches and in public parks and reserves is likely to have a direct impact on a limited range of businesses, such as personal training and some tourism related activities. Nevertheless, given the range of environmental related functions undertaken by LG, business at some point will more than likely have some interaction with LG environment regulation. The impacts of these interactions are discussed below.

## **11.2 The impact on business**

LG interactions with business on environmental regulation tend to occur either in relation to development applications or in response to complaints about a business’s impact on the environment. The trend towards the states handing over the enforcement of environmental compliance to LGs suggests a greater potential impact of such regulation on local businesses (NSW Business Chamber 2007). The Commission’s survey of small and medium size businesses indicates that around 32 per cent of respondents had dealings with LG over the past three years on an environmental protection or pollution matter (Survey of small and medium business 2011).

This outcome is consistent with the Victorian Competition and Efficiency Commission (VCEC) (2010) which reported that under 30 per cent of businesses interacted with Victorian LGs on environmental protection regulation in the past three years, and that the level of interaction on environmental protection was one of the lowest of the eight regulatory areas which business were questioned about.

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## **Is LG environmental regulation a problem for business?**

Although many businesses have dealings with LG in relation to environmental regulation, only 9 per cent of businesses reported that environmental regulation was the regulatory area that had the most impact on their business.

Similarly in South Australia, a Business SA survey found that ‘environmental issues (such as waste)’ was an area of LG responsibility and regulation that was of *least* concern. Specifically, fewer than 3 per cent of responding businesses noted this area as being of particular concern to them (sub. 9). The SA Farmers Federation noted that its members generally find that it is not SA LGs which hinder farmers, but rather state government legislation and regulations (sub. 25).

## **But LG environmental regulation still matters**

While the impacts of environmental regulatory activity by LGs on business overall may be small, they do have potential impacts on certain businesses. Sectors that may be more impacted by LG environmental regulatory activity include agricultural industries and transport and storage. Land developers and environmental tourism operators also reported to the Commission that in their dealings with LG, environmental regulation has impacted on their business. For small and medium businesses, it is predominantly through development controls in LG plans, including zoning, that the majority of environmental compliance issues are encountered (NSW Business Chamber 2007).

The Brisbane City Council commented that:

Key costs to businesses in Brisbane are most often when work in progress is stopped for offences such as water contamination or the removal of protected vegetation without a permit. The cost to business is then the secondary cost in project delays and associated corrective action to become compliant. (sub. DR64, p. 9)

More generally, business concerns with LG involvement in environmental regulation typically relate to:

- inconsistency in, or lack of, enforcement of regulatory requirements
- confusion over the role of multiple environmental agencies within an area, inconsistent agency boundaries, and overlapping or time consuming negotiations with these agencies
- unpredictable environmental outcomes, or approaches to achieving outcomes, required by LGs as part of development approvals
- environmental implications of neighbouring approved developments

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- LG requirements/costs for environmental offsets associated with developments
  - single-focus, blinkered objectives of some environmental legislation.

Particular impacts on business and examples associated with specific areas of environmental regulation are discussed later in the chapter.

### **LG resources for environmental regulation and the impact on business**

LGs vary considerably in their capacity (particularly skills and financial resources) to undertake environmental functions. An ALGA survey of LGs indicated that just over half of NSW LGs considered they have a comprehensive or good capacity to take up environmental management initiatives, compared with only around one third of LGs in Victoria, Western Australia, South Australia and Tasmania, a minority of Queensland LGs and only a single Northern Territory LG reporting positively (ALGA 2005).

Over 80 per cent of LGs surveyed by Municipal Association of Victoria (MAV 2011b) indicated that capacity on environmental management was most limited by a lack of funding for employment of environmental officers and for on-ground actions and projects. These factors were also significant constraints for LGs in other states to undertake or be involved in environmental management initiatives (Haslam, McKenzie and Pini 2007). The Commission's surveys of LGs indicated that the number of environmental health officers in LGs varied from none in some rural towns in Tasmania and South Australia to 17 in a NSW coastal city, with these officers undertaking a wide range of functions beyond just environmental regulation (Productivity Commission survey of local governments — general survey 2011–12, unpublished).

The implications for business of these capacity constraints are possible delays in having development applications approved due to the lack of LG officers with the necessary skills to undertake the required inspections and assessments. For example, a shortage of LG staff with the necessary vegetation management skills could hold up clearing approvals or weed inspections required in the development application process.

LG staff hours spent on regulatory functions related to the environment were reported to be generally low compared with other regulatory functions. For most environmental regulatory areas, LG staff tend to visit business locations for inspection or monitoring purposes only if they receive a complaint about the business (Environment module 2011-12).

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## LG responses to resource and skill shortages

In response to such resource and skill shortages, certain LGs have formed regional alliances or utilised existing regional structures to share staff resources to undertake environmental management and regulatory functions (resource sharing and LG coordination and consolidation are discussed further in chapter 5). This reduces the range of staff resources and capabilities required by a LG to deal with each and every aspect of environmental management and regulatory responsibility within their LG area. This ‘pooling’ of resources by LGs, particularly where there are a number of smaller LG authorities located adjacent to each other, could provide individual LGs with access to additional skills and resources and reduce the delays on business in respect of environmental approvals. Several examples of LGs in Western Australia sharing staff resources are contained in box 11.3.

### Box 11.3. Voluntary arrangements by LGs to share staff resources

A number of LGs in Western Australia have come to arrangements to share staff resources in a number of areas. These cover a range of service areas, including environmental management and regulation. For example, the Western Australian Local Government Association (WALGA) highlighted the following arrangements.

- The Shire of York purchases financial management services from the City of Canning and engineering and planning services from the City of Swan, while providing ranger services to the Shires of Cunderdin, Tammin, Kellerberrin and Beverley and health and building services to the Shire of Quairading.
- The Shires of Carnamah and Perenjori participate in shared delivery of environmental health and building services.
- The Shire of Collie uses planning and engineering services from the City of Canning, environmental health and building services from the Shire of Northam, and ranger services from the Shire of York.
- The Shire of Gnowangerup provides a number of services to surrounding councils including ranger services, environmental health, club development, and septic tank cleaning. It also uses building permit services from the Shire of Narrogin.

Source: WALGA (2011).

There are other various cooperative arrangements between LGs in environmental management and regulation. For example, the Goulburn Broken Local Government Biodiversity Reference Group in Victoria managed by Moira Shire Council was originally formed to assist LGs in the region to develop their roadside management plans. It has since developed a much broader focus in regard to biodiversity conservation, native vegetation planning as well as providing training and peer support for LG natural resource management practitioners (Moira Shire

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Council 2012). Often informal arrangements, such as information sharing and mentoring of recently appointed environment officers across neighbouring LG authorities, also play a role in developing the capacity of LG authorities.

*While many already exist, there appears to be greater scope to develop regional alliances or utilise existing regional councils for LGs to share staff resources to undertake environmental management and regulatory functions. This reduces the range of staff resources and capabilities required by a LG authority to deal with each and every aspect of environmental management and regulatory responsibility within their LG area. Sharing staff resources provides individual LGs with access to additional skills and resources that is likely to assist in reducing the delays on business in respect of environmental approvals.*

*Examples of such arrangements include the sharing of resources between the City of Canning and the Shire of Collie and the Shire of Northam in Western Australia and the regional alliance of LGs operating under the Goulburn Broken Local Government Biodiversity Reference Group in Victoria.*

## **Implications of LG funding and expenditure on environmental regulation**

In many areas of environmental regulation, the states reported to the Commission that they do not fully fund LG to implement these regulations with some costs being recovered from business by LG. A related issue with funding for environmental management and regulation by LGs is a lack of continuity. Haslam, McKenzie and Pini (2007) reported that inconsistent funding from state and Commonwealth agencies contributed to ‘stop-start’ environmental projects and undermined stakeholder’s confidence in LG’s environmental role and LG capacity to consistently enforce environmental requirements.

LGs indicated to the Commission that environmental regulation is an area in which considerable cost-shifting from state to local governments has occurred over the past decade. The Brisbane City Council said:

A large amount of environmental regulation has been devolved by the Queensland Government to local government over the last decade without providing adequate compensation or the ability to recover the cost of undertaking the devolved regulatory roles. (sub. DR64, p. 8)

Environmental areas in which cost-shifting has been most apparent include waste recycling, native vegetation management and the control of invasive species (SOE 2011, Wild River 2006).

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LGs reported to the Commission that they spent around \$455 000 (the median reported expenditure) on implementing environmental regulatory responsibilities in 2010-11 — expenditure ranged from \$3000 in one rural South Australian LG area to \$7 million in one of the state capital cities (Environment module 2011-12).

While much of this LG expenditure relates to environmental maintenance of LG land rather than the regulation of business activities, LGs reported to the Commission that, on average, around 37 per cent of expenditure on environmental activities related to business regulation (Environment module 2011-12). Further, for the majority of environmental regulatory areas (waste management is the exception), LGs do not recover from business the costs of implementing business-related regulation (Environment module 2011-12).

*State governments increasingly rely on LGs for the on-ground implementation of many of their environmental objectives and yet LG skills and resources to do this are limited. Greater clarity on the availability of state government funding for LG implementation of environmental objectives and ongoing environmental projects may reduce cost shifting.*

Issues surrounding the capacity of LG to undertake regulatory functions are discussed in chapter 4.

## **11.3 Water management**

The regulation of water resources includes the regulation of access to and use of water in the natural environment (rivers, lakes and dams); the regulation of stormwater drainage and runoff from developed land; and the regulation of the collection and discharge of treated wastewater and the reuse/recycling of water resources (tanks, grey-water).

### **Role of LG in water management**

Water is an area in which many LGs both provide a service and have a regulatory role. The extent to which LG is involved in supplying water services, sewerage services and drainage varies between and within jurisdictions. Similarly, LGs' regulatory role regarding water varies considerably between states and for different regions (urban vs non-urban) within states (PC 2011c). Typically, LGs regulate drainage and stormwater, particularly outside of major city areas, are involved in the retailing of water and wastewater in some jurisdictions, but have little or nothing to do with the regulation of bulk water supplies. In some areas of water regulation, there were differing responses to the Commission's information requests from state governments and the local government association in that jurisdiction as to which areas LGs were responsible for (table 11.1).

Table 11.1 Nature of LG regulatory responsibility for water

	<i>Water collection &amp; reuse</i>	<i>Water quality &amp; monitoring</i>	<i>Stormwater &amp; drainage</i>	<i>Wetlands &amp; inland waterways</i>
<b>New South Wales</b>				
Approval	□		□	
Monitoring	□	■		□
Enforcement	□	■	□	
Appeals		■		
<b>Victoria<sup>a,b</sup></b>				
Approval	■		■	■
Monitoring	■	■	■	■
Enforcement	■	■	■	
Appeals	■	■	■	
<b>Queensland<sup>a</sup></b>				
Approval	■			
Monitoring	■			
Enforcement	■			
Appeals	■			
<b>Western Australia</b>				
Approval	■	□	■	□
Monitoring	■	■	■	□
Enforcement	■	■	■	□
Appeals				
<b>South Australia</b>				
Approval			□	□
Monitoring	□	■ <sup>b</sup>	□	□
Enforcement	□		□	□
Appeals			□	□
<b>Tasmania</b>				
Approval	■	■	■	
Monitoring	■	■	■	
Enforcement		■	■	
Appeals				
<b>Northern Territory <sup>c</sup></b>				
Approval				
Monitoring				
Enforcement				

□ Responsibility indicated by responses from state LG associations. ■ Responsibility indicated by responses from state governments. ■ Responsibility indicated by responses from both state LG associations and state governments. <sup>a</sup> Only includes responses from state governments. <sup>b</sup> The Victorian Government and South Australian Governments responded that some LGs had these regulatory responsibilities. <sup>c</sup> There is no devolved LG responsibility for water in the Northern Territory.

Sources: Productivity Commission survey of state governments (2011-12, unpublished); Productivity Commission survey of LG Associations (2011-12, unpublished).



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Responsibility for water is devolved to LGs through the general LG Act (New South Wales), various drainage acts and a public and environmental health Act (South Australia), an environmental Act (Tasmania) or a specific water Act (Victoria, Queensland and Western Australia) (box 11.4).

#### **Box 11.4 LG regulation of water**

In NSW, the *Local Government Act (NSW) 1993* establishes LG responsibilities for water, wastewater and stormwater services (National Water Commission 2009). Individuals require approval from their LG to install and manage on-site water recycling or wastewater management systems and private sector recycled water schemes also may need approval from LG to install and operate.

Victorian LGs are responsible for the local drains, road networks and street and property drainage in urban areas and all provide stormwater services in regional urban areas (PC 2011c, appendix B). Of most relevance to businesses, stormwater management and water sensitive urban design were selected by many LGs as activities which they see as most assisting in the achievement of sustainability.

In South East Queensland the role of supplying water and sewerage services was recently transferred from individual LGs to three new distribution and retail businesses jointly owned by the LGs (Harman and Wallington 2010). Outside of South East Queensland, LG owned utilities provide water and waste water services (PC 2011c).

In Western Australia, LGs have a role in all aspects of drainage, lot-scale water re-use and quality regulation. For example, LG approval (in addition to that of the Department of Health) is required to establish smaller on-site recycling systems (larger schemes require approval from the Executive Director of Health). LGs are not typically involved (unless they are the proposed licenced service provider, under the *Water Services Licensing Act 1995*) in the approval and assessment of schemed water services (water supply and waste water treatment).

In South Australia, LG involvement in the regulation of water use is generally limited to stormwater and drainage in urban areas.

The Tasmanian Government and LGs regulate stormwater, drainage and water quality under the *Environmental Management and Pollution Control Act* and the *Land Use Planning and Approvals Act 1993*. Some activities require a permit from LG. The *State Policy on Water Quality Management 1997* requires monitoring on compliance with guidelines and permits issued by the EPA and LG authorities.

Northern Territory LGs have no responsibility, under the *Local Government Act*, for water. The Act only enables a LG to make a regulatory order to mitigate a nuisance or hazard. The example provided in the Act is a LG requiring a landowner to construct a drain to prevent water from draining across an adjoining road.

*Sources:* National Water Commission (2009); PC (2011c); Local Government Association websites.

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## Scope for excessive regulatory burdens on business

Given the scope of issues included under the broad category of ‘water regulation’, most businesses are likely to be impacted in some way by LGs’ implementation of water regulations. Businesses potentially affected could include:

- primary producers involved in dairying, aquaculture, horticulture and mining — these activities are traditionally significant users of water and/or generate by-products which may affect the quality of water resources for other parts of the local community
- urban uses which are particularly water-intensive, such as concrete operations and road formation contractors
- operators of sites that have large run-off capacity, such as shopping centres and warehouse complexes.

Some potential key costs to business associated with water regulation and the sources of these costs are listed in table 11.2. Some of the costs imposed on business may be necessary in order to bring about regulatory benefits to the local community.

**Table 11.2 Sources of water regulation costs to business**

<i>Cost</i>	<i>Sources</i>
Increased costs associated with LG interactions	<ul style="list-style-type: none"><li>• Assessing legislative requirements</li><li>• Lack of clarity or duplication in roles of different government agencies</li><li>• Additional plans to accompany development applications<ul style="list-style-type: none"><li>- drainage plans – \$ cost &amp; time cost</li><li>- flood management planning – \$ cost &amp; time cost</li></ul></li></ul>
Increased business operating costs	<ul style="list-style-type: none"><li>• Capital and labour costs associated with implementing LG requirements for:<ul style="list-style-type: none"><li>- stormwater direction, drainage and runoff</li><li>- tanks, water reuse or recycling</li></ul></li><li>• Inspection and monitoring fees</li><li>• Water conservation/management plans</li></ul>
Lost business opportunities	<ul style="list-style-type: none"><li>• Prohibitions on developing land because of stormwater collection and runoff, existence of water pipes or local drainage (eg. easements) or inundation</li></ul>

While many of these costs are difficult to separately identify, the costs associated with obtaining and submitting to LG additional plans to accompany development applications, and the capital costs associated with implementing LG requirements (such as installation of rainwater tanks) are often more readily quantifiable.

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However, charging arrangements for these activities often lack transparency and the methods used to allocate costs to developers are frequently not clear.

Just over a third of LGs that responded to the Commission's survey indicated that they either partially or fully recover the costs of implementing water regulations from business (Environment module 2011-12).

***Cost recovery in undertaking environmental regulation, such as that for water and water discharge, is applied inconsistently by LG .***

The timing in a development process at which information on aspects such as drainage and stormwater management is required to be provided to LG can impact on the usefulness of the information and subsequent business compliance costs. Heine Architects (2011b) reported that some LGs require stormwater management plans and sediment management plans at the development approval stage, but the required information relates to how the construction is undertaken and is generally under the management of the contracted builder, not the architect submitting the plans to LG. This may necessitate costly amendments to plans after construction has begun.

***Plans on environmental aspects of developments such as waste management, vegetation cover and stormwater/drainage are often requested at the initial development application stage, with basic information on these aspects of a development being essentially guess work until a builder is contracted and the initial site preparation has begun.***

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*To minimise the overall costs of regulation and in order to be useful to both business and local government, any additional environmental plans required with development applications need to be requested by local governments at the appropriate stage of the development rather than requiring all information to be provided at the initial development application stage.*

## 11.4 Coastal management and sea level rises

One of the main environmental challenges facing coastal LGs is climate change and the related tidal inundation. Around 35 per cent of Australia's LG authorities have coastline within their LG area and any tidal inundation can affect vegetation, soil and water quality in coastal areas as well as cause damage to developed property. Sea level changes are not expected to be uniform around the Australian coastline. The projections for sea level rise by 2100 vary between Australia's states

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from 80 cm in Western Australia to 100 cm in South Australia (National Sea Change Taskforce 2011).

## **Role of LG in coastal management**

### *National regulation and guidelines*

There is no national coastal policy to deal with climate change and management of the coastal zone, although issues have been recognised at national level — for example through the National Sea Change Taskforce — a national body established in 2004 to represent the interests of coastal councils. There are some national coordination processes for coastal zone management undertaken through the COAG Select Council on Climate Change.

### *LG regulation*

Coastal zone planning and management are largely a state/territory responsibility, with LG taking a subordinate role. All jurisdictions, except Queensland, rely on their generic LG legislation to enable LGs to regulate coastal management, and all but Western Australia and Northern Territory have specific coastal legislation that additionally confers responsibilities on LGs. Furthermore, every state has some kind of state coastal policy and many have policies for particularly sensitive regions and allow for local variations in such documents by their LGs. The division of roles and responsibilities between various state agencies and LGs varies considerably between jurisdictions (table 11.3).

Most regulation of the coastal environment relevant to business falls under the local ‘planning’ system and most is related to applications to LG for development or use of coastal land with the day-to-day decision making on these matters also the responsibility of LGs. Specifically, LG is:

- the land manager for many coastal reserves and other coastal buffer areas
- the main approval body for activities which use water front or foreshore land and, in some cases, coastal estuaries and reserves
- the key decision maker and service provider throughout much of the coastal zone with regard to, provision of waste removal and treatment services, water, and sewerage services, and provision and management of public infrastructure such as roads, recreational areas and parks.

Table 11.3 LG coastal management regulatory responsibilities

	Key state legislation			State policies	Specific LG coastal regulatory functions	LG Actions
	Planning Act	LG Act	Coastal Act			
NSW	✓	✓	✓	NSW Coastal Policy 1997 SEPP 71 – Coastal Protection	Given state plans, local actions are to consider: Public access; setbacks; visual amenity; hazard management; coastal protection through stormwater interception; erosion control/remediation	Approval Enforcement Referrals
Vic	✓	✓	✓	Victorian Coastal Strategy Coastal Spaces Victorian Local Sustainability Accord	For land above low water mark, LG is responsible for planning; building control; approval of waste disposal systems <sup>a</sup>	Approval Monitoring Enforcement Appeals
Qld	✓	✗	✓	Qld Coastal Plan - State Policy for Coastal Management- SPP 3/11: Coastal Protection	Day-to-day land use planning	
WA	✓	✓	✗	State Planning Policy No 2.6: State Coastal Planning Policy; SPP 2.6 Guidelines	Foreshore reserves; specific area plans detailing setback and permitted uses; stormwater management	Approvals Monitoring Enforcement
SA	✗	✓	✓	Our seas and coasts State planning strategy Coast Protection Board Policy Document 2002 Estuaries policy & action plan	LG has 'care, control and management' of its coast and can enact bylaws	Approval Monitoring Enforcement Appeals Referrals
Tas	✓	✓	✓	State Coastal Policy 1996	Coastal zone planning; permits for activities which impact on coastal zone (incl. domestic sewerage treatment)	Approval Monitoring Enforcement Appeals Referrals
NT <sup>b</sup>	✗	✓	✗	Top End Regional Organisation of Councils Policy on the Protection of Darwin Harbour and its Coastline, 1999	Municipal LGs – foreshore protection; stormwater drainage; litter control Shire LGs – coastal infrastructure (barge landings, ramps, storm water, vegetation control)	Monitoring

<sup>a</sup> For some LGs around Port Phillip Bay, planning schemes extend seaward about 600m from the low water mark. The land use planning responsibilities of LG therefore extend over near shore waters beyond the LG boundary. <sup>b</sup> Coastal management by Northern Territory LGs is undertaken as part of good governance of the coastal area rather than a regulatory responsibility under the Local Government Act.

Sources: Productivity Commission survey of state governments (2011-12, unpublished); Productivity Commission survey of LG Associations (2011-12, unpublished); ALGA (2006a).

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To a varying extent across the states, LGs may be required to take into account the potential effects of climate change in the planning and management of coastal development. LGs may also be required to consider the likely impact of coastal processes and coastal hazards on development and likely impacts of developments on coastal processes when preparing local plans and assessing DAs to carry out development on coastal land. For example, NSW Coastal Policy 1997 seeks to prioritise natural processes in the management of the coastal zone while State Environmental Planning Policy (SEPP 71) obliges LGs to consider impacts of coastal processes and hazards in their local plans and in assessing applications for development on coastal land (Bonyhady and Christoff 2007; Durrant 2010). MAV (2011b) reported that, for Victorian LGs with coastal frontage, coastal management is a high to medium priority environmental issue.

