NATIONAL OCCUPATIONAL LICENSING LAW BILL
EXPOSURE DRAFT

EXPLANATORY PAPER

This Explanatory Paper is provided to assist with interpreting the National Occupational Licensing Law.

Public comments on the Exposure Draft and this Explanatory Paper should be submitted to info@coagskillstaskforce.gov.au by 28 December 2009.

Government agency comments must be submitted to the respective Steering Committee member for coordination before 21 December 2009.

National Occupational Licensing Law Bill 2009

Introduction

The purpose of the national licensing system is to remove overlapping and inconsistent regulation between jurisdictions for the licensing of occupational areas. By so doing, it aims to improve business efficiency and the competitiveness of the national economy, reduce red tape, improve labour mobility and enhance productivity. This will enhance consumer confidence and protection without imposing unnecessary costs on consumers and business or substantially lessening competition.

The Intergovernmental Agreement for a National Licensing System for Specified Occupations (IGA) agreed by the Council of Australian Governments (COAG) on 30 April 2009 contains objectives that are included in the National Law and the IGA at clause 4.2 contains the following guiding principles:

a. the system operates in a transparent, accountable, efficient, effective and fair manner;

b. regulatory intervention in the form of licensing is only contemplated where risks arising from market failure or risks to public health and safety warrant corrective action and, of all feasible options, licensing provides the greatest net public benefit;

c. licensing arrangements do not duplicate legislative protections contained under other laws, in particular, competition law, consumer protection law or occupational health and safety law;

d. licensing arrangements only include requirements needed to address identified consumer protection risks arising from market failure and/or worker and public health and safety risks without imposing unnecessary costs on consumers and business or substantially lessening competition;

e. licensing eligibility requirements are expressed in objective not subjective terms;

f. the system will not require the extension of licensing to sub-groups of a broad occupational group that are not currently licensed in particular jurisdictions; and

g. licensing arrangements are subject to an initial review five years after commencement and subsequently at a frequency of no less than every ten years.

It is a requirement that any person who performs functions under the national licensing system exercises their functions having regard to the objectives and guiding principles of the national licensing system.

Reasons for the National Licensing System

Licensing of occupational areas is predominantly a State and Territory function and is conducted by a range of regulatory bodies in each State and Territory. For historical reasons, licensing systems have developed in different ways in each jurisdiction so that approaches to licensing are not consistent. Depending on the occupational area and/or the jurisdictions involved, the objectives of licensing may focus primarily on consumer protection, occupational health and safety and/or public worker safety.

Regulatory bodies currently have responsibility for administering threshold licence entry criteria and ongoing conduct requirements for licensees. They monitor compliance and administer disciplinary procedures, maintain registers of licensees and oversee skills maintenance requirements such as continuing professional development. They may also manage the relationships between licensing systems and the consumer remedies available under a range of legislation.

Due to differing jurisdictional policies and practices, licences issued for the same occupational area by individual jurisdictions often have different parameters and different eligibility requirements and scopes of work allowed. Different licence nomenclature, duration, licence structures and fee structures generally apply.

The direct compliance costs from overlapping and inconsistent regulation that are borne by businesses and eventually consumers include the costs of multiple licence fees and the indirect costs include those of managing multiple regulatory regimes.

Both direct and indirect costs are particularly high for small to medium sized businesses where they constitute a greater proportion of total costs.

Under the *Mutual Recognition Act 1992* (MRA) individual occupational licence holders from one jurisdiction can apply to be registered in a second jurisdiction on the basis of their existing licence and without further assessment of their skills. Regulators in a second jurisdiction have an obligation to issue an applicant under mutual recognition with a licence to undertake activities that are ‘substantially the same’ as those permitted

by that person under their licence in the first jurisdiction. They may use conditions on licences to achieve equivalence. The MRA does not apply to business licences.

Despite mutual recognition, while each State and Territory maintains different licensing regimes, licensees who want to move between jurisdictions must still apply for a licence, meet different non-skills requirements and pay a separate licence fee for the equivalent licence(s) in each jurisdiction in which they wish to work. In certain circumstances they may also need to satisfy other additional requirements not covered by mutual recognition. These arrangements are particularly difficult for individuals and/or businesses operating in multiple jurisdictions and for those working in border areas, both of which must comply with different licensing and regulatory requirements and is a disincentive to pursuing work in other jurisdictions – particularly work of a shorter nature.

As part of the Council of Australian Government's (COAG) agenda to move towards a seamless national economy, COAG agreed on 3 July 2008 to develop a national occupational licensing system that would remove inconsistencies across State borders and allow for a more mobile workforce. COAG agreed to develop a national licensing system with the following characteristics:

a. cooperative national legislation;
b. national governance arrangements to handle standard setting and policy issues and to ensure consistent administration and compliance practices;
c. all current holders of state and territory licences being deemed across to the new licence system at its commencement;
d. the establishment of a publicly available national register of licensees; and
e. the Commonwealth having no legislative role in the establishment of the new system.

What COAG Agreed

Under the IGA agreed by COAG at the 30 April 2009 meeting a licensing body is to be established to develop policy and administer the national licensing system. This body is to be operational by January 2011.

The model chosen for the national licensing system is the "delegated agency model". This means that the licensing body will delegate all of regulatory functions for licensing

to existing regulatory agencies (for example issuing of licences). However, it should be noted that the national licensing system at this stage does not include conduct provisions, that is how a licensee must perform their work under a licence, although this may occur in the future.

The national licensing system will initially be applied to seven occupational areas:

a. air conditioning and refrigeration mechanics;
b. building and building-related occupations;
c. electrical;
d. land transport (passenger vehicle drivers and dangerous goods only);
e. maritime;
f. plumbing and gasfitting; and
g. property agents.