A survey of coastal LGs for the National Sea Change Taskforce's report into planning for climate change adaptation in coastal Australia, found that nearly 90 per cent of respondents had commenced action to change planning controls or intended to make changes in the near future. Also, nearly half of the survey respondents reported that their LG had undertaken a study or formal climate change risk analysis (Gurran et al. 2011). Ultimately (and often regardless of state policy), the priority given to natural processes versus development varies from LG area to LG area reflecting local values and priorities.

For example, the Byron Shire Council has implemented a planned retreat strategy to coastal management. This aims to enable natural processes to take place without undertaking engineering works to counteract these processes and the retreat of development and infrastructure in the face of coastal erosion (Byron Shire Council 2011b). In contrast, the Gold Coast City Council has a long commitment to undertaking coast works to protect the coastline including construction of the A-line seawall parallel to the beach, sand by-passing, dune nourishment and dredging (Gold Coast City Council 2011).

Despite the importance of coastal management and the mounting pressures from climate change, population expansion and the desirability of coastal space, the capacity of many coastal LGs to regulate and manage their coastal resources is limited (PC 2012b). The House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts concluded that LGs were critical to coastal management, but that:

... capacity building, as well as increased resourcing, is urgently required to improve local government's ability to manage the coastal zone effectively. It was noted that many councils are struggling to attract and retain staff that have enough knowledge and experience to manage their coasts. Without technical support at the state level for these council officers many poor decisions can be made ... without local government

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involvement, no cooperative coastal management strategy could succeed. (2009, pp. 258, 268)

## Scope for excessive regulatory burdens on business

The main businesses affected by LG coastal management regulation are likely to be:

- construction/development businesses
- hotels/restaurants/tourist operations in foreshore locations — including boat waste disposal and vehicles and tourist activities on beaches.

Some potential key costs to businesses associated with coastal regulation and the sources of these costs are listed in table 11.4.

**Table 11.4 Sources of coastal regulation costs to business**

<i>Cost</i>	<i>Sources</i>
Increased costs associated with LG interactions	<ul style="list-style-type: none"><li>• Uncertainty due to inconsistency (over time and between LGs) in requirements for coastal land</li><li>• Assessing legislative requirements, local plans and council sentiment on coastal development</li><li>• Lack of clarity or duplication in roles of different government agencies</li><li>• Plan approval and environmental studies – \$ costs &amp; delay costs</li></ul>
Increased business operating costs	<ul style="list-style-type: none"><li>• Capital and labour costs associated with implementing LG requirements for developments to withstand natural coastal conditions and/or support improvements in coastal environments</li><li>• Inspection and monitoring fees</li></ul>
Lost business opportunities	<ul style="list-style-type: none"><li>• Prohibitions on developing land and/or protecting existing coastal developments</li></ul>

Many of these sources of costs are derived from planning or building requirements, which may provide other benefits to the local community. For example, some LGs in South Australia and Western Australia build protective coastal buffers into their planning schemes (Glaetzer 2011). For developers, this means that there must be 100 metres of foreshore in front of a development in order to get LG approval. Where this buffer is not available on public land, developers would potentially be unable to develop their land within 100 metres of the foreshore. The cost of some of these planning and building related requirements are detailed in PC (2011b) and in chapter 7 of this report.

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Business groups have also noted inconsistencies in LG treatment of existing developments compared with new developments in coastal areas, which can increase the uncertainty for developers in these areas. The HIA commented that LGs:

... view planning decisions in areas identified as potentially affected by sea level rise as future liability risks, albeit 40 years or more into the future. With a preference to zero (liability) risk, councils are starting to apply more stringent, higher sea level rise scenarios on new development when compared to existing development. (sub. 34, p. 14)

This uncertainty appears to be a result of a lack of clarity as to the roles and responsibilities of LG in managing the risks of climate change and the uncertain legal liability facing LGs in implementing changes to planning and development plans and controls to adapt to rising sea levels. In addition, LGs face capacity constraints in this area.

Gurran et al. (2011) noted that LGs in parts of coastal Australia approve hundreds of millions of dollars' worth of building approvals without a clear statutory framework for considering potential climate change. Many LGs have expressed concern as to their legal liability in making planning decisions in regard to development on coastal land. For instance, Glaetzer reported that Tasmanian LGs are, 'too scared to implement new coastal planning schemes because they fear being sued' (2011, p. 1). Some LG's consider they are in a 'no win situation'. If they limit development on coastal land they may be subject to legal action from developers and if they do not place limits on this development they could be faced with greater legal liabilities in the future.

There have been reports of developers and property owners — faced with restrictions on developing existing land holdings and declines in the value of existing properties — proposing legal action against changes to LG's planning and development controls to deal with future rises in sea levels (*Sydney Morning Herald*, 6 March 2012). As a result, LGs face increased costs from obtaining legal advice, and in some cases defending planning decisions, meeting insurance premiums as well as building coastal protection works (Gurran et al. 2011).

In its draft report on *Barriers to Effective Climate Change Adaptation* (PC 2012b), the Commission found that uncertainty surrounding legal liability was hindering LG from adapting to climate change (see box 11.5).

The Commission recommended that state and Northern Territory governments clarify the legal liability of LG regarding climate change adaptation matters and the processes required to manage that liability. It also recommended that state and Northern Territory governments clarify the roles and responsibilities of LG in



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adapting to climate change and publish a comprehensive list of laws which delegate regulatory roles to LG.

**Box 11.5 Barriers to LG in adapting to climate change risk**

In its draft report on *Barriers to Effective Climate Change Adaptation* the Commission identified several barriers facing LG in adapting to climate change risk.

- *The roles and responsibilities of local government are not particularly clear* — these include responsibilities for managing the risks of climate change, especially in the areas of land-use planning and emergency management, but also extend to many areas beyond adaptation. As a first step to clarifying these roles and responsibilities, state and territory governments should compile and publish a comprehensive and up-to-date list of laws that impose responsibilities on local governments.
- *Local governments have capacity constraints* — shortages of professional and technical expertise, and financial constraints, are preventing some councils from planning for climate change and implementing effective adaptation actions. There is also inadequate information and guidance to support local government decision making — a large volume of guidance material is currently provided to councils to assist them to make decisions about adaptation, but this does not appear to be meeting the requirements of some councils.
- *Legal liability concerns are hindering adaptation for many local governments* — for instance, some councils are reluctant to release information on the vulnerability of properties to climatic events because they are concerned that this could negatively impact on the value of some properties or lead to legal disputes. In other cases, it may be perceptions about legal liability that are hindering effective adaptation, rather than the underlying legal arrangements themselves.

Source: PC (2012b).

The Commission (PC 2012b) also noted examples of LGs undertaking climate change risk and vulnerability assessments. For example, Redland City Council in Queensland developed an adaptation plan covering the period 2010–15 in response to an assessment of the climate change risks facing its local area. Specific actions included further analysis of risks, updating bushfire mapping and management plans, and investigating options to manage risks, including ‘planned retreat’. Clarence City Council in Tasmania has adopted a risk management approach to addressing climate change in land-use planning decisions, including the use of ‘triggers’, where approval for development is given until a predefined event occurs.

***A risk management approach to the implementation of environmental regulation is likely to reduce unnecessary regulatory burden on some businesses. Although risk management has been used more consistently in other areas of LG environmental regulation, such as charges for waste disposal which relate to the***

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*type of business and/or the nature of waste, some coastal LGs have adopted a risk management approach to manage the regulation of coastal areas prone to future sea level rises.*

#### LEADING PRACTICE 11.2

*There is scope to reduce the regulatory burdens on business through the use of risk management by local governments in managing the regulation of development in coastal areas prone to sea level rises and tidal inundation.*

## 11.5 Vegetation and weed control

Vegetation and land cover regulation encompass a very broad range of topics — bushfire protection; land clearing (including vegetation preservation, fragmentation of native species, biodiversity, and soil and water impacts); invasive species (including fungi, pest animals and weeds); and allowable land uses (such as mining, forestry, agriculture and urban developments). The discussion of LG regulation of vegetation and land cover in this chapter has been narrowed down to those areas identified to the Commission during consultations as being most likely to impact on the largest range of businesses — specifically the focus here is on regulations related to weeds and pests and regulations related to land clearing.

### Role of LG in vegetation and weed control

The range of LG responsibilities in respect of vegetation management varies across states. In some areas of vegetation management, there were differing responses to the Commission's information requests from state governments and the local government association in that jurisdiction as to which areas LGs were responsible for (table 11.5).

All states have specific legislation which lists declared noxious weeds and animal pests and details the related management practices that are required. The state agency with primary responsibility is typically either an agriculture department or an environment department. All jurisdictions produce lists of weeds and pests and LGs form their own additional lists targeting particular weeds and pests. Control of weeds and pests is an area that LGs both perform functions on council-owned land and regulate the activities on private land. The states vary somewhat in the range of responsibilities afforded to their LGs (box 11.6).

Table 11.5 Nature of LG vegetation management regulatory responsibility

	Reserves & picnic areas	Biodiversity & vegetation	Other landcare	Pest animals & plants
<b>New South Wales</b>				
Approval	□	□		□
Monitoring		■	■	■
Enforcement	□	■	■	■
Appeals		■	■	■
<b>Victoria<sup>a,b</sup></b>				
Approval	■	■	■	■
Monitoring	■	■	■	
Enforcement	■		■	
Appeals	■	■	■	■
<b>Queensland<sup>a</sup></b>				
Approval	■	■		■
Monitoring	■	■		■
Enforcement	■	■		■
Appeals	■	■		■
<b>Western Australia</b>				
Approval	■	□	■	■
Monitoring	■	□	■	■
Enforcement	■	□	■	■
Appeals				□
<b>South Australia</b>				
Approval	■	□ <sup>c</sup>		
Monitoring	■	□ <sup>c</sup>		□
Enforcement	■	□ <sup>c</sup>		□
Appeals	■	□ <sup>c</sup>		□
<b>Tasmania</b>				
Approval		□		
Monitoring	■	■		
Enforcement	■	□		
Appeals		□		
<b>Northern Territory<sup>a</sup></b>				
Approval				
Monitoring	■	■	■	■
Enforcement	■			
Appeals				

□ Responsibility indicated by responses from state LG associations. ■ Responsibility indicated by responses from state governments. ■ Responsibility indicated by responses from both state LG associations and state governments <sup>a</sup> Only includes responses from state governments. <sup>b</sup> The Victorian Government responded that some LGs had these regulatory responsibilities. <sup>c</sup> The SA Government responded that LGs only have responsibility in terms of significant trees in defined urban areas.

Sources: Productivity Commission survey of state governments (2011-12, unpublished); Productivity Commission survey of LG Associations (2011-12, unpublished).

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## Box 11.6      **State and local government regulation of weeds**

**New South Wales:** The *Noxious Weeds Act 1993* is administered by the NSW Department of Primary Industries, with 128 Local Control Authorities responsible for implementing the Act on private lands. The LCAs are usually (but not always) either the LG for the area or a special purpose county council. Weeds are declared on a Local Control Authority basis and with some LCA boundaries not lining up with LG area boundaries, declarations for the same noxious weed can vary across the State and within a LG area.

**Victoria:** The principal legislation is the *Catchment and Land Protection Act 1994* (CaLP Act). The CaLP Act is administered by the Department of Sustainability and Environment who employ Pest Management Officers through the Department of Primary Industries to enforce provisions of the CaLP Act. There is also provision under the *Local Government Act 1989* for LGs to enact local by-laws targeting specific weeds. In addition, Victoria has also declared certain plants as Noxious Aquatic Species under the *Fisheries Act 1995*.

**Queensland:** The *Land Protection (Pest and Stock Route Management) Act 2002* (LPA) and the *Land Protection (Pest and Stock Route Management) Regulation 2003* provide legislative measures to manage pests and address the impacts they may have. While these legislated pest provisions are administered by the Queensland Government, all landowners are required to control declared pest plants consistent with guidelines and LG area pest management plans and the Queensland Weeds Strategy 2002–06. Under the Local Law provisions, a LG can declare any plants not declared under the LPA and enforce their control.

**Western Australia:** The principle legislation is the *Agricultural and Related Resources Protection Act 1976* and the *Biosecurity and Agriculture Management Act 2007*. This legislation is administered by the Department of Agriculture and Food. Regional Advisory Committees advise the Department on weed and other protection issues within WA. The State's quarantine responsibilities are handled by the Western Australian Quarantine Inspection Service operating within the Department of Agriculture and Food. Related legislation is the *Plant Diseases Act 1989*. This Act is concerned primarily with pests and diseases. In addition to declared plants under the *Agricultural and Related Resources Protection Act 1976*, there is also provision for a shire council to prescribe any plant, other than a declared plant, as a pest plant within its municipality.

**South Australia:** The *Natural Resources Management Act 2004* is administered by the Department of Environment and Natural Resources and implemented throughout the State by Natural Resource Management authorities; these may be the eight regional Natural Resource Management Boards or their subsidiary Natural Resource Management groups set up at the local level. Natural Resource Management authorities employ regional Authorised Officers to inspect properties and regulate matters related to prescribed plants. LGs only have an indirect role in the issuing of vegetation hazard orders under the *Local Government Act 1999* and fire prevention orders under the *Fire and Emergency Services Act 2005*.

**Tasmania:** The *Weed Management Act 1999* is administered by the Department of Primary Industries, Parks, Water and Environment and provides for the appointment of LG officers as weed inspectors.

**Northern Territory:** The *Weeds Management Act 2001* is administered by the NT Department of Natural Resources, Environment, the Arts and Sport. There is little role for LGs.

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Land clearing is regulated at all levels of government in Australia. At a Commonwealth level, the EPBC Act has been applied to control land clearing.<sup>2</sup> However, most legislation which directly regulates land clearing is at a state level. Land clearing controls differ substantially between, and in some cases within, jurisdictions with little uniformity in either the approach or substance of these laws.

Clearing which is regulated tend to relate to forestry, cropping, grazing or urban development. In most jurisdictions, there are threshold levels set, above which some form of approval is required. Justifications for approval of land clearing typically include some building works, fire breaks, fuel reduction, fencing materials, tracks, fence lines, scientific study, mining, and some existing use rights such as grazing. The basis of land tenure (freehold versus leasehold) and land use zones are also bases for differential treatment with respect to land clearing regulations.

LGs in all states have some control over land clearing — usually through their local planning processes, but often through additional, clearing-specific controls. As a result of increasing population pressures in both capital and regional cities, controls over urban land clearing have also become more complex for LGs as they seek to provide more land for urban growth (box 11.7).

Increased community focus on environmental issues as well as the recognition of the important role of remnant native vegetation in supporting vulnerable and declining species has translated to increased demand for preservation of natural vegetation. Opposing this are the development pressures on vegetation to accommodate expanding population needs. LGs are often at the ‘coal face’ in weighing up community environmental demands against development pressures.

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<sup>2</sup> For example, see *Minister for Environment and Heritage v Greentree (No. 2)* [2004] FCA 741.

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### Box 11.7 State and local government regulation of land clearing

**New South Wales:** Clearing vegetation of all types is highly regulated in NSW. The *Native Vegetation Act 2003* (NV Act) and the *Native Vegetation Regulation 2005* ended broad scale land clearing (the Act does not apply to urban land or to clearing which is authorised under other legislation). To clear land, a landholder may either apply to LG for development consent or submit a draft property vegetation plan (PVP) to the catchment management authority for approval. A PVP identifies areas which may be cleared, which vegetation must be kept as an offset and what the cleared land may be used for. The plan is voluntary, but once made, it is binding on current and future owners (up to 15 years), even if the land is subsequently rezoned and excluded from the NV Act.

The NV Act does not override or replace any requirement to obtain consent from a LG where an LEP requires approval for the clearing of native vegetation. Similarly, a development approved by LG may still require approval under the NV Act.

In urban areas, LGs use 'tree preservation orders', LEP and Development Control Plan restrictions, and SEPP 19 'Bushland in Urban Areas' to regulate vegetation clearing. Typically, under a tree preservation order, land users must obtain a permit to cut, lop, prune or remove a tree that is more than a certain height. In general, LGs can impose any conditions seen appropriate on the granting of such permits. Under SEPP 19, bushland which is zoned or reserved as public open space cannot be disturbed without development consent from the LG.

**Victoria:** Under the *Planning and Environment Act 1987*, LG's administration of native vegetation regulation includes pre-application consultation, assessment, approval, monitoring and enforcement. Landholders wanting to clear, destroy or lop native vegetation (including dead vegetation) generally must have a planning permit from their LG. Proposals which need technical expertise are generally assessed by the state Department of Sustainability and Environment (DSE), rather than by LG. However, some LGs have signed 'referral agreements' with DSE that allow some applications that would otherwise be referred to DSE to be assessed by the LG only.

Victoria's 2002 *Native Vegetation Management — A Framework for Action* aims to achieve a net gain in the extent and quality of native vegetation, with a priority on avoiding clearing. The scope for an applicant to provide an appropriate vegetation offset is one factor that must be considered by LG or DSE in deciding applications for vegetation removal.

**Queensland:** The clearing of native vegetation on freehold and leasehold land in Queensland is regulated by the *Vegetation Management Act 1999* and the *Sustainable Planning Act 2009* (the VM framework). The VM framework guides *what* clearing can be done, and *how* it must be done. A permit system for clearing operates through the *Sustainable Planning Act 2009*, by defining clearing of vegetation as 'development'. The *Vegetation Management Act 1999* prescribes the mapping products that identify regulated vegetation, the conservation status of the ecosystems and what applications can be applied for a permit.

Although clearing may be exempt under the vegetation management framework, landholders must check with a number of authorities about obligations under other legislation (including water, soil conservation, heritage, coastal management, fisheries, planning and LG by-laws).

(continued next page)

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### Box 11.7 (continued)

**Western Australia:** Land clearing is regulated by the *Environmental Protection Act 1986* (EP Act) and the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*. Clearing of native vegetation is an offence unless a permit is obtained or an exemption applies as set out in Schedule 6 of the EP Act or Regulation 5 of the Native Vegetation Regulations. The Act provides for two types of permits — an area permit (for a defined area for a default period of 2 years) and a purpose permit (range of areas for a default period of 5 years). In the Perth Metropolitan region, the *Bush Forever* policy provides a policy overlay which needs to be taken into account in any change to land use.

**South Australia:** South Australian legislation protects all native vegetation and requires all clearance to be approved, including removal of individual plants and even damage to individual plants. The *Native Vegetation Act 1991* and the *Native Vegetation Regulations 2003* outline the management of native vegetation on all private and public land in South Australia. Landholders must apply for approval before performing any activity that could cause substantial damage to native plants. In some cases, landholders must show that they plan to offset clearance by conducting restoration or other works that will provide a significant environmental benefit. The Act is administered by an independent statutory body — the Native Vegetation Council. This Council determines applications for consent to clear and, under the Act, requires consideration to be given to balancing primary production requirements with environmental protection.

**Tasmania:** The *Forest Practices Act 1985* covers most activities that involve clearing more than one hectare of trees or clearing on vulnerable land and also covers 'clearing and conversion' of threatened native vegetation communities (including non-forest communities such as wetlands, scrub and grasslands).

There is no specific land clearing legislation to control non-forestry related clearing. Some LG planning schemes include vegetation clearance controls, and most development applications require identification of vegetation that will be removed as part of the development. However, for the most part, clearing on private land (particularly if it is less than one hectare and not 'vulnerable land') often needs no planning approval, as approval need only be sought to undertake a new development or expand an existing development. Some LGs, generally in urban areas, maintain a 'Significant Tree register' and approval is required to remove or damage these trees.

**Northern Territory:** Clearing in the Northern Territory is regulated, primarily in the more settled areas around Darwin, by the *Planning Act* (as clearing constitutes development). Landholders are required to obtain a permit to clear more than one hectare of native vegetation. Pastoral leases are subject to clearing controls under the *Pastoral Land Act*. The objective has not been to stop clearing, but to ensure that it occurs in a sustainable manner (PC 2004b).

## Scope for excessive regulatory burdens on business

There is a range of potential burdens placed on business from LG regulation of vegetation and weed control. Some potential key costs to businesses associated with regulation of vegetation and land clearing and their sources are listed in table 11.6.

**Table 11.6 Sources of vegetation and weed control regulation costs to business**

<i>Cost</i>	<i>Sources</i>
Increased costs associated with LG interactions	<ul style="list-style-type: none"> <li>• Assessing legislative requirements</li> <li>• Charges for inspections or use of private consultants</li> <li>• Lack of clarity or duplication in roles of different government agencies</li> <li>• Additional plans to accompany development applications</li> </ul>
Increased business operating costs	<ul style="list-style-type: none"> <li>• Delays in processing clearing application</li> <li>• Negotiating and funding environmental offsets</li> <li>• Inconsistency in treatment of certain environments</li> </ul>
Lost business opportunities	<ul style="list-style-type: none"> <li>• Prohibitions on developing land because of vegetation and clearing controls</li> </ul>

Key impacts of this regulation on business raised in submissions and Commission consultations were varied and included:

- uncertainty as to which government has responsibility for weeds and pest control and inconsistency in regulating access to roadside environments
  - in Victoria, the Commission was advised during consultations that it is often unclear as to whether responsibility for weeds and pest control on roadsides lies with LG or a state department
  - in South Australia, where unmade road reserves border farmland, some LGs allow farmers access to these reserves whereas other LGs require permits to be sought or generally deny access (sub. 25).
- delays in processing applications for vegetation clearing or weed inspections, and multiple levels of approvals required
  - Indigo Shire Council (Victoria) reported that councils receive applications for assessment and approval for lopping, removal or destruction of native vegetation, refer these to DSE and then get them back again to prepare a permit and issue to the applicant. This process can result in unnecessary delays for business.
  - NSW Farmers Association noted jurisdictional overlap in the implementation of the *Native Vegetation Act 2003* with LG able to override permissions granted under the Act (sub. 23).
  - The Brisbane City Council agreed that the processing time for applications dealing with vegetation was a burden for business and the multiple layers of regulatory control created confusion for business (sub. DR64).
- negotiating and funding of environmental offsets associated with land clearing



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- Businesses reported to VCEC (2009) that around 60 per cent of the total costs of complying with native vegetation obligations are associated with negotiating and funding offsets. To address the cost, uncertainty and delays associated with meeting offset obligations under the current native vegetation regulations, VCEC recommended that the Victorian Government should remove the capacity for LGs to fragment offset markets by imposing additional conditions on offsets when the Native Vegetation Regulator has specified the offsets to be provided in its advice on planning applications.
  - Champion (2011) reported that Lake Macquarie City Council has a requirement for property owners who clear half a hectare or want to cut down more than 10 trees on their land to purchase another property within the LG area with the same type of trees as those to be felled.
  - inconsistency in enforcement of environmental regulations and unusual LG requirements
    - Indigo Shire Council stated that for many businesses, there is little incentive for environmental protection as there is little or no enforcement. LGs are responsible for the administration of the native vegetation provisions under the *Planning and Environment Act 1987* which requires pre-application consultation, assessment, approval, monitoring and enforcement. Limited resources within LG lead to little or no monitoring and enforcement of any breaches occurring (Indigo Shire Council 2009, p. 2).
    - The Victorian Farmers Federation reported to the Commission regarding clearing permit processes in Victoria that:

The regulations appear to vary significantly from shire to shire, and region to region, depending on the way in which Department personnel or shire planners are willing to interpret them. (Victorian Farmers Federation 2003, p. 11)
    - GHD (sub. 19) and Nekon (sub. 24) noted the instance of a Tasmanian LG requiring, as conditions to its approval of a development application, that the applicant make all reasonable attempts to relocate roses on its property, provide a report by a suitably qualified horticulturist and submission of a detailed management plan to LG.

#### LEADING PRACTICE 11.3

*There is scope to reduce the regulatory burdens on business by clearly delineating responsibilities between local governments and the often large range of state agencies with environmental responsibilities. While the boundaries of responsibility usually appear to be clear to local governments, there is some evidence of duplication in information requirements placed on business, for example, in relation to land clearing applications.*

There are also differences in the fees LGs charge for inspections and reports on matters such as tree/vegetation significance and removal and weed cover or treatment. The cost of inspections for weed cover or treatment and to remove or lop trees for a selection of LG areas are detailed in table 11.7. The variability in these fees may indicate the costs incurred in undertaking these inspection in different locations vary and/or that a portion of these costs imposed on landowners could be considered beyond that which is necessary to achieve the desired regulatory outcomes.

**Table 11.7 Selected LG charges for the vegetation regulatory functions**

<i>LG Authority</i>	<i>Weed inspection charges (per hour)</i>	<i>LG Authority</i>	<i>Tree removal and/or lopping inspection charges</i>
Shoalhaven (NSW)	\$86.60	Wollongong (NSW)	\$62.00
Bland (NSW)	\$75.00	Gawler (SA)	\$87.00
Charters Towers (Qld)	\$110.00	Blacktown (NSW)	\$50.00 (1 to 10) \$95.50 (<10 trees)
Western Downs (Qld)	\$83.00	Break O'Day (Tas)	\$60.00
Whitsunday (Qld)	\$115.00	Maroondah (Vic)	\$75.00 (1 tree) \$25.00 (per additional tree up to a max of \$200.00)
Gladstone (Qld)	\$95.00	Pittwater (NSW)	\$60.00 (1 tree) \$80.00 (2 to 4 trees), \$120.00 (5 to 9 trees), < 10 trees \$200.00. Onsite appointment \$60.00

Sources: LG websites.

In the Commission's survey, LGs reported that vegetation and weed regulation is an area of environmental regulation in which implementation is more likely to involve visits to businesses. Nevertheless, most LGs reported that they typically visit a businesses for vegetation or weed regulation purposes only when a complaint is received. Furthermore, the costs of LG regulatory work in this area are generally not fully recovered from businesses (Environment module 2011-12).

## 11.6 Waste management

### Role of LG in waste management

Waste management has been a function of LGs in Australia since their creation. While many LGs still provide a waste collection/treatment service, such as those in Western Australia, most LGs have transitioned in recent decades away from the role

of collector and disposer of rubbish to that of enforcing waste management regulation in pursuit of environmental objectives and targets.

While the Australian Government does not directly regulate waste management (except where international treaties are involved, most notably for radioactive waste), Australia's environment ministers endorsed the National Waste Policy in 2009 and its implementation plan in 2010. The policy aims to reduce the amount of waste for disposal, manage waste as a resource and ensure that waste treatment, disposal, recovery and reuse is undertaken in a safe, scientific and environmentally sound manner over the period 2010 to 2015.

For the most part, LG's role in waste management is one of monitoring and enforcement of requirements (table 11.8). LG is still involved in operating and managing landfill sites and also has a role in regulating the location of private landfill sites through zoning and planning — the relatively small number of private landfill sites mainly receive specialised waste with the majority being construction and demolition waste (Queensland Department of Environment and Resource Management 2011). MAV (2011b) reported that across Victorian LGs, resource recovery and waste management is the most supported and best resourced of environmental issues as it is backed by policy, has dedicated resources and political support and monitoring and reporting activities.

**Table 11.8 Nature of LG waste management regulatory responsibility**

	<i>Approval</i>	<i>Monitoring</i>	<i>Enforcement</i>	<i>Appeals</i>	<i>Referrals</i>
NSW	x	✓	✓	✓	x
Vic	✓	✓	✓	✓ <sup>a</sup>	✓ <sup>a</sup>
Qld	x	x	x	x	x
WA	✓	✓	✓	x	✓
SA	✓	✓ <sup>a</sup>	✓ <sup>a</sup>	✓ <sup>a</sup>	✓
Tas	x	✓	✓	x	✓
NT	x	✓	✓	x	x

<sup>a</sup> Some LGs.

*Sources:* Productivity Commission survey of state governments (2011-12, unpublished); Productivity Commission survey of LG Associations (2011-12, unpublished).

Most states and many LGs have developed waste reduction policies or strategies and some (such as Victoria and South Australia) refer to 'zero waste', although not as an actual, or feasible, target. For example, the Office of Zero Waste in South Australia is seeking to reduce waste by 35 per cent by 2020 with a milestone of 25 per cent by 2014. This strategy includes assistance to LGs in developing regional waste management plans and improvements to their kerbside recycling collection systems (Zero Waste SA 2012).

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To support implementation of these strategies, many LGs have landfill bans in place for a variety of waste types such as e-waste, concrete and tyres. These bans supplement state level bans on a range of wastes including hazardous waste, vehicles and electrical equipment. LGs in some jurisdictions, such as Queensland and Western Australia, are also involved in the regulation of littering and dumping through local laws and under state legislation.

The majority of LGs in each state reported to the Commission that waste management is an environmental regulatory area of high to medium importance to them. Partly driving this importance are an increase in national and state government requirements for waste management in recent years (for example, management of landfill sites) and the cost-shifting to LG that has accompanied some of these requirements (such as waste recycling) (SOE 2011).

The Productivity Commission inquiry into waste management found that some LGs were finding it difficult to fulfil their waste management responsibilities (PC 2006c). The Commission recommended that state and territory governments should consider shifting the responsibility for waste disposal and resource recovery from LG to appropriately constituted regional waste authorities, particularly in large urban centres where LGs did not have sufficient scale or resources to handle these roles.

In all jurisdictions, businesses producing liquid trade waste are required, under state legislation, to obtain approval from the operator of the sewerage system to discharge waste into the sewerage system. In most of New South Wales and Queensland (outside of the major population centres), the approval body is usually the relevant LG. In other states (and in Sydney and South East Queensland), it is generally a local/regional water utility (see PC 2011c for a listing of waste water utilities in each jurisdiction).

### **Scope for excessive regulatory burdens on business**

Businesses likely to be impacted by waste regulation include those generating:

- large volumes of waste, such as construction businesses, some primary production (such as dairies) and some industrial sites
- liquid trade waste that poses a risk for the environment, such as mechanics and service stations, some industrial sites, restaurants and food premises, hairdressers and dentists.

Businesses with the largest waste disposal requirements or with waste in certain categories of hazard, are generally regulated at a state rather than local government

level. For the remaining smaller businesses and those with less hazardous waste, waste disposal charges imposed by LGs apply. These include:

- charges to use landfill sites
- charges to put liquid trade waste into sewerage systems, plus application, monitoring and inspection fees in a number of jurisdictions.

Some of the potential key costs to businesses associated with LG waste management regulation and their sources are listed in table 11.9.

**Table 11.9 Sources of waste management regulation costs to business**

<i>Cost</i>	<i>Sources</i>
Increased costs associated with LG interactions	<ul style="list-style-type: none"> <li>• Lack of clarity or duplication in roles of different government agencies</li> <li>• Additional plans to accompany development applications               <ul style="list-style-type: none"> <li>- waste management plans</li> <li>- conditions on planning or building permits</li> </ul> </li> </ul>
Increased business operating costs	<ul style="list-style-type: none"> <li>• Landfill levies and fees</li> <li>• Applications for the transport of waste products</li> <li>• Inconsistent and punitive enforcement</li> </ul>
Lost business opportunities	<ul style="list-style-type: none"> <li>• Prohibitive costs on establishing new businesses and building development due to waste disposal fees and levies</li> </ul>

LGs reported to the Commission that waste management is a key environmental regulatory area in which cost recovery occurs. Specifically, around 77 per cent of LGs reported that the costs of implementing waste regulations are recovered, at least in part, directly from business (Environment module 2011-12).

Landfill levies and charges for waste disposal are used to curb waste levels and recover costs. All states, except Tasmania and the Northern Territory, have a landfill levy (although Tasmania allows for LGs to apply such levies). These levies also vary within jurisdictions, usually between metropolitan and non-metropolitan areas, with a higher levy/charge applying to metropolitan areas.

These levies are usually collected by LG on behalf of their state (Hyder Consulting 2011). These activities involve revenue collection on behalf of the states rather than LG regulation.

LG imposed charges for the disposal of general commercial and domestic waste vary substantially between LG areas — where applicable these charges include state government landfill levies (table 11.10). As charges usually relate to the type of waste, hazardous waste, such as asbestos, incur higher disposal fees. In some areas,

LG waste facilities are fully funded through residential rates and offer free disposal for locally-sourced construction and demolition waste material.

**Table 11.10 Waste disposal charges for selected LGs**

<i>LG Authority</i>	<i>Per vehicle/ small amount</i>	<i>General commercial waste</i>	<i>Per car tyre</i>
Maitland City Council (NSW)	\$17.00 per car/station wagon	\$178 per tonne	\$4.00
Waratah Wynyard Council (Tas)	\$7.50 per car/station wagon	Trucks < 5 tonne GVM \$165.00 Trucks 6–12 Tonne GVM \$660.00 Trucks 13–16 tonne GVM \$990.00	\$7.50
Rural City of Wangaratta (Vic)	\$5.00 (.05 m <sup>3</sup> to 0.125 m <sup>3</sup> ) \$10.00 (0.125 m <sup>3</sup> to 0.25 m <sup>3</sup> ) \$20.00 (0.25 m <sup>3</sup> to 0.5 m <sup>3</sup> )	\$40.00 per m <sup>3</sup>	\$5.00
Rockhampton Regional Council (Emu Park) (Qld)	\$5.00 per car boot/station wagon	\$73.98 per tonne (if weighbridge available) \$36.98 per m <sup>3</sup> (if weighbridge not available)	\$5.00
Northern Midlands Council (Tas)	\$5.00 per car boot/station wagon	\$35 per m <sup>3</sup> \$70.00 (compacted)	\$5.00
Shire of Irwin (WA)	\$15.00 minimum charge	\$50.00 per m <sup>3</sup>	\$4.60
Litchfield Council (NT)	Free for residents (a minimum charge of \$15.00 applies for non-residents)	\$120 per tonne (unsorted waste)	

Sources: LG websites.

Some other costs that may be incurred by business relate to waste generation rather than to waste disposal. These include:

- preparation of waste management plans (WMPs) to accompany development applications
- LG conditions on planning or building permits relating to waste disposal or management on site
- applications for the transport of waste through some LG areas.

Businesses are generally negative in their views on the benefits of WMPs, given the effort required for their preparation and the practicalities of compliance. Hardie et al. (2007) surveyed 21 firms across New South Wales, Queensland, Victoria and ACT on waste management in the commercial construction sector. The survey found that:

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- none of the interviewees reported an effective process of monitoring WMPs by local councils and 39 per cent of respondents reported that WMPs were not monitored at all in any effective way
  - most LGs have produced their own preferred format of WMP to be submitted with an application for development approval and there is little consistency in format or content required.

Similarly, Heine Architects reported:

Most if not all Councils require a Waste Management Plan, which is a detailed document that is completely useless — regardless of what information is put in it, there is no reference to it in the DA conditions and it makes no difference to what happens on the site during construction. Councils could simply condition DAs such that all waste is to be disposed of at licensed tips, materials that can be recycled are recycled etc, saving countless hours work in preparing Development Applications. Ask yourself how many DAs are prepared across NSW in a year and multiply that by at least one wasted hour for each one ...

No Architect that I have met is capable of preparing them. I have in the past filled out waste management forms giving quantities of waste that are quite ridiculous, and they are never queried by Council. (2011a, p. 4)

HIA reported that restrictions on waste management collection on building sites (such as those contained in WMPs or as conditions on building permits) may inhibit more cost effective waste solutions for builders:

Builders often have small amounts of waste that need to go to landfill — the separation of waste on site for these small amounts is unwieldy and in most instances it is more appropriate and cost effective for the builder to collect waste on site and remove it to a waste transfer facility to complete the sorting and separation ... (sub. 34, p. 15)

Developers or builders who are found by LG to be managing waste in ways inconsistent with a WMP or conditions on their development/building permit can generally be fined. HIA questioned the extent to which some LGs use their enforcement powers under waste regulation as a revenue collection exercise:

Local government use their powers to place penalties and fines on builders for single waste incidents ... HIA members increasingly questioned whether these fines reflect the status of the issue at hand, or whether they seek to enhance revenue. Their questions are valid — in a number of instances members have been fined because of litter emanating from an adjoining property. The cost to appeal an “on the spot” fine is normally prohibitive, leaving the builder to incur the cost, which is ultimately passed on to consumers. (sub. 34, pp. 15, 16)

***Punitive consequences for business failure to comply with regulation requirements would generally be considered a reasonable cost to be imposed on***

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*business for the effective enforcement of a regulation, provided the fine is proportionate to the offence and consistently applied.*

## **11.7 Air quality and noise**

For many forms of air pollution and noise disturbances, there are international and/or national guidelines on appropriate concentrations or levels to ensure personal/public safety. In most instances, it is the state or local level of government which implements these guidelines in relation to businesses, depending on the size of the business involved and the nature of the pollutant or noise disturbance.

### **Role of LG in air quality and noise regulation**

#### *Air quality*

In 2008, the National Environment Protection Council (NEPC), consisting of Commonwealth, State and Territory Ministers, agreed to a 'Measure on Ambient Air Quality'. This measure established a set of standards and goals for six air pollutants and requires that regions with a population over 25 000 undertake direct monitoring and reporting of air quality.

In most jurisdictions, state level agencies have enforcement roles on air pollution standards for some types of premises (termed 'scheduled premises' in New South Wales) and for some other sources, such as smoky vehicles. For smaller businesses, or those with less frequent or less toxic emissions, LG has the primary responsibility for air quality regulation. The scope of LG responsibilities with regard to air quality regulation is usually specified in the state's environmental protection legislation (appendix F).

In many LG areas, these responsibilities translate principally to LG being the body that receives and investigates complaints of air pollution incidents. Some LGs, however, also conduct regular audits or inspections of selected business premises. For example, LG environmental health officers may take note of air quality within and around food premises as part of a routine food safety inspection.

One activity that is usually highly controlled for its air quality impacts are burn-offs. Most LGs require that their permission be sought for burn-offs, particularly in urban areas, and some LGs ban the practice entirely.



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## Noise

Noise regulation is aimed at alleviating the negative impact of excessive noise on health and amenity. Noise is managed through local zoning and planning arrangements, the relevant Environmental Protection legislation and through responses to noise complaints. The focus below is on LG responsibilities in regard to noise regulation under the relevant Environmental Protection legislation.

Noise disturbances relating to businesses or activities that are regulated by Commonwealth or state legislation (such as airports, premises with a liquor licence and some heavy vehicles on some roads) are typically the responsibility of a body other than the LG. For example, police are responsible for noise from parties, licensing authorities for noise from licensed premises, AirServices Australia for complaints about aircraft noise and marine authorities for noise from boats.

Responsibility for vehicle noise (both from individual vehicles and from traffic) is different in each jurisdiction, but is often split between state and LG. In most jurisdictions, LG is responsible for traffic noise originating from LG roads while the regulation of vehicle noise and traffic noise on major roads is the responsibility of the state government environmental or traffic and roads agency. In Queensland, LG is responsible for traffic on minor roads, while the Department of Main Roads is responsible for traffic on major roads and Queensland Transport has responsibility for noisy vehicles.

In general, the scope of LG responsibilities for noise regulation in each jurisdiction is specified in the relevant environmental protection legislation. For example, in New South Wales, the *Protection of the Environment Operations Act 1997* provides the legislative framework for regulating noise and sets out the activities for which LG is the regulating authority. These include animal noise, noise from residential construction, amusements, commercial non-licensed premises and agricultural activities (some agricultural activities such as dairy processing and some piggeries are regulated under licensing by the EPA). The environmental protection legislation in all jurisdictions provides guidelines in regard to the times and days of the week during which certain activities (outdoor concerts and amusements) can be undertaken or machinery (lawn mowers, chainsaws and power tools) can be operated. In most jurisdictions, LG is the regulating authority for these specified activities. For example, in Western Australia LGs do have the power to regulate noise and dust under the *Environmental Protection Act 1986*, but are not responsible for regulating the disposal of construction waste (the LG regulation of construction related noise is discussed in chapter 7).

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LGs also have a role in controlling land use in areas affected by aircraft noise. However, as planning and development is not always subject to LG control — as an example, planning and development on Commonwealth and military airport sites is regulated under Commonwealth legislation and planning and development at Cairns and Mackay airports are regulated under Queensland legislation — there are often disconnections between the planning systems applying to airports and adjacent land (Australian Government 2009). There are also variations across jurisdictions and within jurisdictions. For example, in Queensland state planning policy applies to all land adjacent to airports while in New South Wales, LG has responsibility for planning and development controls on land adjacent to airports. The impacts on business of these arrangements are discussed below.

As in the case of air quality, the role of LG in noise regulation is primarily one of enforcement of regulations in response to complaints. Specifically, under most state/territory environmental protection legislation, LG is the designated agency to receive complaints relating to excessive noise. It is usually the LG's environmental health officer who is responsible for the investigation and enforcement of reported noise disturbances in their LG area.

One of the main noise related complaints received by LGs is animal noise — barking dogs in particular. For example, in 2007-08, barking dogs accounted for over 66 per cent of the noise complaints received by Blacktown City Council followed by music related noise complaints (accounting for around 20 per cent). Similarly, over two thirds of the noise complaints received by the Wollongong City Council in 2007-2008, related to barking dogs (NSW Department of Environment, Climate Change and Water 2010).

## **Scope for excessive regulatory burdens on business**

Businesses that could be impacted by air quality and noise regulation include:

- urban activities — construction sites, accommodation, food premises, sports clubs, tourist attractions, live music dance party venues and some industrial/manufacturing businesses
- transport activities — heavy vehicles (use of brakes) and stock deliveries to retail premises
- non-urban activities — intensive agriculture (chicken farms and piggeries) and mining or quarry sites.

Some potential key costs to businesses associated with air quality and noise regulation and their sources are listed in table 11.11.

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**Table 11.11 Sources of air and noise regulatory costs to business**

<i>Cost</i>	<i>Sources</i>
Increased costs associated with LG interactions	<ul style="list-style-type: none"><li>• Assessing legislative requirements</li><li>• Lack of clarity or duplication in roles of different government agencies</li><li>• Additional plans to accompany development applications (eg. noise management plan)</li><li>• Uncertainty in utilising and developing land adjacent to airports sites</li></ul>
Increased business operating costs	<ul style="list-style-type: none"><li>• Capital and labour costs associated with implementing LG requirements for:<ul style="list-style-type: none"><li>- Removal of fumes, smoke or odours</li><li>- Deadening noise levels of machinery</li><li>- Noise insulation to reduce airport noise</li></ul></li><li>• Inspection and monitoring fees</li><li>• Restrictions on use or hours of operation of vehicles or machinery</li><li>• Restrictions on delivery times of stock or equipment</li></ul>
Lost business opportunities	<ul style="list-style-type: none"><li>• Restrictions on business hours of operation</li><li>• Restrictions on business location because of noise or air quality requirements</li><li>• Restrictions on the types of business operations on land adjacent to airport sites</li></ul>

The extent to which air quality and noise regulation impacts on business is generally related to the types of businesses within the LG area, their location in relation to residential and other sensitive land uses areas, and hence, the potential for complaints to be made to the LG. For example, a business may operate in a given manner for many years until the expansion of residential development toward the business locality increases community focus on air quality or noise levels.

The planning and development controls placed on land adjacent to airport sites has a number of impacts on business. These controls limit the type of business activities that can operate in these areas. For example, such controls generally exclude ‘noise sensitive’ businesses, such as child care and aged care facilities and public performance venues, from operating in these areas. These controls can also impact on existing business operations — such as through requiring prescribed levels of noise insulation. Moreover, the variation in these controls between jurisdictions and in relation to specific airport sites within jurisdictions can create uncertainty for business as to the future use and development of vacant land.

In some areas, the more proactive approaches of LGs to reduce air pollution or excessive noise may have a direct impact on business operations. For example, Guthrie (2011) reported that Yarra City Council (Victoria) is developing a Noise

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Management Plan to limit the noise from building projects. Under the plan, developers will have to prove that they are minimising noise in order to obtain LG development approval.

*The regulation of air quality and noise involves balancing the restrictions on business operations with the amenity of the surrounding community. Although LG is primarily responsible for enforcing state government regulation in response to complaints, it does have some ability to address potential noise and air quality issues through its planning and development controls. For LG, this is likely to involve dealing with the expansion of residential development in proximity to commercial and industrial sites.*

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## 12 Planning, zoning and development assessment

### Key Points

- Local government has a significant role in the planning, zoning and development assessment (DA) system through: developing local plans in accordance with state and regional strategic plans; processing and determining the vast majority of development applications; and monitoring and enforcement to ensure land is being used appropriately.
- Business indicates that local government regulation of planning, zoning and DA activities is a significant source of excessive and unnecessary burdens.
  - Most business concerns are about the direct and indirect costs arising from the rezoning and DA process. Costs associated with gaining approval for a proposed development include: accessing and understanding relevant information; requests for excessive and unnecessary information to support applications; uncertainty arising from the decision-making process; assessment fees and infrastructure charges.
  - Other businesses indicated that costs can arise from the ongoing impact of poor planning and DA decisions through the imposition of excessive and unnecessary development controls and consent conditions.
  - Planning, zoning and DA regulation can also create lost business opportunities through holding costs associated with time delays and restrictive zoning that prohibits certain business types.
- Leading practices relating to local government regulation of land use and DA include:
  - measures that facilitate the early resolution of land-use and coordination issues and provide more flexibility to the market, such as: regularly updating local planning schemes; consistently adopting broad land-use zones; and establishing regional or state bodies able to assess all impacts, particularly for large projects seeking planning scheme amendments for development approval
  - further adoption of code-based assessment and streamlined administrative processes, such as pre-lodgement meetings, electronic lodgement and assessment processes, and resolving referrals simultaneously
  - making lodgement and decision outcomes publically available and implementing a graduated framework for reviews and appeals (that is, internal and external review mechanisms and formal appeal processes) with provisions limiting the scope for frivolous, vexatious and/or anti-competitive appeals
  - providing clear guidelines for the assessment of development proposals related to specific sectors.

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The planning, zoning and development assessment (DA) system was the subject of the Commission's business regulation benchmarking study in 2010-11 (PC 2011b). The study assessed regulatory burdens imposed by all levels of government across the broad planning, zoning and DA system, specifically focusing on land use and development of the built environment in metropolitan centres. Many of the findings and leading practices identified previously are relevant to LG regulation of land-use activities.

The role of LG in planning, zoning and development approval was considered in the broad operation of the land-use and development system, and as part of the interactions between different levels of government. However, the focus was not on the burdens imposed by LGs and the analysis undertaken was limited to Australia's 24 largest cities, whereas this review covers LGs in general, including those operating in rural and remote areas and addresses some issues relating to these areas.

Other chapters in this report explore specific issues with the planning, zoning and DA system as they relate to particular regulatory areas, including building and construction (chapter 7), parking (chapter 8), brothels (chapter 10) and the environment (chapter 11). These issues are not re-examined in this chapter.

This chapter outlines the regulatory roles of LGs in the planning, zoning and DA system (section 12.1). It identifies areas of LG activity that can potentially contribute to excessive regulatory burdens for business (section 12.2) and explores specific industry sectors where it appears that businesses may be affected by the regulatory activities of LGs (section 12.3).

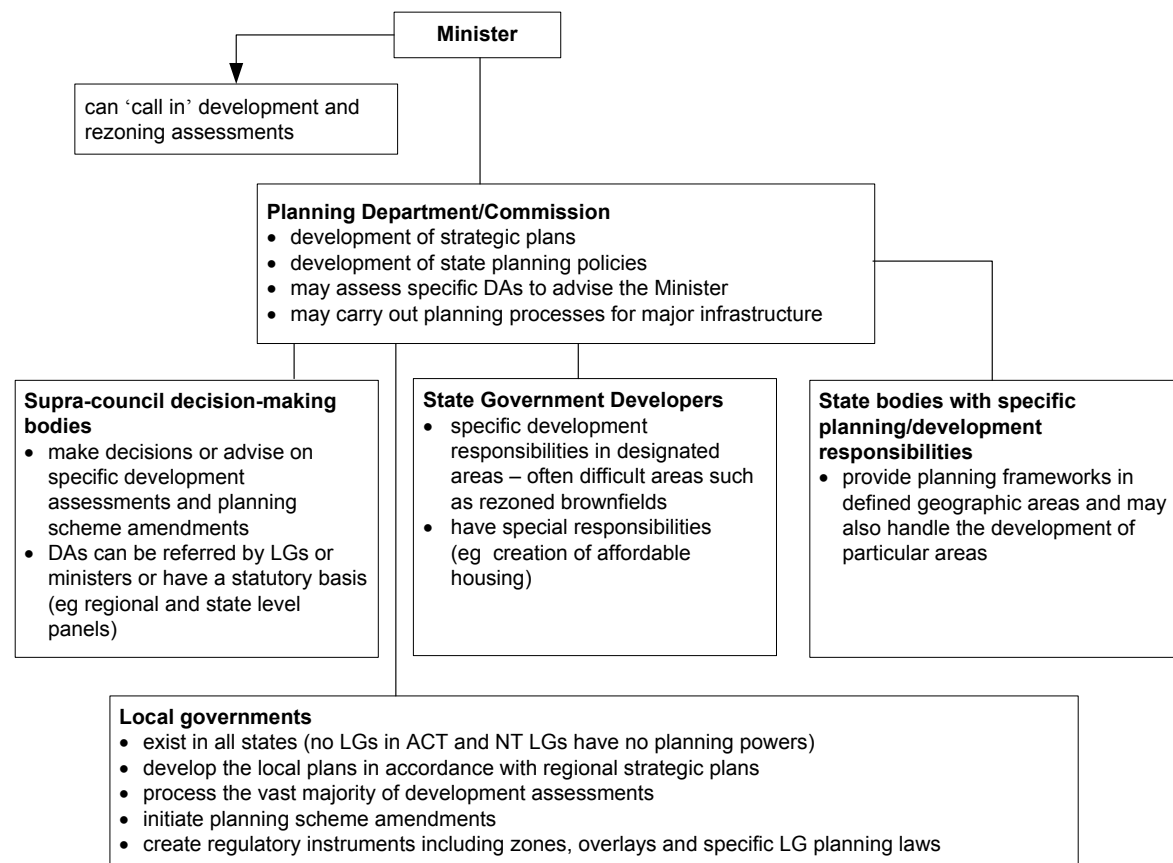
## **12.1 Overview of the regulatory framework**

Regulations pertaining to land use and the development of the built environment are necessary: to deliver a coordinated approach to the release and development of land; to construct and maintain the economic and social infrastructure needed to support land uses; and to preserve and enhance the quality and amenity of the built and natural environment (PC 2011b).

The distribution of regulatory responsibilities relating to planning, zoning and DA among different levels of government in Australia is complex and varies substantially across jurisdictions. The planning, zoning and DA system in each jurisdiction has evolved separately but the main elements are common between jurisdictions (figure 12.1).

Unlike some other regulatory regimes, the delineation between policy and regulation making and the administration of the regulations in this system is often not clear.

Figure 12.1 Simplified planning system regulatory structure

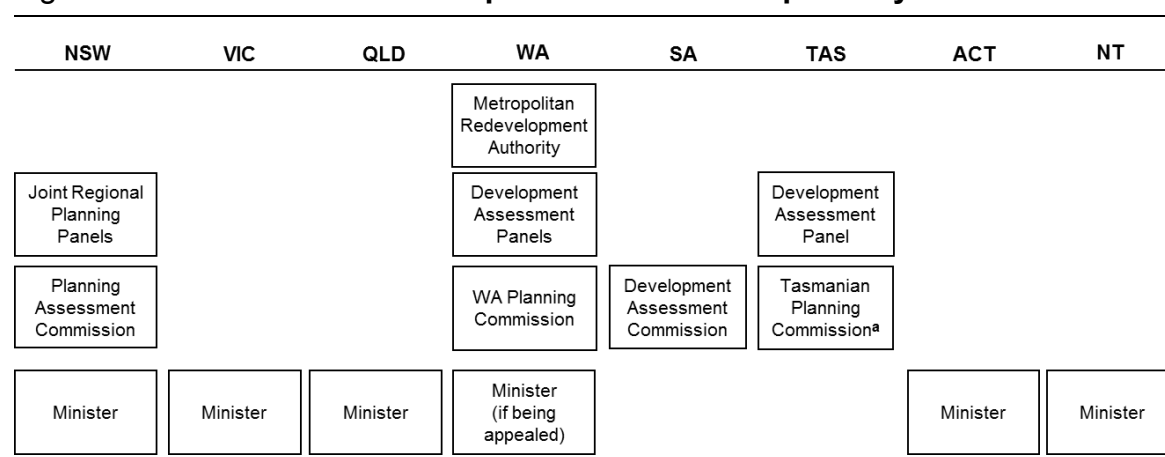


Source: Adapted from PC (2011b).

State and territory governments have primary responsibility for planning and development activity within their jurisdiction. Each state and territory has a lead agency which is either a planning department or authority. Lead agencies engage in broad strategic land-use planning and guide the creation of more detailed, regional and local plans. State and territory governments delegate separate responsibilities for land-use planning and DA to various agencies including: specific state government development organisations; state bodies with planning and development responsibilities (such as state-wide planning authorities and commissions); regional planning and decision-making bodies (such as regional commissions or planning panels). Land-use planning at a local level and development assessments are devolved to LGs except in the Northern Territory.

While state and territory governments delegate a significant amount of planning and DA responsibility to other bodies, they reserve and exercise the right to involve themselves in strategic planning and development approval processes. State governments may exert significant influence over the strategic direction of planning and land use policy at the LG level. All states have a hierarchy of planning instruments whereby LG plans and policies must be consistent with state government planning policies. In addition, most state government planning departments issue planning policies and guidelines to assist LGs. Alternative mechanisms for development approval may also exist which give either a regional planning body, state government commission and/or the planning minister decision-making powers (figure 12.2).

**Figure 12.2 Alternative development assessment pathways**



<sup>a</sup> The Tasmanian Planning Commission makes a recommendation to the government, whereby an order from the Governor enabling the project to proceed must be approved by each House of Parliament.

Source: Updated from PC (2011b).

LGs derive regulatory responsibilities for land-use planning and development primarily from state planning legislation and supporting regulations (table 12.1). Other legislative instruments at the state and federal level may impose additional regulatory requirements on LGs to consider certain issues as part of their planning, zoning and DA activities, or require LGs or businesses to refer an aspect of a planning amendment or development application to a government minister or department for consideration. In the case of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth), for example, developments or actions that may have a significant impact on the matters of national environmental significance require approval from the relevant Australian Government minister.



**Table 12.1 Primary planning and development legislation and supporting regulations**

	<i>Legislation</i>	<i>Supporting regulations</i>
NSW	<i>Environmental Planning and Assessment Act 1979</i> <sup>a</sup>	Environmental Planning and Assessment Regulation 2000
Vic	<i>Planning and Environment Act 1987</i>	Planning and Environment Regulations 2005
Qld	<i>Sustainable Planning Act 2009</i>	Sustainable Planning Regulation 2009
WA	<i>Planning and Development Act 2005</i>	Town Planning Regulations 1967
SA	<i>Development Act 1993</i>	Development Regulations 2008
Tas	<i>Land Use Planning and Approvals Act 1993</i>	Land Use Planning and Approvals Regulations 2004
ACT	<i>Planning and Development Act 2007</i>	Planning and Development 2008
NT	<i>Planning Act 2009</i>	Planning Regulations 2009

<sup>a</sup> The *Environmental Planning and Assessment Act 1979* is currently the subject of a comprehensive review with draft legislation to be released in 2012.

Source: PC (2011b).

Most LGs have a number of important roles in planning, zoning and DA through:

- developing local plans and zones (which are required to be consistent with broader strategic plans determined by regional and state bodies)
- processing and determining development applications (where not assessed by alternative mechanisms) and potentially undertaking internal reviews of decisions
- monitoring and enforcement to ensure land is being used appropriately (table 12.2).

**Table 12.2 Nature of LG planning and DA regulatory responsibilities**

	<i>Land use planning</i>	<i>Development assessment</i>	<i>Internal reviews</i>	<i>Monitoring and enforcement</i>
NSW	✓	✓	✓	✓
Vic	✓	✓	x <sup>a</sup>	✓
Qld	✓	✓	x	✓
WA	✓	✓	x	✓
SA	✓	✓	x <sup>b</sup>	✓
Tas	✓	✓	✓	✓

<sup>a</sup> No internal appeal/review after decision is made. Prior to the decision being made, the permit applicant may have capacity for the matter to be elevated to the Council or a Council Committee for decision. This is dependent on individual LG's processes and delegations. <sup>b</sup> The Development Assessment Panel will hear objections only on draft conditions and only in relation to projects of regional significance.

Source: PC (2011b).

The level of LG involvement in planning and DA can vary significantly both within and between jurisdictions. This variety reflects the diversity of LGs in Australia and

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the flexibility afforded to them through state legislation, regulations and supporting policies, and the resources and attitude of individual LGs to their planning and DA role. For example, LGs are required to update their local land-use plans after state and regional strategies are updated to ensure consistency but there are numerous examples where LGs have not done so (PC 2011b).

Most LGs have substantial interactions with state government ministers and relevant departments through consultation and referral requirements. For example, LGs in South Australia may be required to consult or refer DAs to up to 19 bodies where a proposed development affects a prescribed matter, action or activity. By contrast, Tasmania only has two such bodies (PC 2011b).

The Northern Territory and ACT Governments undertake most of the planning, zoning and DA activities in their jurisdictions.<sup>1</sup> The Northern Territory Government consults LGs in regard to development applications prior to determination to ensure that the concerns of LGs are identified and considered. As such, this chapter focuses on the role of LG in the states with reference to the Northern Territory and the ACT if practices within these territories are relevant or provide insights into the benchmarking exercise.

The Australian Government has only limited powers with regard to planning and DA activity except where it has control over Commonwealth land (such as defence land and major airports) where it is also the development assessor. However, Australian Government policies for such land can be contrary to local planning policies and affect development in surrounding LGs. The Australian Government can also influence land-use and development activity in areas where it has constitutional authority, for example, the Communications Minister can approve the development of telecommunications infrastructure which is considered to be of national significance.

In areas where the Australian Government has limited constitutional authority, it can encourage the states, through the Council of Australian Governments (COAG) and other means (such as incentive payments), to adopt and implement nationally consistent policy frameworks to reduce regulatory burdens. For example, DA reform is a deregulation priority being pursued under the *National Partnership Agreement to Deliver a Seamless National Economy* that directly impacts on this regulatory function of LGs (COAG Reform Council 2010). Areas where reform is progressing include the adoption of national planning principles and the development of capital city strategic planning systems.

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<sup>1</sup> Planning, zoning and DA activities in certain areas of the ACT are undertaken by the National Capital Authority.

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In relation to governance of land use and the built environment, the Commission has previously supported the adoption of the subsidiarity principle — that is, decisions should be made by the lowest level of government capable of adequately taking into account all positive and negative impacts (PC 2004c, 2011b). Hence, leading practice would be for proposed developments which only affect the local community to be assessed at the LG level. By contrast, developments having broader impacts outside the local government area in which it occurs are better assessed by a regional or state body that can objectively take these broader impacts into account. An example of such a development would be a new airport that benefits an entire city (or the nation), not just the area where it is located.

This principle has been applied by the states through their adoption of alternative development assessment pathways (figure 12.2). In the Commission's view, the Western Australian Development Assessment Panel (DAP) system contains most of the features desirable in an alternative assessment pathway. There are 15 DAPs covering all LG areas in Western Australia which are independent decision-making bodies comprised of independent technical experts and elected LG representatives. They are bound by the provisions of the relevant Local and Region Scheme, where applicable. Any interested party can make a submission on an application during the public advertising process and attend the DAP meetings. DAPs are the decision-making authority for most applications where the value of the development is over a mandatory threshold, or where the applicant or LG choose to elect the DAP as the decision-making authority.<sup>2</sup> All other applications continue to be assessed by the relevant planning authority which includes LGs.

Local government associations were critical of the development assessment panel model as an alternative assessment pathway. For example, the Australian Local Government Association contended that 'Panels are simply an additional decision making entity that potentially adds yet a further layer in the planning process' (ALGA, sub. DR52, p. 10). In relation to the Western Australian DAPs specifically, the Western Australian Local Government Association (sub. DR47) noted that the DAPs have only been in operation for less than 12 months and have yet to be reviewed. Subject to an independent review being undertaken and the results released, the Commission considers that the Western Australian model represents a leading practice.

***Consistent with leading practice 3.16 and where the impacts of a planning or development decision extend beyond a single LG area, the leading practice in alternative decision making should involve a decision-making body that is***

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<sup>2</sup> 'Excluded development applications', such as development by a LG or the Western Australian Planning Commission, are not able to be determined by a DAP.

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*independent and transparent which takes into account local, state and community interests. The Western Australian DAPs arrangement appears to represent a leading practice in this area.*

## **Planning and zoning — land use and supply**

LG planning and zoning activities are generally undertaken with guidance from broad state strategic planning policies and, where developed, regional strategies. Each state takes a different approach to planning and zoning and this is reflected in the varying regulatory responsibilities afforded to LGs.

In all states, a hierarchy of planning instruments exist to facilitate consistent planning and land use outcomes (figure 12.3). At the top of the hierarchy, principle-based instruments developed by state planning departments (or delegated bodies) set the broad framework and are intended to take precedence over more detailed and prescriptive land-use plans developed by regional bodies and/or LGs.

Regional planning policies, including those covering metropolitan centres, have been developed under the auspices of the state governments to accommodate sustainable population growth. They facilitate orderly and coordinated growth in areas where there are multiple LGs — for example, in the greater Sydney area there are over 40 LGs. Regional planning policies also have a role in rural locations through outlining potential development paths and land-use changes.

LGs are responsible for implementing state policies and strategic plans relating to land use through the development of planning schemes as well as developing local policies that relate to development in their area, particularly in rural areas and regional centres, provided they are consistent with those policies above them in the planning hierarchy. These local planning schemes generally detail land uses, zones, reserved land for infrastructure and public use, and may include guidelines for development controls or standards. In addition, LGs can supplement local planning schemes with other strategic plans and policies (including development control plans, overlays, precincts, area classification, domains, constraint codes and use codes) in order to control land use and development within their area.

Figure 12.3 Planning instruments by jurisdiction

	WA	NSW	QLD	VIC	SA	TAS	NT	ACT
State-wide Planning	State Planning Strategy Development Control Policies Model Scheme Text Planning Bulletins	Standard Instrument (Local Environment Plans) Order 2006 State Environment Planning Policies (SEPPs)	The Queensland Planning Provisions State Planning Policies	The Victorian Planning Provisions State Planning Policy Framework	Better Development Plan Project SA Planning Policy Library	Resource Management and Planning System State Policies State Planning Directives	Territory 2030 Strategic Plan	National Capital Plan The Canberra Spatial Plan
Regional Planning	Regional Planning Strategies Regional Planning Schemes	Metropolitan Plan 2036 Regional Plans Sub-regional Strategies (draft) Strategic Regional Land Use Plans (draft)	Statutory Regional Plans	Regional Development Victoria (Established By <i>Regional Development Victoria Act 2002</i> )	Regional volumes of the Planning Strategy/ Regional Development Plans	Regional Land Use Strategies and Plans		
Local Planning	Local Planning Strategies Local Planning Schemes	Local Environment Plans Development Control Plans	Local Planning Schemes	Municipal Planning Schemes Municipal Strategic Statement Local Planning Policies	Development Plans	Local Planning Schemes	Northern Territory Planning Scheme Town of Jabiru Planning Scheme	The Territory Plan

Sources: L.E.K. Consulting (2011); PC (2011b).

LGs may also have various roles in rezoning processes arising from proposed planning scheme amendments. Amendments to a planning scheme may be proposed to change the zoned use of a particular piece of land for development purposes. Planning scheme amendments may be approved by LGs or be referred to higher level bodies (see PC 2011b, appendices E and I). As noted in the *Planning, Zoning and Development Assessment* study (PC 2011b), planning scheme amendment processes, or ‘spot rezoning’, are often not transparent and may not undergo rigorous community consultation as part of the assessment process. ***Ensuring planning scheme amendments have effective engagement, transparency and probity processes was identified as the leading practice in this area.***

## Development assessments

LGs are generally responsible for the assessment of development applications and make the vast majority of development proposal determinations. Determinations of development applications are generally made by LG staff under delegation but some

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applications incorporating issues of community interest may be considered by elected LG representatives, who are ultimately responsible for any development decision at the LG level. However, formal intervention by elected representatives is relatively rare. For example, only 3 per cent of development applications in New South Wales during 2010-11 were determined by councillors (NSW DP&I 2012). This figure was similar to Queensland in 2009-10 where 3.15 per cent of all development related decisions were made by politicians or councillors (Queensland Department of Local Government and Planning 2011e).

Each state has implemented some form of 'track'-based assessment system to streamline the DA process and align the level of assessment undertaken by LGs with the perceived risk of the development application (box 12.1). However, each state has implemented a slightly different track-based assessment framework (figure 12.4) which makes it difficult to identify relevant benchmarking indicators or undertake comparisons between the performances of LGs in assessing development applications between jurisdictions. The Property Council of Australia ranks Victoria, Queensland and Tasmania equally well in terms of their track-based assessment models and considers these states to have a better model than New South Wales and South Australia (PCA 2012).

Less than half of LGs responding to the Commission's survey report using the track-based assessment frameworks introduced by state governments to assess development applications (table 12.3), even though all states have such systems. Relatively more LGs in Queensland and South Australia reported that they use a track-based assessment system compared to other states. It is unclear why LGs report not using a track-based assessment system given that the states and territories have introduced these frameworks. *An education program to increase the awareness of LG staff about the planning framework and track-based assessment could be undertaken. Such a program has the potential to deliver wider benefits in terms of promoting more appropriate, risk based assessment of development applications at the LG level.*

Figure 12.4 Local government development assessment tracks

DAF track	NSW	VIC	QLD	WA	SA	TAS	ACT	NT
Exempt	Exempt	Exempt	Exempt	Exempt	Exempt	Exempt	Exempt	
		No permit required				No permit required		
Self assess			Self-assessment					
Code assess	Complying	VicSmart <sup>a</sup>	Compliance assessment	Permitted	Complying	Permitted	Code assessment	Permitted
Merit assess	Merit Assessment	Permit required	Code assessment	Discretionary not-notifiable	Non-complying	Discretionary	Merit assessment	Discretionary
Impact assess	Designated		Impact assessment	Discretionary notifiable	Merit assessment		Impact assessment	
Prohibited	Prohibited	Prohibited	Prohibited	Not permitted		Prohibited	Prohibited	Prohibited

<sup>a</sup> The Victorian Government has recently introduced legislation to create the VicSmart planning assessment process. The proposed new process would align with the 'code-assess' process under the DAF assessment track model.

Source: Updated from PC (2011b).

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### Box 12.1 **Track-based assessment of development applications**

The Development Assessment Forum (DAF) was established in 1998 to identify and promote leading practice approaches to simplify and improve DA, without sacrificing the overall quality of the decision making. In 2005, the DAF released a Leading Practice Model which outlined ten leading practices and six 'tracks' that apply the leading practices to the spectrum of assessment types.

Each 'track' was developed to allow applications to be streamlined corresponding to the level of assessment required to make an appropriately informed decision. The six development tracks are:

- Exempt — development that has a low impact beyond the site and does not affect the achievement of any policy objective and should not require DA
- Prohibited — development that is not appropriate to specific locations should be clearly identified as prohibited in the ordinance or regulatory instrument so that both applicants and consent authorities do not waste time or effort on proposals that will not be approved
- Self-assess — where a proposed development can be assessed against clearly articulated, quantitative criteria and it is always true that consent will be given if the criteria are met, self-assessment by the applicant can provide an efficient assessment method
- Code assess — development assessed in this track would be considered against objective criteria and performance standards. Such applications would be of a more complex nature than for the self-assess track, but still essentially quantitative
- Merit assess — this track provides for the assessment of applications against complex criteria relating to the quality, performance, on-site and off-site effects of a proposed development, or where an application varies from stated policy. Expert assessment would be carried out by professional assessors
- Impact assess — this track provides for the assessment of proposals against complex technical criteria that may have significant impact on neighbouring residents or the local environment.

While the adoption of any track is optional, jurisdictions were encouraged to implement each track consistently. Each state has introduced a slightly different track-based assessment system which has limited the capacity to make meaningful comparisons between the frameworks and outcomes.

*Source:* DAF (2009).



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**Table 12.3 LG's reported use of track-based assessment**

Per cent of responding LGs by jurisdiction

	NSW	QLD	SA	TAS	VIC	WA
Uses track-based assessment	53	83	86	22	7	11

Sources: Productivity Commission survey of local governments — planning, zoning and development assessment survey (2011-12, unpublished); Productivity Commission survey of local governments (2011, unpublished).

LGs are required to refer aspects of development applications to state government departments for approval in circumstances where matters other than land use and planning — such as heritage, traffic or environmental issues — need to be taken into consideration when assessing a development application. The referral of an application can add substantially to the length of the development application process. For example, in New South Wales the median assessment time taken by referral agencies, in addition to the LG assessment time, was 27 days in 2010-11 (NSW DP&I 2012). While some referral agencies in New South Wales processed all referrals in less than 40 days, others had a clearance rate of less than 85 per cent in this timeframe.

LGs also have a role in justifying their decisions in review and appeal processes where they may be required to appear in courts and tribunals as respondents. In addition, LGs may be appellants against determinations made through alternative DA pathways (such as when ministers call in decisions) or decisions made by LGs in adjoining jurisdictions.

## 12.2 The impact on business

Consultations and submissions to this study and the Commission's previous research into the planning, zoning and DA system (PC 2011b) have identified a number of areas where LGs impose substantial and unnecessary compliance costs on business.

A quarter of businesses in the survey of small and medium businesses that cited local planning, zoning and DA regulations as having the most impact on their business indicated that their regulatory dealings had a positive impact on their business over the last three years, compared with over a third that indicated their regulatory dealings had a negative impact (Sensis survey of small and medium businesses — 2011, unpublished). While excessive regulatory burdens can be felt by all types of businesses that interact with the planning, zoning and DA system, it appears from submissions and consultations that those most affected are in the building and construction, retail, and tourism related industries.

It is the LG's role to weigh the relative costs and benefits of a particular development and impose appropriate regulations that balance community interests and opportunities for business. It is not surprising then that participants in this study have indicated that some costs, both direct and indirect, are excessive or avoidable, and hence impose unnecessary regulatory burdens (box 12.2). The main sources of excessive burdens on business that can arise from planning, zoning and DA regulations are outlined in table 12.4.

**Table 12.4 Sources of planning, zoning and DA costs to business**

<i>Cost</i>	<i>Sources</i>
Increased costs associated with LG interactions	<ul style="list-style-type: none"> <li>• Accessing and understanding relevant information prior to lodging applications</li> <li>• Inefficient lodgement mechanisms</li> <li>• Inconsistencies between planning schemes (including between local and state plans)</li> <li>• Requests for excessive and unnecessary information to support applications</li> <li>• Uncertainty due to different approaches between authorised delegates in assessing applications</li> <li>• Potential for adverse political intervention in decision making</li> <li>• Excessive costs associated with planning and DA fees and infrastructure charges</li> </ul>
Increased business operating costs	<ul style="list-style-type: none"> <li>• Imposition of inconsistent development controls and consent conditions</li> </ul>
Lost business opportunities	<ul style="list-style-type: none"> <li>• Time delays associated with processing applications, including additional time when further information is requested</li> <li>• Time delays associated with reviews and appeals of decisions</li> <li>• Restrictions on development in certain areas due to prescriptive zoning</li> </ul>

The *Planning, Zoning and Development Assessments* report (PC 2011b) identified and explored a number of indicators to benchmark the regulatory functions of LGs in the areas of compliance costs, competition and governance. Where applicable, these indicators have been used in this study to give some insight into the regulatory differences between LGs.

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### **Box 12.2 Participants views on LG administration of planning, zoning and DA regulation**

Reflecting the views expressed at regional forums, the NSW Small Business Commissioner indicated:

Many small businesses face unacceptable delays when they seek planning approvals from councils. There is a common complaint that local council staff do not understand the financial impacts when small business owners are required to adhere to duplicative and excessive assessment procedures and wait for significant periods for council assessments. (sub. 18, p. 2)

According to the Australian Institute of Architects:

Inconsistency between local government areas planning schemes, even when purportedly made under the same state or territory authority, is a significant barrier to an efficient planning approval system. (sub. 40, p. 1)

The National Tourism Alliance said:

The planning and development approval process has been identified as a significant source of additional costs to tourism businesses and an impediment to the development of new tourism products, including accommodation, restaurants and cafes and tourist attractions.

... there is a misalignment in incentives and costs in the planning process. Councils have little incentive to ensure speedy process as costs are borne solely by the developer. (sub. 28, p. 3)

Small Business Development Corporation (WA) noted:

Currently, significant differences exist between the local laws introduced by local governments in Western Australia. These are most pronounced in regards to the planning and approvals processes for business, particularly for those that work from or at home (i.e. home based businesses). (sub. 29, p. 5)

The Housing Industry Association (HIA) contended that:

Many of the problems faced by builders when dealing with local government relate to the plethora of planning requirements and delays in the administration of the planning and building system. Particularly in planning there are long delays experienced in processing applications and local governments are frequently unable to meet statutory deadlines. (sub. 34, p. 6)

Hosted Accommodation Australia (formerly Bed & Breakfast, Farmstay and Accommodation Australia) commented that:

... it has been notified of many instances of Local Government being unable to effectively and economically implement regulations because of economies of scale and/or misunderstanding and interpreting the purpose behind the regulation. (sub. 13, p. 1)

Property Council of Australia said:

Many councils don't have the capacity to administer best-practice planning and development assessment systems due to:

- insufficient funding
- a shortage of skilled staff
- poor business planning
- inadequate delivery models. (sub. DR60, p. 17)

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The Commission has undertaken a survey of the planning, zoning and DA activities of a number of non-metropolitan LGs as part of the LG survey. Information from this survey has been combined with data from the *Planning, Zoning and Development Assessments* study to assist in benchmarking and provide a more robust picture of LG regulatory activity in this area.

### **Increased costs associated with LG interactions**

There is significant potential to reduce excessive or unnecessary costs, both direct and indirect, arising as a result of the application and decision processes imposed by LGs in regulating the planning, zoning and DA system.

#### *Pre-lodgement services and lodgement mechanisms*

Prior to lodging rezoning and development applications, many businesses encounter problems accessing and understanding the relevant information necessary to determine if their proposal is allowed or feasible under the local planning scheme (or equivalent). In addition, many LGs employ inefficient lodgement mechanisms which increase the costs and time associated with determining development applications.

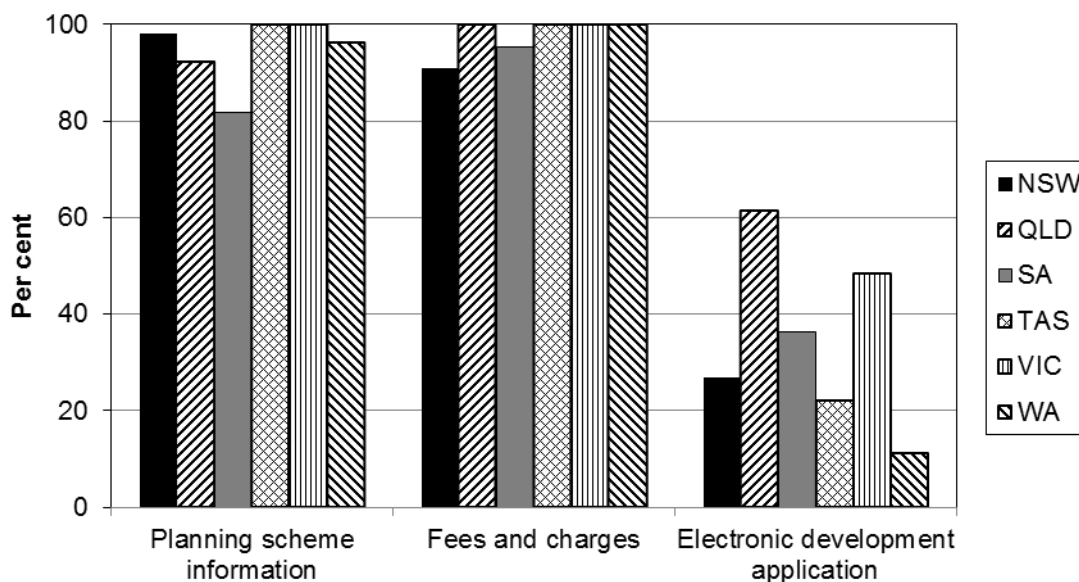
There are a number of measures that can be employed by LGs to reduce these unnecessary burdens and expedite the DA process, including making useful information available online, offering pre-lodgement services and introducing electronic lodgement facilities.

In terms of making relevant information available to prospective developers, almost all LGs publish their local planning scheme (or equivalent) and application fees and charges (excluding infrastructure levies) on the internet (figure 12.5).

Many LGs are working towards making the planning and DA system easier to navigate for customers. For example, Adelaide City Council (sub. DR43) is implementing a variety of measures directed at improving the information available to applicants and the application process itself, including:

- revised plain English application forms and guides
- an improved DA website to help customers find and complete forms online
- informative automated email communications to notify customers as each stage of the process is completed
- online lodgement and assessment of applications.

Figure 12.5 **Availability of information on the internet**  
Per cent of LGs that responded to this question



Data sources: Productivity Commission survey of local governments — planning, zoning and development assessment survey (2011-12, unpublished); Productivity Commission survey of local governments (2011, unpublished).

Business representatives were also supportive of improved access to information.

The NSWBC [New South Wales Business Chamber] strongly supports any change to current practice that leads to an improvement in the accessibility of land use information. Information provided in this manner should be free of charge and able to be legally relied upon...

Providing accurate, legally reliable, land use information online presents an opportunity for significant cost savings for businesses looking to develop and expand their operations in an area. (sub. DR42, p. 2)

The wider adoption of code assessment (box 12.1) and electronic DA (eDA) may deliver significant benefits to the economy. As part of the study into the *Impacts and Benefits of COAG Reforms* (PC 2011f), the Commission estimated that the introduction and adoption of these processes could save development applicants (including individuals and businesses) around \$340 million each year. Savings from eDA adoption were based on a study which considered that assessment times would be reduced by around 5 days per application as a result of efficiencies gained from the movement of data between participants (Stenning and Associates 2004).

There would appear to be opportunities to streamline the development application process through greater use of eDA as less than half of LGs indicate that application lodgement is available electronically (figure 12.5). **Proportionately more LGs in**

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***Queensland (almost 60 per cent) report offering eDA facilities compared to other states, particularly Western Australian LGs (just over 10 per cent).***

Although the rollout of eDA was part of COAG's Seamless National Economy reform program, the Commission notes that major resourcing and technical issues, and uncertain government commitment, has affected its adoption at the LG level (COAG Reform Council 2011). Further, the Property Council of Australia's *Development Assessment Report Card 2012* (PCA 2012) reports limited progress in the roll-out and adoption of eDA facilities at the LG level. According to the PCA, Queensland is the state with the highest proportion of development applications submitted via eDA (using the Smart eDA system) at around 10 per cent while in Victoria less than 1 per cent of development permit applications are processed using their eDA system (known as SPEAR — Streamlined Planning through Electronic Applications and Referrals).

That the adoption of eDA systems would reduce costs for businesses and residents is not debated, but the funding for such systems is significant and who should fund them is a critical issue.

Some LGs offer pre-lodgement consultations to expedite the assessment process. ***The vast majority of LGs that responded to the 2011-12 survey indicated consultation with business prior to the lodgement of a development application had a moderate or major impact on expediting the assessment process*** (figure 12.6).<sup>3</sup> According to Coles Supermarkets Australia:

There are also opportunities for councils to improve the level of engagement and consultation before property development applications are submitted and throughout the assessment process. For example, some councils encourage a pre-lodgement meeting whilst others may refuse to discuss the proposed project until an application is submitted. We consider pre-lodgement meetings to be most helpful and a best practice approach to ensure that [the] applicant meet[s] the application criteria, understand timing, etc and has all the information required before submitting. Where the value of a project can go into the multi-million dollars, a pre-lodgement meeting is an important step in the process that can ultimately save the local government and the applicant significant time and money. (sub. 5, p. 5)

However, the NSW Business Chamber (NSWBC) was concerned about potential excessive charges being imposed for pre-lodgement meetings.

While the NSWBC does support councils providing pre-DA lodgement meetings to identify issues related to a proposed development, the fees applied by some councils to undertake such meetings can make them prohibitive. For example Manly Council

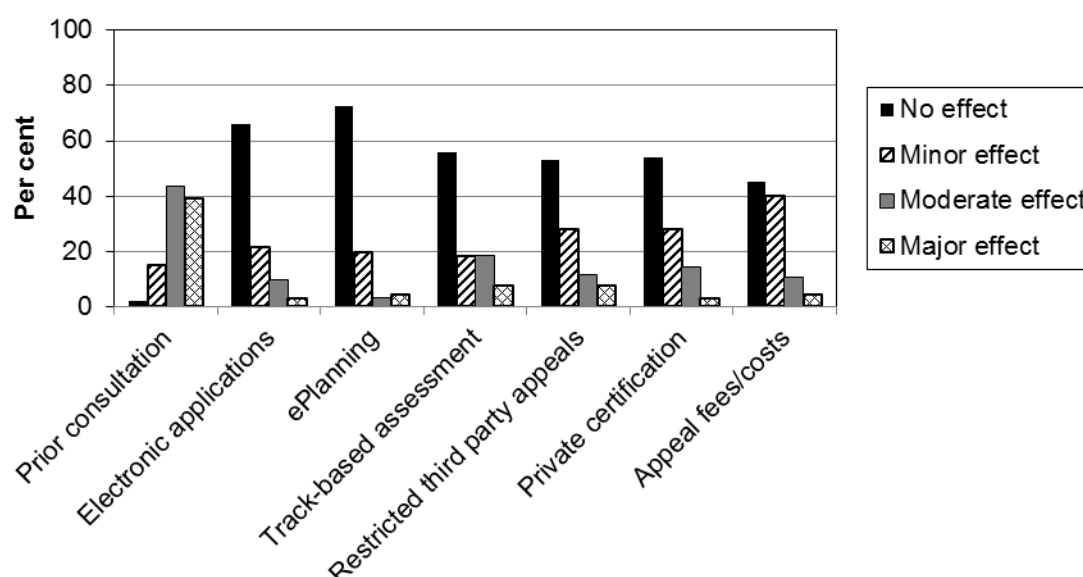
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<sup>3</sup> Questions about the impact of prior consultation were only asked in the 2011-12 survey module and not in the 2011 survey.

charges \$2,500 for a pre DA lodgement meeting with Senior Planners and Managers, North Sydney \$1,000 and Mosman \$950 (plus 0.001% on amount [value of proposed development] in excess of \$1,000,000). If pre-DA meetings are to be supported as a leading practice, appropriate mechanisms to ensure councils are not charging excessively for such meetings need to be put in place. (sub. DR42, p. 2)

Figure 12.6 **LG perception of measures to expedite the assessment process<sup>a</sup>**

Per cent of LGs that responded to this question



<sup>a</sup> Questions about the impact of prior consultation were only asked in the 2011-12 survey module and not in the 2011 survey.

*Data sources:* Productivity Commission survey of local governments — planning, zoning and development assessment survey (2011-12, unpublished); Productivity Commission survey of local governments (2011, unpublished).

Further, *pre-lodgement meetings will not deliver all the possible benefits if advice is not communicated in writing*. The HIA said:

In relation to pre-lodgement meetings often held between councils and applicants, HIA members have found that requests for specific information tend to be made verbally and are not always backed-up in writing, as either a file note or formal advice. This creates a ‘to and fro’ situation whereby the applicant thinks they understand all that is required by the local council but it is open to the council to request more information at a later date or completely alter their position, for example where staff change during the assessment. (sub. 34, p. 10)

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### *Concerns about development application processes*

There are a number of unnecessary regulatory burdens imposed on businesses by LGs through requests for extraneous information, unnecessary delays from the referral process and inconsistencies both within and between LGs in decision making.

Many businesses commented that much of the information required by LGs to support applications was excessive and seemed to be increasing over time. These requests can add substantially to the cost of proposed developments. For example, the Business Council of Australia noted:

The increasing complexity [of the regulatory system] is particularly evident in regards to planning and zoning where the documentation required to support development applications has continued to grow in volume and complexity. One of our member companies has indicated that a full Economic Impact Statement can often take up to six to eight weeks to prepare at an average cost of \$25 000 to \$38 000. Similarly, development delays have led to an average development time of 26 months for one of our members in the retail sector. (sub. 38, p. 3)

In the HIA's experience:

Requests for 'further information' from local government officers often require expensive consultants' reports and planning officers may not always have skills to assess these reports. For example reports on sustainable building practices, coastal hazard vulnerability assessments, native vegetation and threatened species assessments, green transport plans and the like. (sub. 34, p. 10)

In the context of variability in decision making, Coles Supermarkets Australia commented:

As a major property developer, we have found each council and sometimes individual planners have different ways of processing a planning permit, identifying the issues and then writing the mandatory conditions. (sub. 5, p. 5)

***The process for considering applications may benefit from assessing some aspects of DAs simultaneously, rather than consecutively.*** Coles Supermarkets Australia indicated:

There is also an opportunity for improvements to the assessment period for planning permits. Often the planning application is stalled while a council planning officer reviews one aspect, before going to the next step in a somewhat linear process. Unfortunately, this has meant that the process to obtain a planning approval can often take longer than the rest of the design. (sub. 5, p. 5)

***There would appear to be scope for greater adoption of innovative methods to expedite the assessment process*** as only prior consultation was reported as having any substantial impact on expediting assessment processing in most LGs that



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responded to a Commission survey (Productivity Commission survey of state governments 2011-12, unpublished, figure 12.6).

However, business concerns about application processes may not entirely be the fault of LGs. For example, almost all LGs responding to a survey undertaken by the Commission report that poor quality and incomplete applications contribute to time delays in the processing of applications. Ways to improve application quality include better pre-lodgement guidance, the use of electronic DA processes that do not allow applications to be submitted until they are complete (as provided in the ACT) and penalty fees for incomplete applications.

#### LEADING PRACTICE 12.1

*Decision-making processes can be made more reflective of the relevant risks, reduce costs to business and streamline administrative processes through:*

- *pre-lodgement meetings with advice provided in writing, clear and accessible planning scheme information and application guidelines*
- *the use of a standard approval format*
- *timely assessment of applications and completion of referrals*
- *facilities that enable electronic submission of applications*
- *the wider adoption of track-based assessment.*

#### **Complex and inconsistent regulatory frameworks**

Costs associated with navigating complex and inconsistent regulatory frameworks were nominated by participants as a significant source of unnecessary regulatory burden. In part, this burden arises from the spreading of responsibility for different aspects of planning and development activities across state agencies and LGs but more important is the very slow rate at which both levels of government achieve consistency in their planning instruments (PC 2011b). In New South Wales, for example, the *Development Assessment Report Card 2012* noted that ‘many councils are still updating their planning schemes (LEPs) [Local Environmental Plans] — the rollout of standard LEPs has been slower than expected’ (PCA 2012, p. 19).

***Many LGs do not have local planning schemes that align with regional or city strategic plans.*** For example, there are local planning schemes in Tasmania that pre-date the planning system (most recently updated in 1993) (PC 2011b). Nekon Pty Ltd related their frustration with the planning system in Tasmania.

Across the 29 councils, there are 36 planning schemes with some councils having at least two planning schemes within their boundaries.

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... the 36 planning schemes have developed into very complex documents that even professionals both within and outside councils appear to not fully understand at times.

This is frustrating and difficult for developers and investors and despite the inconvenience and unnecessary cost, it can ... be tolerated as an avoidable cost of doing business. However, the effect this expensive and bureaucratic nightmare has on the ordinary home owner, sole trader and small business person is another matter altogether. People should not have to endure the inefficiencies and waste emanating from the current planning system. (sub. 24, pp. 1–2)

More broadly, the Australian Institute of Architects commented:

There is a significant barrier to compliance when planning schemes are extremely complex ... Where complexity exists, an architectural practice must wade through it to establish likely compliance of the planning scheme ... or, if unable to do so with any certainty, and anticipating the time delays this will inevitably bring in eventually achieving compliance, submit plans anticipating rejection but expecting to be given reasons for rejection. This is an inefficient and costly way of conducting business with costs borne by architects and their clients. (sub. 40, pp. 1–2)

In terms of consistency between LG regulatory frameworks, Coles Supermarkets Australia considers:

... that there is significant opportunity for a National or even State Authority to define more stringent guidelines, parameters or a standard pro-forma so that councils have an exact framework to work within and importantly, so that businesses that operate in multiple locations can expect a level of consistency in their approval process. We note that the Victorian Government seems to do this better than most States through its use of a standard approval format. (sub. 5, p. 5)

The relationship with relevant state government bodies is also important in streamlining the overall planning system and reducing inconsistency and unpredictability. The relationship between different levels of government can affect the development and implementation of planning, zoning and DA policies. On this matter, the *Planning, Zoning and Development Assessment* study concluded:

While many factors influence the nature of arrangements between states and councils — such as the size of councils, the way state priorities are communicated and implemented, how council performance is evaluated — better relationships are more likely to deliver broad state goals in a more timely and effective way. (PC 2011b, p. XXXIV)

The state governments consider that they have a positive overall relationship with LGs in relation to planning, zoning and DA matters. This view was supported by around half of LGs which consider their overall engagement with the relevant state government as positive (Planning, zoning and development assessment survey 2011-12, unpublished).

LGs in Queensland appear, on average, to have a better relationship with the state government than in other jurisdictions (table 12.5). However, it is unclear why these LGs perceive their relationship to be relatively more positive than other jurisdictions. Less than 40 per cent of LGs in New South Wales, South Australia and Tasmania consider that engagement is based on a good understanding of challenges facing the local area while a majority of LGs in Western Australia, South Australia and Tasmania report that engagement is outcome focused. Only around a third of LGs agree that their engagement with the state government engenders them with a sense of trust.

**Table 12.5 LG perceptions of engagement with their state government**  
Per cent of responding LGs which agree with statement

	<i>Aust</i>	<i>NSW</i>	<i>Vic</i>	<i>QLD</i>	<i>WA</i>	<i>SA</i>	<i>TAS</i>
Engagement is based on a good understanding of challenges facing local area	43	38	50	62	44	38	38
Engagement is based on a common view about planning objectives or priorities	52	50	53	62	63	52	13
Engagement is collaborative	47	45	39	54	56	48	38
Engagement is outcome focused	53	48	45	42	63	71	50
Engagement involves a two way flow of knowledge and information	48	50	34	54	46	57	50
Engagement engenders a sense of trust	35	38	21	46	37	38	38
Engagement exerts a strong influence on LG's ability to manage planning processes	48	61	50	50	40	33	25

*Sources:* Productivity Commission survey of local governments — planning, zoning and development assessments survey (2011-12, unpublished); Productivity Commission survey of local governments (2011, unpublished).

Compared to other states, relatively few LGs in Tasmania agree that engagement is based around a common view of planning objectives and priorities. This may reflect the absence of regional land-use strategies and plans until relatively recently.

***Efforts to reduce the level of inconsistency and unpredictability in the planning and DA system constitute some important leading practices.***

Some states have legislative requirements for LGs to update their planning schemes on a regular basis to ensure consistency with state and regional planning instruments and policies. For example, South Australia and Western Australia require a planning scheme revision at least every 5 years. Even so, implementation remains slow in most jurisdictions.

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Most lead agencies provide support to LGs to assist in developing and updating local planning schemes, however, the extent of this support varies. Victoria has announced a dedicated program to provide LG support services in a variety of areas, including strategic planning, while New South Wales is supporting the development of Local Environmental Plans (LEPs) consistent with the standard instrument through the LEP Acceleration Fund (VIC DPCD 2011b; NSW DP&I 2011).

In the *Planning, Zoning and Development Assessment* study (PC 2011b), the Commission espoused the value of placing more emphasis on resolving land use early in strategic planning processes involving business and other interests and thereby minimise uncertainty and related costs, including timeliness of subsequent development assessments. The Commission recognises that the reform efforts of state planning departments have been directed at this aim and continues to support these initiatives as they should provide greater certainty and faster approval times for business.

#### LEADING PRACTICE 12.2

*The adoption of the following measures would assist in strengthening the overall planning system, reduce confusion for potential developers and assist local governments by facilitating early resolution of land use and coordination issues:*

- *developing strategic plans and eliminating as many uncertainties as possible at this stage and make consistent decisions about transport, other infrastructure and land use*
- *developing and implementing standardised definitions and processes to drive consistency in planning and development assessment processes between local governments*
- *ensuring local planning schemes are regularly updated or amended to improve consistency with state-wide and regional planning schemes and strategies*
- *providing support to local governments that find it difficult to undertake strategic planning and/or align local plans with regional or state plans.*

#### **Fees and charges**

LGs may levy a variety of fees and charges associated with the assessment of development applications, requests for associated amendments to planning schemes and for the provision of essential and community infrastructure. The *Planning, Zoning and Development Assessments* study explored the differences in fee regimes

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across jurisdictions in a number of stylised examples.<sup>4</sup> That study found that the discretion afforded to LGs in setting fees varied between jurisdictions and between the types of fees and charges levied. For example, most state and territory governments set maximum nominal fee levels. However, fees for the assessment of development applications in Queensland are based on cost recovery principles.

In relation to this study, some participants raised concerns about fees imposing excessive burdens for developments in specific sectors or locations. Many of the concerns centred on fees imposed by Queensland LGs. For example, the Mobile Carriers Forum (MCF) noted:

Whilst this seems reasonable, some Councils take advantage of the ability to set their own fees, and the telecommunications sector can be singled out for fees that are higher than can be justified.

For example ... the Banana Shire claims that application fees equating to more than \$29 000 are needed to recover costs for processing Impact assessable development applications for a telecommunications facility. This is well beyond any reasonable justification and equates to more than 10% of the cost of the actual development. (sub. 14, p. 4)

The HIA provided a comparative example to illustrate the differences in development fees both within and between jurisdictions associated with a series of DAs for the establishment of a number of regional outlets for developments of the same use, similar floor area and a change of use request within an existing building, namely 24 hour gym franchises (table 12.6). Part of the increase in fees may be attributed to the different development assessment path required in Queensland; however, even when the development path requires less scrutiny (code compared to impact assessment), the DA fees are not significantly less compared with other states.

***It would appear from this information and that presented in the Planning, Zoning and Development Assessments study (PC 2011b) that LGs in Queensland have substantially higher fees associated with development applications, reflecting the process of setting fees on a cost recovery basis.***

In addition to the fees associated with the assessment of development applications, participants also raised the issue of developer contributions for infrastructure. Developer contributions on most developments (low value additions or developments are generally exempt) are levied by LGs to provide the extra public amenities and services that will be required as a result of the development. Such infrastructure may include the provision of roads and traffic management measures,

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<sup>4</sup> See chapters 6 and 7 of *Planning, Zoning and Development Assessments* (PC 2011b) for a detailed examination.

open space and recreation facilities, community facilities (such as community halls or childcare facilities). Development contributions are levied in advance of their use (such as during construction) and held until needed.

**Table 12.6 Comparison of development assessment fees**

<i>Local Government Authority</i>	<i>Development assessment path</i>	<i>Fees charged for application</i>
Sunshine Coast Regional Council — Maroochy (Qld)	Impact assessment	\$7 584.60
Sunshine Coast Regional Council — Beerwah (Qld)	Impact assessment	\$5 223.00
Sunshine Coast Regional Council — Coolum (Qld)	Impact assessment	\$6 146.45
Gold Coast City Council — Burleigh Heads (Qld)	Impact assessment	\$6 035.00
Logan Regional Council (Qld)	Code assessment	\$5 942.00
Brisbane City Council — Chermside (Qld)	Impact assessment	\$6 000.00
Tea Tree Gully (SA)	Code equivalent <sup>a</sup>	\$577.50
Unley (SA)	Impact equivalent <sup>a</sup>	\$715.00
Burnside (SA)	Impact equivalent <sup>a</sup>	\$754.00
Yarra (Vic)	Impact equivalent <sup>a</sup>	\$1 052.70
Port Phillip (Vic)	Code equivalent <sup>a</sup>	\$502.00
Casey (Vic)	Code equivalent <sup>a</sup>	\$502.00
Sydney City (NSW)	Code equivalent <sup>a</sup>	\$1 115.00
Wollongong (NSW)	Code equivalent <sup>a</sup>	\$456.00
Kogarah (NSW)	Code equivalent <sup>a</sup>	\$310.00
Stirling (WA)	Code equivalent <sup>a</sup>	\$270.00
Armadale (WA)	Code equivalent <sup>a</sup>	\$270.00
Mandurah (WA)	Code equivalent <sup>a</sup>	\$270.00
Launceston (Tas)	Code equivalent <sup>a</sup>	\$330.00

<sup>a</sup> Refers to the jurisdictional assessment type equivalent to Queensland's assessment track (see figure 12.4).

Source: Housing Industry Association (sub. 34, p. 30).

Infrastructure levies are not, in themselves, an unnecessary regulatory burden. However, they can be excessive and unjustified if:

- the levies go towards paying for infrastructure that benefits residents who do not live in the new development (PC 2004c)
- LGs do not use the levies to provide infrastructure *or* if the levies do not reflect the cost of providing the infrastructure (which is difficult to determine ex ante).

It is currently unclear as to whether the infrastructure contributions levied by some LGs are excessive although the amounts certainly differ markedly and some

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developers claim the fees have increased, especially where LGs have restricted access to other income sources. For example, the *Planning, Zoning and Development Assessment* study (PC 2011b) noted that LGs in Sydney charged \$37 000 per lot for greenfield developments while LGs in Adelaide charged \$3693. However, it should be noted that LGs in Sydney also provided the broadest range of infrastructure items.

In most states, LGs set their development charges independently according to anticipated expenditure outlined in an infrastructure development plan. New South Wales and Queensland constrain the level of development contributions. By contrast, Western Australia has a policy and guidance which provides a consistent, accountable and transparent system for LGs to plan and charge for community infrastructure items which are not included in the standard provisions.

*The Commission explored issues relating to developer contributions and infrastructure charges in detail in the Planning, Zoning and Development Assessments study and considers that the leading practices in this area remain current — that is, in setting the level of developer contributions ‘the appropriate allocation of costs hinges on the extent to which infrastructure provides services to those in a particular location relative to the community more widely’ (PC 2011b, p. 215).*

#### *Lack of independence in decision making and avenues for review and appeal*

Another source of indirect regulatory costs relates to a lack of independence, transparency and accountability in LG decisions, particularly where LGs are involved in other aspects of a development (such as selling or leasing land for a proposed development).

For example, Nekon Pty Ltd highlighted the potential conflicts of objectives that can arise when LGs are the assessors of development applications:

... there are occasions where councils are proponents of development applications as well as being the planning authority that makes the decision. Sometimes, after applications have been made, a council might decide it has an interest of its own in the subject property and decide to use its position in the approval process to progress that interest. (sub. 24, p. 2)

Given that many small businesses are part of the community in which they operate, concerns were also raised about the consequences of appealing a decision made by the LG or lodging a formal complaint about the process. In this context, the NSW Small Business Commissioner noted:

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A significant concern for business is that if an applicant appeals a decision or seeks to make a formal complaint there is fear of retribution and that future applications will not be fairly treated. (sub. 18, pp. 2–3)

A direct effect of contesting a decision or questioning the objectivity of the underlying process is reduced business confidence in the land use and development system and forgone growth opportunities resulting from business reluctance to consider further investment in the region. Providing a graduated review and appeal framework as discussed in chapter 3, may reduce opportunities for bias or capricious decisions and improve the quality of assessment processes. It may also provide an avenue for small business to object to decisions without resorting to costly (and often prohibitive) formal appeal processes. The Commission identified a leading practice in providing a larger role for Small Business Commissioners to try and assist in resolving disputes through mediation processes (chapter 3).

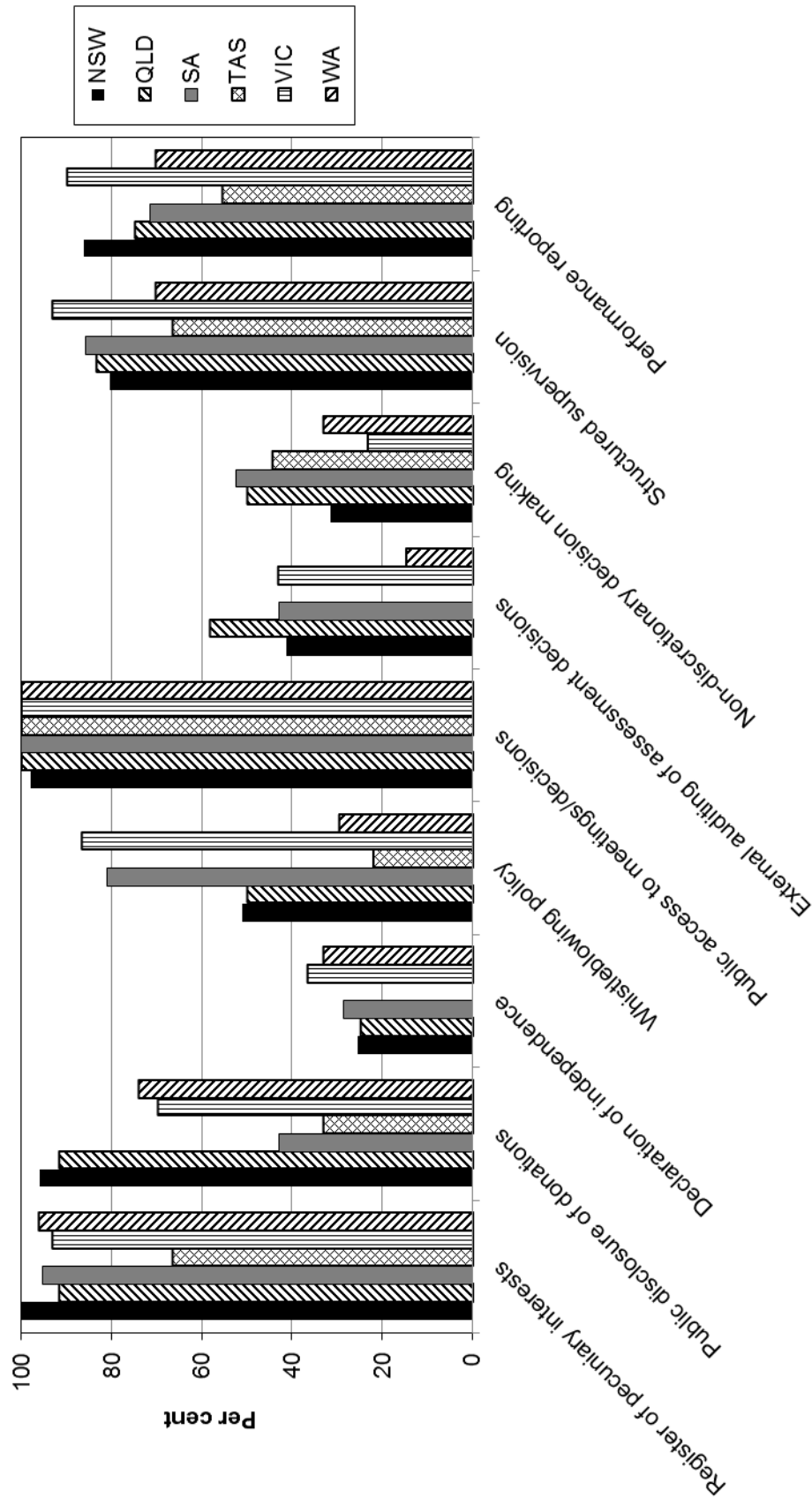
LGs undertake a variety of measures designed to increase the level of transparency and accountability in their planning, zoning and DA activities. All LGs that responded to the Commission’s survey indicated that they allow public access to meetings and decisions while the vast majority of LGs maintain a register of pecuniary interests and undertake structured supervision and performance reporting (figure 12.8). In addition, most LG decisions in relation to rezoning and DAs can be appealed through formal processes.

Measures to increase probity, such as non-discretionary decision making, declarations of independence and external auditing of assessment decisions are important signals that decision-making processes are fair and independent. While a significant proportion of LGs report employing these practices, they are the least used across Australia. An increase in their uptake could be expected to increase transparency and community trust in the decision-making processes and decision makers themselves.



Figure 12.8 Practices employed by LGs to facilitate accountability and transparency

Per cent of LGs that responded to this question

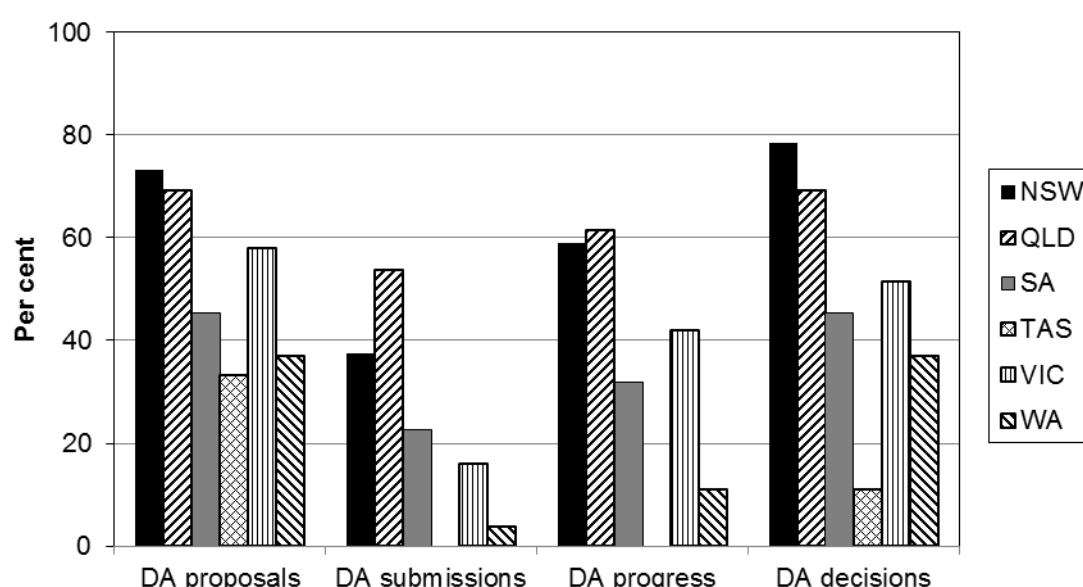


Data sources: Productivity Commission survey of local governments — planning, zoning and development assessment survey (2011-12, unpublished); Productivity Commission survey of local governments (2011, unpublished).

Transparency and accountability may also be improved through providing greater public access on the internet for development proposals and related submissions, the progress of development applications and outcomes of decisions. While over half of LGs that responded to a survey question on probity indicated that development proposals and decisions are published on the internet, less than half publish development application submissions or the progress of applications (figure 12.9). Relatively more LGs in New South Wales and Queensland publish development application information on the internet compared with the other states. The extent to which improved transparency can be achieved may be constrained by privacy legislation that limits the information which can be made publicly available.

**Figure 12.9 Availability of development application information on the internet**

Per cent of LGs that responded to this question



*Data sources:* Productivity Commission survey of local governments — planning, zoning and development assessment survey (2011-12, unpublished); Productivity Commission survey of local governments (2011, unpublished).

### LEADING PRACTICE 12.3

*Making information, on lodgement and decisions relating to planning applications, publicly available increases transparency for business and the community. Public confidence can be improved through periodic external auditing of assessment decisions and processes.*

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## Increased business operating costs

Most of the excessive regulatory burdens arising from planning, zoning and DA regulations have an impact on businesses at the planning and DA stage. As such, there is only a limited amount of ongoing interaction with LG, mainly associated with the imposition of excessive or unnecessary development controls and consent conditions. However, poor planning and development decisions can impose substantial ongoing costs on business through the imposition of development controls and consent conditions that lead to sub-optimal land use.

While businesses generally accept the need for development controls and consent conditions to establish operational boundaries, participants indicated a significant level of inconsistency in the controls imposed (often between neighbouring LGs) and the imposition of controls which appear to be outside the remit of the planning and development approval regime.

For example, GHD Pty Ltd, reflecting its experience in Tasmania, noted:

It is our experience in acting as agent on behalf of and/or advisor to various developers that the planning decisions of Councils are being increasingly influenced by matters irrelevant to the respective planning scheme, and therefore irrelevant to the planning process. Whilst it is unlikely that a Council would refuse an application based solely on matters outside of the ambit of their planning scheme, it is not uncommon for such matters to form conditions of approval. (sub. 19, p. 2)

Coles Supermarkets Australia cited numerous examples of compliance burdens arising from the planning and development approval process:

Planning systems and development consent conditions vary between States and local governments, each with different focuses on factors such as design, traffic, noise, signs, trading hours/delivery hours, trolley management etc.

In New South Wales, our supermarkets operate in approximately 90 councils where each council can set prescriptive conditions in development consent

... noise restrictions are often contained in the development consent and based on the relevant EPA (Environment Protection Act) which has mandatory requirements for design and construction. However, it is not uncommon for councils to order additional acoustic requirements or require reports to investigate an alleged issue which could be investigated in a more timely and efficient way. (sub. 5, p. 4)

Participants highlighted a degree of unpredictability in planning and development outcomes arising from the subjective nature of LG regulation.

Identifying and measuring unnecessary compliance costs associated with development controls is complex as interested parties can disagree over the type and level of community outcomes (such as a 'liveable city') which are desirable and

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whether they are worth the cost — what a business might consider unnecessary, a LG may consider essential.

*While acknowledging the differences of opinion between businesses and the community, LGs appear to use the planning and DA system to impose controls on business where it would be more appropriate to target undesirable activities or practices through regulation in other areas (such as, building and construction or environmental regulations).*

## **Lost business opportunities**

The main lost business opportunities arise from holding costs. Holding costs are associated with time delays and restrictive zoning that prohibits certain development types.

### *Holding costs associated with time delays*

One of the most significant costs associated with obtaining planning and development approval is the cost of holding the land to be developed. Participants indicated that application processing delays were an important contributor to the overall viability of a development. For example, the HIA outlined the impact of time delays:

Local Governments also regularly fail to meet statutory timeframes set out in state legislation for the processing of planning applications. This has dire consequences for the housing industry. Every day of delay adds to the cost of development through ‘land holding costs’ that is the cost of financing the property as the applicant obtains permission. Despite some Councils being poorly resourced compared to their workload, in most cases Local Governments appear to have a blatant disregard for maintaining statutory deadlines and there is little penalty or comeback for failing to meet regulatory timeframes. (sub. 34, p. 10)

Similarly, the NSW Small Business Commissioner commented that:

Anecdotally, the current situation has arisen due to lack of adequate resourcing of councils, a culture which is not strongly focussed on customer service or an appreciation of how businesses operate and a lack of appropriately skilled planners to undertake assessments. (sub. 18, p. 2)

There are many reasons for time delays (which may increase holding costs) including incomplete applications, resource constraints, referral requirements and appeals (figure 12.7). *Workload pressures and incomplete applications were identified by over 75 per cent of LGs in all jurisdictions as a factor limiting their ability to act on planning, zoning and DA issues in a timely manner.* A broader

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discussion of the resourcing constraints experienced by LGs is presented in chapter 4.

The regulatory framework, including legislative complexity and conflicting state objectives, is also reported by LGs as an important constraint in Queensland but less so for LGs in other states (figure 12.7). ***Delays from referrals were reported as having a moderate or major impact in more than half of LGs in New South Wales and Queensland and around a third of LGs in other states.*** It appears that the majority of LGs surveyed in Tasmania would appreciate greater guidance from the lead planning agency.

Time delays may also arise from reviews and appeals of decisions concerning development applications. All jurisdictions have a formal process whereby applicants can appeal varying aspects of the decision and/or decision making process through a relevant court or tribunal.<sup>5</sup> While the right to reviews and appeals are a feature of good governance, it would appear that there are only limited and costly mechanisms currently available in most jurisdictions. Examination of survey data collected by the Commission suggests that the impact of appeals is an issue for over half of LGs in New South Wales, Queensland and Western Australia. Broad issues relating to review and appeal mechanisms are explored in chapter 3.

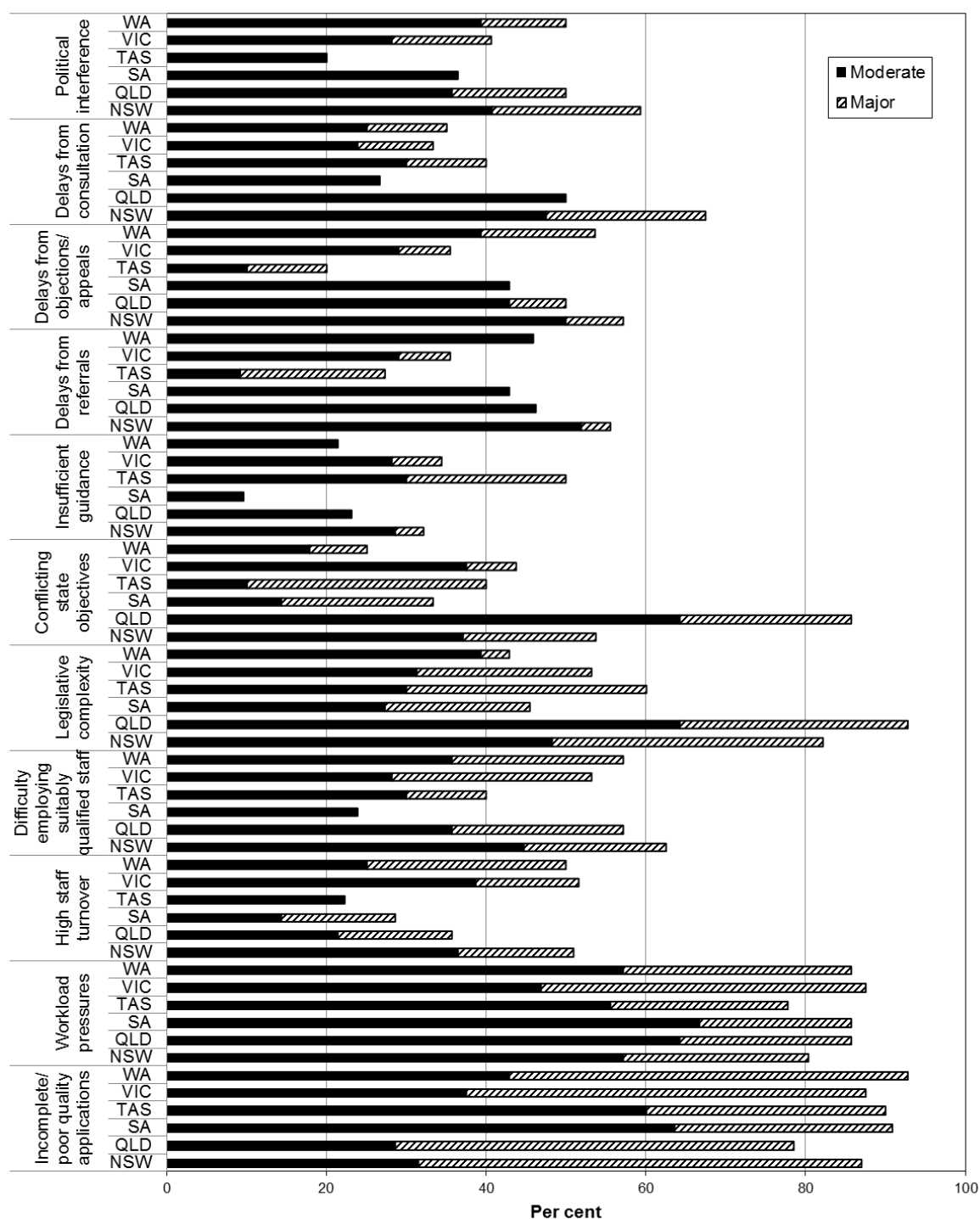
Third party appeals — that is, appeals from non-applicants — can also divert significant resources away from other planning and development functions as LGs are required to attend proceedings and justify their decisions. While it is important that appeals can be heard from third parties to ensure community concerns are voiced and promote an open and transparent process, appeals that are spurious or vexatious do not contribute to better land-use and development outcomes. Indeed, the gaming of the planning system through vexatious, frivolous and anti-competitive appeals may result in sub-optimal land use from a community perspective.

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<sup>5</sup> More information on appeal mechanisms can be found in section 3.3 of the *Planning, Zoning and Development Assessment* study (PC 2011b).

**Figure 12.7 Factors impacting on LG's capacity to act in a timely manner**

Cumulative per cent of respondents reporting each factor as having a moderate or major impact



*Data sources:* Productivity Commission survey of local governments — planning, zoning and development assessment survey (2011-12, unpublished); Productivity Commission survey of local governments (2011, unpublished).

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Victoria and Tasmania, the two jurisdictions where third party appeals are allowed in almost all cases, had more than three times as many appeals in 2009-10 than other jurisdictions (PC 2011b). Requirements aimed at reducing vexatious third party appeals — such as clear identification of appellants' reasons for appeals, awarding costs against parties appealing for purposes other than planning concerns and requirements for parties to meet and discuss issues could improve the timeliness of final decisions — are likely to reduce anti-competitive appeals and reduce holding costs.

### *Restrictive zoning*

LG restrictions on the types of activities that can be undertaken within the LG area or certain land-use zones can sometimes be another source of unnecessary regulatory burden. Such planning and land-use restrictions effectively limit opportunities to compete, expand and/or innovate.

In this regard, the Queensland Tourism Industry Council commented:

Tourism opportunities for Queensland and Australia have been identified particularly in areas of nature-based tourism. This will require innovation, new product development for accommodation, attractions and tours. Under current land use and development provisions, at both state and local government level, such opportunities have only a very limited chance of being realised. (sub. 33, p. 6)

More broadly, restrictive land-use zonings can create difficulties for certain types of businesses and severely constrain investment. For example, restrictive land uses in particular zones in New South Wales have limited the expansion of a number of bulky goods retailers. By contrast, the Victorian Government has relaxed the restrictions and definitions to allow a broader range of retailers to operate from industrial areas and homemaker centres (Fielding 2012).

The Commission has previously highlighted the restrictive nature of narrowly defined land-use zones and highly prescriptive requirements on activity centres (PC 2011b). For example, LGs in South East Queensland have an average of 40 zones compared to just 12 in Western Australian LGs. In addition, inconsistency in decision making and in the application of planning principles can provide opportunities for existing businesses to block or delay the establishment of competing enterprises.

While foregone opportunities may be a significant source of regulatory burden, it is difficult to quantify the costs imposed by restrictive planning and zoning frameworks.

*The implementation of broad land-use zones in local planning schemes that apply across the state or territory has the potential to increase competition, allow businesses to respond to opportunities more flexibly and reduce costs for businesses operating in more than one jurisdiction.*

## **12.3 Issues relating to specific industry sectors**

While some regulatory burdens appear to impact on a variety of industry sectors, participants indicated that there are some specific sectors which are disproportionately affected by LG regulation of planning and development activities. Unusual features of planning and development for these industries merits a deeper consideration of the regulatory burdens of affected businesses.

### **Telecommunications facilities — mobile phone towers**

LGs can have a significant role in the development of infrastructure assets, but this depends on the size and nature of the project. Planning and development applications for most large infrastructure developments of state or national significance are assessed through ‘alternative decision mechanisms’ by a state government minister or delegate to a state government department/agency (including, in some cases, a regional planning body). However, LGs are still the determining authority for some facilities that are not considered critical.

‘Low impact’ telecommunications facilities (such as small radio-communications dishes or antenna, underground cabling and pits, and public payphones) do not require development approval. Other telecommunications facilities which are not considered ‘low-impact’ (such as most mobile phone towers) require planning or development consent from LGs. The MCF, representing the three carriers currently deploying mobile network facilities in Australia, raised concerns about inconsistent and inefficient planning and development processes between LGs as:

... 40% of telecommunications facilities (primarily towers and poles) are subject to development or planning consent from Australia’s 561 Councils. Almost without exception, Councils have very limited strategic or policy frameworks from which to make their decisions in relation to whether to approve or reject Development Applications (DA’s). (sub. 14, pp. 1–2)

The MCF (sub. DR46) highlighted three areas where they consider that LGs impose excessive regulatory burdens on their activities: excessive rental demands for



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facilities on LG land; excessive monetary contributions or conditions for capital works; and obstructive actions by LGs in the approval process.

The MCF raised concerns that the assessment of development applications by LGs is somewhat arbitrary and that there is a lack of consistent guidelines (either at a state or national level) for assessing development applications. In this context:

The MCF is a strong advocate for the Leading Practice Model for Development Assessment developed by the Development Assessment Forum ... In particular, the MCF has been advocating to State Governments across Australia that a significant proportion of telecommunications infrastructure can be appropriately assessed and determined by Pathways 1 (Exempt Development), 3 (Self Assess) or 4 (Code Assess) of the Leading Practice Model. These Pathways remove the need for Council to utilise unguided discretion, and they also provide greater certainty as an incentive to the carriers to produce better infrastructure solutions that meet best practice codes (e.g. co-location of infrastructure). (sub. 14, p. 2)

The MCF goes on to note that even small differences in procedural requirements across the vast array of LGs can substantially increase the cost of deploying a national network.

As noted earlier, there is a potential conflict of objectives for infrastructure developments on land owned or managed by a LG where that LG is also the assessor of the development application. For example, the MCF expressed concerns about the subjective nature of LG decisions and differences in leasing land to deploy infrastructure between LGs and other types of owners:

When carriers identify sites on land owned by the private sector or other government agencies, commercial terms are agreed and lease negotiations advanced (usually to execution) prior to the lodgement of a development application. This is the case with other forms of development, be it for civil infrastructure or commercial development.

Conversely, negotiations with local governments require the lodgement and approval of a development application prior to the resolution of the commercial tenure with that Council. This results in carriers committing considerable resources and funds without any certainty that tenure will be granted (on the in principally agreed terms or for that matter any reasonable terms) upon issue of the planning consent. (sub. 14, p. 3)

In response to the MCF claims, a number of LGs provided the Commission with an explanation of their perspective in relation to development requests from telecommunications providers. The complex situation faced by LGs in balancing the interests of the community and business interests was neatly presented by Tweed Shire Council:

Council has a direct responsibility to the community. This is an intrinsic and fundamental premise of Local Government. Subsequently, establishing community leadership in the community in the decisions Council makes is a fundamental part of

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the local democratic process. Councils do not have to answer to a Board they have to answer to the community. Council is therefore the voice of a community. The way in which individual councils respond to a mobile telephone tower is therefore also representative of that particular community and can in large [part] explain the different and varied examples of different councils' responses to tower applications as provided through the MCF submission. (sub. DR61, p. 1)

The Armidale Dumaresq Council outlined their approach to determining a specific DA cited in the post-draft MCF submission:

The relevant Development Application, once authorised by Council as the land owner, was lodged on 9 February 2011. It was assessed by independent planning consultants, as the Council had a property interest in the proposal. (sub. DR49, p. 1)

Some LGs also appear to be charging fees in relation to the leasing of land owned or managed by the LG that may not be consistent with the cost recovery framework. The MCF said:

When it comes to the leasing of Council land, requests have been received ... for an 'Establishment fee' of \$15 000 for telecommunications facilities which are to be located on Council land via a formal lease arrangement. The fee (should it exist) is not recorded in the lease and it is not listed in ... Council's 'Register of Regulatory Fees'. (sub. 14, p. 4)

As a result of these regulatory burdens, the MCF indicated that:

... member carriers are choosing to delay, defer or even abandon proposals designed to improve mobile coverage, call quality and network capacity in these areas. (sub. 14, p. 3)

That said, the MCF:

... also recognises many instances of Councils that have been encouraging and co-operative in the deployment of mobile telecommunications network infrastructure in recognition of the strong social and economic benefits that such facilities bring to their municipalities and its constituents. (sub. DR46, p. 7)

Western Australia, Victoria and New South Wales report that they provide specific policies or guidelines to promote consistency and assist LGs in undertaking assessments for mobile telecommunications developments (table 12.7). By contrast, the Queensland Planning Provisions provide guidance for LGs to incorporate mobile telecommunications facilities in local planning schemes but not guidelines for the assessment of proposed developments. South Australia classifies telecommunication facilities as essential infrastructure while Tasmania does not report providing any LG guidelines for mobile telecommunications developments.

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**Table 12.7 State guidance and assistance for telecommunications facilities**

State	Nature of guidance or assistance
Western Australia	<ul style="list-style-type: none"><li>• <i>State Planning Policy 5.2: Telecommunications Infrastructure</i> — outlines a consistent approach in the preparation, assessment and determination of applications related to telecommunications infrastructure.</li><li>• <i>Guidelines for the Location, Siting and Design of Telecommunications Infrastructure</i> — assists local government in planning for telecommunications facilities at the local level.</li></ul>
Victoria	<ul style="list-style-type: none"><li>• <i>A Code of Practice for Telecommunications Facilities in Victoria (2004)</i> — sets out the circumstances and requirements under which land may be developed for a telecommunications facility, and sets out principles for the design, siting, construction and operation of such a facility.</li></ul>
New South Wales	<ul style="list-style-type: none"><li>• <i>State Environmental Planning Policy Infrastructure 2007</i> — designed to facilitate the effective delivery of infrastructure (including telecommunications facilities) across NSW.</li><li>• <i>NSW Telecommunications Facilities Guideline Including Broadband</i> — outlines principles for the design, siting, construction and operation that apply to all proposed telecommunications facilities in NSW.</li></ul>
Queensland	<ul style="list-style-type: none"><li>• Land use defined in the Queensland Planning Provisions.</li></ul>

Source: Productivity Commission survey of state governments (2011, unpublished).

Having dealt with different LGs across all states and territories, the MCF considers that the guidance contained in the NSW State Environment Planning Policy represents the leading practice in this area through:

... a broad level of exemption for very specific types of telecommunications facilities that comprise a modern communications network and do not impact on amenity. This is consistent with DAF's Leading practice Model. The capacity for the mobile network carriers to establish network infrastructure has been greatly enhanced, and state wide decision guidelines for Councils are clearer. (sub. 14, p. 2)

#### LEADING PRACTICE 12.5

*Engaging an independent consultant can increase transparency and probity where a development application relates to land owned by a local government, as practised by some local governments.*

#### LEADING PRACTICE 12.6

*Businesses wishing to expand mobile telecommunications infrastructure may benefit from clear state guidelines relating to the assessment of development proposals in this area. New South Wales, Victoria and Western Australia provide specific guidelines to promote consistent decision making and assist local governments in assessing development applications for mobile telecommunications infrastructure.*

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## Tourism

Tourism activities often occur in multiple regulatory frameworks that have the potential to constrain tourism related investment and participants indicated that the planning, zoning and development system is a major contributor to regulatory burden for prospective tourism developments.

The introduction or expansion of tourism into locations where the planning system is not designed to adequately deal with the evolution of land use creates an unusual set of regulatory burdens. Consultations with interested stakeholders illuminated the tension between traditional land uses and proposals to develop new tourist attractions or experiences. In some rural areas, for example, farmers face restrictions on the use of crop protection measures such as netting on fruit trees or bird scarers because tourism operators object to the use of such measures as they detract from the visual amenity of the region. Similarly, some farmers report either not being able to employ efficient spraying techniques or fully utilise their land as a result of tourism developments on the border of adjacent properties.

The Commission was also advised in consultations where, in an effort to preserve the rural amenity of a LG area, restrictions on dividing land or land use were preventing the establishment of compatible craft and food businesses that were directly related to the current agricultural use of the land.

In other areas, farmers who wish to diversify into tourism activities may be limited in doing so by prescriptive land-use zoning which prohibits the use of a rural property to provide a café, restaurant and/or accommodation facilities. An example was provided to the Commission of an orchard receiving approval from a LG to build a café and shop to sell the orchard's products, but then the same LG refused to approve the necessary operating permit.

The Queensland Tourism Industry Council outlined the regulatory conundrum facing operators of tourism-related businesses:

Tourism businesses operate in a very wide range of sectors: transport, education, accommodation, hospitality, attractions, tours, marine, environmental, conservation, events, consulting, entertainment, agriculture, development, health, etc. As a consequence, there are multiple legislative and regulatory provisions that affect individual businesses and the industry as a whole. The secondary impacts of regulatory changes tend to spread widely in the tourism industry due to the interdependencies of service providers ...

Tourism as a land use or zoning category is rarely identified in planning instruments and does not readily fit into current planning frameworks. (sub. 33, pp. 4, 6)

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Given tourism's sizeable contribution to the economy and concerns about its potential to grow, the Australian Government has developed a National Long Term Tourism Strategy (NLTTS — DRET 2009) and commissioned a number of other studies that explore the regulatory burdens faced by tourism operators.

According to the Investment and Regulatory Reform Working Group (established as part of the NLTTS), the main land-use and development issues that significantly impact on tourism businesses are:

- complex and challenging planning schemes that can act to prohibit, discourage or limit the scope of developments, particularly where land is zoned in a manner that does not provide for tourism uses
- LGs lack resources and experience to properly assess tourism developments
- LG decisions can be subject to a high level of community influence or intervention which adds to uncertainty
- the regulatory culture can be as important as the letter of the regulation
- the impact of tourists (short-term visitors) is often not reflected in local area plans, resulting in inadequate investment in public facilities and infrastructure (DRET, sub. 37).

L.E.K. Consulting in the DRET submission outlined the consequences of failing to explicitly consider tourism in planning policies:

The lack of consideration for tourism in planning regulation, particularly provision for tourism uses in zoning, translates into unnecessarily high costs for tourism operators. These regulations typically add to planning timelines (increasing holding costs), create additional processes and compliance requirements (raising administrative costs and consultant fees), exclude tourism from attractive development opportunities (decreasing revenues and profits), and add to uncertainty by investors (raising capital costs). (sub. 37, p. 5)

The National Tourism Alliance is critical of the attitude of many LGs towards new and innovative tourism activities:

The planning and development approvals process has been identified as a significant source of additional costs to tourism businesses and an impediment to the development of new tourism products, including accommodation, restaurants and cafes and tourist attractions. (sub. 28, p. 3)

Queensland Tourism Industry Council reflected:

Of particular concern to investors and business operators is the capacity and resources of local governments to respond in a timely and effective way to planning issues and development applications. (sub. 33, p. 6)

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The Victorian Competition and Efficiency Commission (VCEC) has undertaken a review of regulatory burdens related to the tourism industry. An analysis of large scale tourism and other major projects indicated that development applications with a tourism related component are:

- perceived by LG planners as being more complex than other applications
- more likely to prompt a request to provide further information
- more likely to be referred to one or more regulatory bodies
- more likely to be notified to the public and to attract objections
- much more likely to end up at appeal to the Victorian Civil and Administrative Tribunal
- more likely to have a longer determination time (VCEC 2011).

As part of the NLTTTS, the Tourism and Transport Forum has developed a *National Tourism Planning Guide: A best practice approach* (2011) to assist planners in better understanding tourism related issues affecting development proposals and practical advice to assist planners in the consideration of tourism related development proposals. According to the Minister for Tourism:

Widespread adoption and use of the Guide is expected to assist planners in streamlining development application processes, encourage greater compliance with planning provisions at earlier stages, and overall help reduce the time and cost of administering planning processes. (Tourism and Transport Forum 2011, p. 3)

The states and territories take different approaches to guiding LGs to support tourism related land uses (table 12.8). For example, Western Australia has a dedicated Planning Bulletin that outlines ways in which LGs can encourage tourism related investment through the planning process (such as the identification of specific ‘tourism precincts and sites’ and wider adoption of mixed land-use zones) and provides guidance in the assessment of tourism specific development applications. Most other states provide varying levels of either formal or informal guidance to LGs on incorporating tourism related activities into the planning process.

Almost three quarters of LGs report that they incorporate tourism into land-use planning through the local planning scheme, other planning instruments and targeted policies (table 12.9). Half of LGs also report that they have considered reviewing land-use definitions and zoning to facilitate tourism activities while a fifth of LGs have considered regulatory changes to support floor space ratio concessions for accommodation in high density areas.

**Table 12.8 State guidance and assistance for tourism activities**

<i>State</i>	<i>Nature of guidance or assistance</i>
Western Australia	<ul style="list-style-type: none"> <li>• <i>Planning Bulletin 83/2011 Planning for Tourism</i> — outlines the Western Australian Planning Commission's policy to guide LGs in making decisions on the planning elements of tourism proposals.</li> </ul>
South Australia	<ul style="list-style-type: none"> <li>• No direct assistance but does provide advice to LGs on tourism planning and occasionally works collaboratively with LGs when introducing a new development plan policy.</li> </ul>
Victoria	<ul style="list-style-type: none"> <li>• The State Planning Policy Framework of all Victorian planning schemes includes two policies relating to tourism — the 'Facilitating Tourism' policy and the 'Tourism in Metropolitan Melbourne' policy. Each policy includes objectives, strategies and policy guidelines, which guide LGs as planning and responsible authorities in both strategic planning and planning permit decision making.</li> </ul>
New South Wales	<ul style="list-style-type: none"> <li>• Planning circular 09-006 guidance to support local tourism strategies and how tourism related activities align with the standard instrument Local Environmental Plan.</li> <li>• The Metropolitan Plan 2036 and subregional plans and regional plans also outline the importance of tourism when looking at the future growth and development of an area.</li> </ul>
Queensland	<ul style="list-style-type: none"> <li>• Strategic intents for tourist activities discussed in each regional plan.</li> <li>• Guidance provided through the Queensland Planning Provisions and the State Planning Regulatory Provisions.</li> </ul>

Source: Productivity Commission survey of state governments (2011, unpublished).

**Table 12.9 LG incorporation of tourism in land-use planning**

	<i>Per cent of respondents</i>
Incorporates tourism in land use planning:	73
through local planning scheme	62
through other planning instruments	44
through tourism-focused planning policies or targeted instruments	36

Source: Productivity Commission survey of local governments — planning, zoning and development assessment survey (2011-12, unpublished).

There appear to be a number of leading practices in the planning, zoning and DA systems which would encourage the development and expansion of tourism related businesses. These leading practices are consistent with the National Tourism Planning Guide (Tourism and Transport Forum 2011). Broad land-use zoning should not be unduly prescriptive so as to reduce the opportunities for or increase holding costs of proposed tourism activities. For many areas, particularly in rural locations, tourism related activities can supplement existing land uses and increase the economic sustainability of existing business and the local community but it can be difficult to get planning and development approval where prescriptive zoning is in place.

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States vary in their approaches to supporting tourism developments. For example, New South Wales applies standard instrument zones where each LG is able to include what development types are permissible within each zone. While the standard instrument encourages tourism land uses, LGs can exercise discretion in which zones tourism is included in and what development form it can take in the development of planning schemes (known as Local Environment Plans). This effectively means that some tourism developments are excluded at the planning stage and continue to be until the Local Environment Plan is amended (which can take many years).

The Queensland Planning Provisions have a similar approach through broad land-use zones that provide for development types that include tourism activities (Queensland Government, sub. DR51). Like New South Wales, LGs can exercise discretion in which zones tourism is included in and when they are to be applied. Further:

Queensland's Integrated Development Assessment System (IDAS) is a performance-based system which means it effectively enables the ability for a proponent to bring forward any proposal and have it tested against the policy benchmarks set under the planning instruments. This development assessment framework allows the flexibility for new tourism uses to be proposed and tested against the strategic intent for the local area in which it is proposed to be located, irrespective of the land use zoning set out in the local government planning scheme. (Queensland Government, sub. DR51, p. 3)

By contrast, Western Australia employs broad land-use zones in planning schemes which can allow tourism business to be established, but proposed developments are decided at the discretion of LGs, unless such activities are explicitly prohibited within that zone.

***Many of the general planning, zoning and DA leading practices (that is, 12.1 to 12.5) have the potential to make investment in tourism developments easier to progress through streamlining the planning and development approval process. In particular, the wider adoption of broad and consistent land-use zones that allow complementary land uses (for example, tourism activities in rural areas) has significant potential to support the tourism industry.***

#### LEADING PRACTICE 12.7

*Tourism developments can be more easily facilitated by allowing them to be tested against the strategic intent of the local planning scheme, as is the case in Queensland.*



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## Mining and extractive industries

Development related to mining and extractive industries can greatly impact on the economic potential of the surrounding region and the broader economy. The planning and DA for most mining and extractive industry projects is usually undertaken by the state government as many of these projects require large scale investment and are considered of ‘state significance’. LGs are often given limited opportunity to provide input into the decision-making process when applications go through alternative development decision mechanisms.

However, smaller development proposals and some developments within a large mining project (particularly related to building development) can require LG involvement as the responsible authority. Limited information has been received to indicate that LG activities in this area are a significant burden.

State governments provide a variety of materials to assist LGs and developers in understanding and undertaking their roles in relation to proposed developments for mining and extractive industries (table 12.10). New South Wales, Victoria Queensland and Western Australia all provide guidance at the strategic planning level and in the assessment of development applications (where these functions are undertaken by LGs).

**Table 12.10 State guidance and assistance to LGs for mining and extractive industries**

<i>State</i>	<i>Nature of guidance or assistance</i>
Western Australia	<ul style="list-style-type: none"><li>• <i>State Planning Policy 2.4: Basic Raw Materials and Basic Raw Materials Applicants’ Manual</i> — sets out the matters which are to be taken into account when making planning decisions for extractive industries.</li></ul>
Victoria	<ul style="list-style-type: none"><li>• <i>Victorian Planning Provisions Clause 14.03: Resource exploration and extraction</i> — includes objectives, strategies and policy guidelines to guide LGs as planning and responsible authorities in both strategic planning and planning permit decision-making.</li></ul>
New South Wales	<ul style="list-style-type: none"><li>• Strategic Regional Land Use Plans that seek to address issues associated with mining, coal seam gas and agriculture land uses along with Development Assessment Guides.<sup>a</sup></li></ul>
Queensland	<ul style="list-style-type: none"><li>• Assistance with the interpretation of building legislation related to the mining industry.</li><li>• Provides a State Planning Policy on the protection of extractive resources and guidelines which must be used in development assessments until it is appropriately reflected in the relevant LG’s planning scheme.</li></ul>

<sup>a</sup> These plans are currently in development with the first two placed on public exhibition on 6 March 2012.

Source: Productivity Commission survey of state governments (2011, unpublished).

DRET (sub. 37) asked the Commission to investigate regulatory burdens arising from the lack of clarity in the scope of LGs’ role in the approval of major oil and

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gas projects. This issue was explored in the *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (PC 2009b) which noted that LGs have a legitimate role in some planning and DAs, but shared concerns from participants that ‘local governments may become involved in areas beyond their expertise’ (PC 2009b, p. 273). The Commission recommended that the regulatory roles between all three tiers of government in Australia should be clarified and where developments or activities are regulated by environmental agencies or major hazard facilities regulators, involvement of LG is not warranted.

The Australian Government accepted the recommendation and tasked the COAG Ministerial Council on Mineral and Petroleum Resources (MCMPR) to progress its implementation. DRET has provided an update on the progress of standard Memorandum of Understanding templates to clarify the responsibilities of state and LGs in relation to the approval of upstream petroleum developments.

After consultation with key stakeholders, the Standing Council on Energy and Resources (SCER) agreed in December 2011 that a national MoU was not a viable approach from either an industry or local government perspective. Instead a guideline on the issues that should be considered by developers and local governments was deemed to be more appropriate. This approach was accepted by the Council of Australian Governments (COAG) in April 2012.

The Western Australian Department of Mines and Petroleum has taken the lead in developing draft Guidelines of Engagement for Petroleum Developers with Local Government that outline principles of engagement for petroleum developers with local government. The guidelines are currently being considered by SCER and will then be referred to COAG before the end of 2012.

Local governments may benefit from clear guidelines for the assessment of development proposals related to specific sectors. The proposed introduction of guidelines should help clarify the role of local governments and promote leading practice in assessments for petroleum proposals with potential application to mining and other extractive industries. (sub. 54, p. 1)

#### LEADING PRACTICE 12.8

*Development of guidelines can clarify the responsibilities of each level of government, particularly local government involvement, in the development and regulation of mining and extractive industries.*

***Guidelines to clarify the roles of local and state governments is an approach that would appear to have general application to any area where more than one level of government is involved and the possibility of confusion over responsibilities is relatively high.***

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## Home-based businesses

Home-based businesses are a significant contributor to economic activity but information about this group of businesses is not regularly collected. The latest data available indicates that, in 2003, there were around 785 000 home-based small businesses in Australia, of which less than one-third had more than one employee (that is, in addition to the operator) (ABS 2004b).

LGs are responsible for regulating home-based business activities and generally interact with these businesses for two reasons:

- when an application to start or amend home-based activities is made
- to investigate a complaint regarding the operation of a home-based business.

One participant specifically explored the regulatory issues pertaining to home-based businesses. According to the Small Business Development Corporation (SBDC Western Australia):

Local governments in Western Australia retain significant discretion to consider their community's needs and the impacts on local amenity when considering applications for businesses to be operated from or at home ...

The issues raised with the SBDC generally do not relate to the granting of approvals, *per se*, moreover the lack of consistency and application of regulations between (often neighbouring) local governments and the arbitrary fees used ...

Inconsistent rules apply to: the types of business that can be run from home; hours of operation; signage; noise and other emissions; maximum floor space; storage requirements; client/staff parking; and number of employees. (sub. 29, p. 5)

Certain aspects of planning, zoning and DA relating to home-based business activities are covered either in the relevant state regulations or guidelines (table 12.11). Most states and territories outline a definition of a home-based business, activity and/or occupation that is exempt from development approval in planning regulations or associated policies, but the role of LG in adopting or implementing these regulations varies in different states.

In New South Wales, Victoria and South Australia, regulations define what characteristics home-based businesses are required to meet in order to be considered to be an exempt development (and thus not require development approval).

**Table 12.11 State regulations or guidance for home-based businesses for planning approval**

<i>Jurisdiction</i>	<i>Regulation or guidance</i>	<i>Notes</i>
NSW	SEPP (Exempt and Complying Development Codes) 2008	Home occupations, home business and home industry are considered exempt development if they comply with the SEPP requirements
Vic	Victorian Planning Provisions	Outlines requirements for a home activity permit to be issued by consenting authority
Qld	Queensland Planning Provisions	Standard provisions may be applied by LGs in developing land use plans
SA	Development Regulations 2008	Carrying on of a home activity consistent with the definition is not considered development
WA	Town Planning Regulations 1967	Provides model scheme text for LGs to incorporate into land use plans
Tas	Planning Scheme Common Elements Template	The template defines a home office for non-binding incorporation by LGs into land use planning schemes

*Sources:* State government legislation and regulations.

In other states, guidelines and model text is outlined for LGs to incorporate into land use plans as they see fit. This has the potential for variation between LGs in the characteristics of home-based businesses that require development approval. In Queensland and Western Australia, the main differences relate to the floor space occupied by the business, the number of visitors and vehicles, and the size of advertising signs. There are also differences in the types of businesses which require development approval but these businesses are generally the subject of other regulation (such as food preparation, bed and breakfast accommodation, sex services and manufacturing activities).

Home-based businesses that do not satisfy the exemption requirements need to apply for development approval. This approval is determined by LG on the basis of the nature of the proposed business activity and its impact on the community.

Clearer guidelines and greater consistency in the approach of LGs to facilitating home-based businesses have been a consideration of both the Local Government Planning Ministers' Council (LGPMC) and the Small Business Ministerial Council for at least five years. The LGPMC has released *Guidelines for Facilitating Home Based Business* (2011) that outlines a set of criteria which, if satisfied, should not require a business to obtain planning permission to operate. Otherwise, prospective home-based businesses need to apply for planning or development approval from the LG. However, these ministerial councils no longer operate (since 30 June 2011) and home-based business initiatives have not been referenced to be progressed by the COAG standing committees.

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*Most states have online portals that provide information for prospective and established home-based businesses, including areas where planning and development approval are required. However, these sites only provide basic information and often refer interested parties to LGs. As such, these portals are currently of limited use in relation to planning and development.*

LEADING PRACTICE 12.9

*Following the guidelines proposed by the Local Government Planning Ministers Council to reduce the regulatory burden on home-based business, local governments can adopt:*

- a self-assessment process (with prescriptive criteria) to determine whether development approval is required*
- outcome-based criteria to ensure that home-based businesses do not adversely affect the amenity of the community where they operate.*

*State and local government websites can make online facilities more useful for potential home-based business operators by providing detailed information, including advice on development approval exempt characteristics to enable operators to undertake a self-assessment of whether they are compliant.*



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## 13 Comments from jurisdictions

In conducting this study, the Commission was assisted by an Advisory Panel comprised of representatives from each of the Australian state and territory governments, and from the Australian Local Government Association. In addition to providing advice to the Commission and coordinating the provision of data, government representatives examined the report prior to publication and provided detailed comments and suggestions to address factual matters and improve the analysis and presentation of the data.

The Commission also invited each jurisdiction, through its panel members, to provide a general commentary for inclusion in the report. These commentaries, where provided, are included in this chapter.

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## Queensland



The Queensland Government welcomes the Productivity Commission's report *Performance Benchmarking of Australian Business Regulation: The Role of Local Government as Regulator*. The Queensland Government recognises the key role that Local Governments play in the lives of all Queenslanders. Local Governments are the elected bodies closest to Queensland communities, and are best placed to provide the most practical and appropriate local solutions to local issues. Local Governments play an important role not only in service delivery, but also by way of administering their own local laws and laws made by other levels of government.

Unnecessary regulation and bureaucratic red tape can impose significant additional costs for business, and stifle productivity and innovation. The burden and cost of this over-regulation on the business community has flow-on effects, driving up costs for consumers. This is an issue for all tiers of government. The Queensland Government is committed to reducing red tape by 20%, and shifting the culture of government from one that promotes red tape to one that actively reduces it.

At the State level, Queensland has established an Office of Best Practice Regulation (OBPR) within the Queensland Competition Authority. The OBPR will:

- review and issue public reports on RISs submitted by departments for new legislation and regulations;
- report annually on departmental performance against regulatory burden benchmarks; and
- establish a process to review the stock of existing Queensland regulations, undertake in-depth reviews, principles-based reviews and benchmarking exercises.

Given the high levels of interaction between State and Local government in the creation and enforcement of regulation, the work of the OBPR is likely to play a significant role in reducing the regulatory burden at the Local Government level, as well as the State Government level.

This report explores several issues involving the difficulties Local Governments face when tasked with the enforcement of State Government regulation. The Queensland Government is currently working with the Local Government Association of Queensland (LGAQ) to finalise a Partners in Government agreement, to ensure the interests of local communities are represented. As part of the agreement, Queensland will seek to ensure that devolution of responsibility to Local Governments will only occur where there has been prior consultation, and the financial and revenue impacts have been considered and addressed. The Queensland Government will work directly with the LGAQ to identify and deal with unnecessary red tape across Queensland's Local Government sector.



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The Partners in Government agreement will also allow for appropriate levels of resource allocation for local governments to meet the growing demand for infrastructure and services.

Benchmarking studies such as this one will undoubtedly play a key role in the OBPR's work targeting areas for reform across Queensland's regulatory environment. The leading practices identified in this report will help to shape Queensland's future regulatory reform efforts at both the State level and through working collaboratively with Local Governments.

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## South Australia

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The South Australian Government welcomes the Productivity Commission's report on benchmarking the role of local government as a regulator and supports the report's inclusion of examples of leading practice.

The Benchmarking Study report highlights a number of leading practices by South Australia that aim to reduce or minimise the level of regulatory burden on business.

Nonetheless, a comprehensive analysis of the examples of leading practices identified in the report will help to inform possible further improvements in the way local government functions as a regulator in South Australia.

The State Government enjoys a healthy working relationship with the local government sector in South Australia. Since 2004, this working relationship has been formalised through the *State-Local Government Relations Agreement*.

The Agreement signifies the cooperative and constructive relationship between State and Local Government in South Australia, and articulates the aspirations of the two spheres of government with the aim of delivering greater benefits for the South Australian community through more strategic collaboration. It is in two parts: the Agreement itself which sets out principles of engagement between state and local government; and a *Schedule of Priorities* that outlines annual priorities for joint action.

In early 2012, the Agreement was reviewed and focuses on a clear statement of Principles, Commitments and Mechanisms, whilst maintaining consistency with the intent of previous Agreements.

The 2012-13 *Schedule of Priorities* focuses on:

- South Australia's seven strategic priorities of:
  - Creating a vibrant city.
  - Safe communities, healthy neighbourhoods.
  - An affordable place to live.
  - Every chance for every child.
  - Growing advanced manufacturing.
  - Realising the benefits of the mining boom for all South Australians.
  - Premium food and wine from our clean environment.
- Continued improvement of governance in Local Government, and
- Constitutional recognition of Local Government.

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The Agreement sets in place an agreed process aimed at providing better communication and consultation between the State Government and Local Government during the development of significant legislative proposals that have an appreciable impact on Local Government, including those that propose new or additional regulatory responsibilities on councils. This process seeks to provide greater certainty to Local Government on the timing of engagement on proposed changes and encourages improved dialogue between the State and Local Government sectors on new initiatives.

At its own initiative the Local Government sector, through the Local Government Association of South Australia, has developed the “Local Excellence – Councils Working Together for Communities” Program. The key objectives of the Program are to work with councils over the next two years, to achieve the following outcomes:

- redefinition of the role and functions of councils in key areas of activity;
- consolidate opportunities and identify service innovation using test sites;
- enhance the skills of staff and Council Members in governance and community
- engagement;
- identify the barriers to service delivery, governance and intergovernmental excellence in South Australia and strategies to raise performance; and
- undertake research to enhance future State/Local Government relations.

Under the Program, work will be done under five key headings: Councils of the Future, Community Engagement, Financial Reform, Service Efficiency & Effectiveness, and Governance. Sixty-eight projects have been identified for consideration, some of which involve collaboration with the State Government. These projects have commenced or are being considered:

### **Red Tape Reduction**

Local Government through a small group of pilot Councils has been working with the State Government to identify opportunities for reducing red tape in areas where Councils have sole responsibility for the delivery of a service. This work may result in regulations being removed where considered a “red tape” issue. However, the current focus is on the identifying opportunities for reducing red tape in the planning and development system, with a particular emphasis on efficiencies through e-solutions.

An additional project to reflect the red tape between State and Local Government is being proposed. This project would deal with functional areas where:

- there is confusion about the role/functions of both spheres of government and the customer is “ping ponged” between agencies and Councils;

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there is reliance by Councils on approvals/concurrences by agencies prior to a customer getting final approval e.g. in the area of planning; and

- functions where Local Government is not best placed to provide regulatory functions eg supported residential facilities.

It is proposed that this project, working with up to five Councils, would identify a program of reform, establishing the evidence and propose changes and be undertaken jointly with key State Government agencies.

### **Public Health**

The *South Australian Public Health Act 2011* (enacted in part February 2012) further clarified the role of Local Government in public health. The Department of Health is working with the Local Government Association of South Australia to develop resources, guidance and training materials to support Councils to develop their capacity to fulfil their obligations under the new Act. A number of pilot programs will also be undertaken to develop Council and Regional Health Plans and implement a suite of resources to assist Councils.

### **Food Rating Program**

The Local Government Association in partnership with the Department of Health has established a Memorandum of Understanding to clarify responsibilities around food safety. A working group with representatives from Local Government, Environmental Health Australia and the Department was established to develop and oversee the work plan. This working group has identified key priorities including:

- improving consistency in the application of the Food Act;
  - reviewing and improving current systems;
  - developing and supporting a skilled workforce;
  - supporting small and remote councils; and
- exploring a state wide food safety rating program.

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