Additional occupational areas may be included in the national licensing system over time. Further, some of the occupations proposed to be covered by the national licensing system are the subject of separate and related COAG activity to provide more unified or harmonised regulation. For example, the work of the Australian Transport Council on a national approach to maritime safety in relation to commercial vessels. Progress in relation to these parallel COAG reforms is being monitored to ensure there is no duplication or overlap with these initiatives. The national licensing system will not compromise Queensland's existing home warranty insurance scheme.

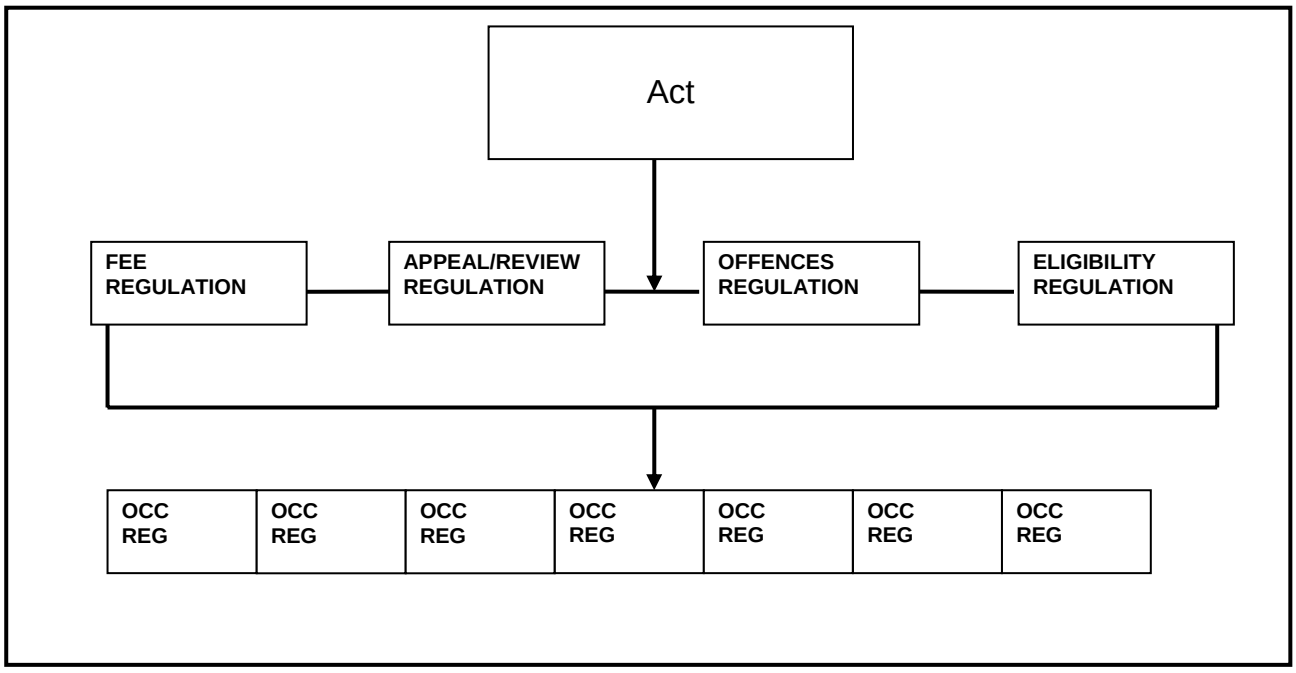
Legislation parameters to establish the national licensing system

Implementing the national licensing system is reliant on a National Law that is given effect to by an Act of a host jurisdiction – in this case, Victoria, which is then adopted and applied as a law by participating jurisdictions.

The introduction of the National Law in a State or Territory parliament for application by other participating States or Territories is a standard practical approach to implementing national systems to achieve uniformity where constitutional powers rest with the States and Territories rather than the Commonwealth.

The legislation identifies Victoria as host of the proposed national system. The National Law incorporates and builds on the IGA. The regulatory model is one of federal co-operation by agreement between States and Territories. The draft Bill is not Commonwealth law, and participating States and Territories are not referring powers to the Commonwealth.

As outlined in the diagram below the draft Bill has been designed to provide the governance and high-level framework for the national system. Regulations for the operational aspects and industry specific issues and instruments to allow for the notifying of special rules and procedures that are likely to need frequent amendment are to be covered in regulations. Accordingly, there will be generic regulations that will cover mostly administrative type matters that apply to all occupational areas. However, each specific occupational area will have its own regulation.



The legislation provides for the establishment of a statutory authority with its own governing board as the National Occupational Licensing Authority. COAG has agreed that the Ministerial Council for Federal Financial Relations will be responsible for the national licensing system in its implementation phase.

The drafting of the National Law

The legislation for national schemes within Australia is drafted by the Parliamentary Counsel's Committee (PCC). This committee comprises of the head of each State and

Territory Parliamentary Counsel's Office (PCO) and also New Zealand. PCC meets on a regular basis to establish protocols and procedures that will be adopted for national schemes. Where there is an established national law provision this will be noted in the discussion of the clauses below.

No Penalty Units for National Law

The penalties to be applied to offence provisions have not been settled at this point in time. PCC has advised that penalty units have not been used in any National Law schemes. Consequently penalties must be expressed in monetary terms.

What does this mean for existing licensees?

On 3 July 2008, COAG agreed that when introducing the national licensing system that all licensees would be deemed across to the new system. Clause 6.9(p) of the IGA also requires that the legislation would provide for the arrangements for current licensees. So if you currently hold a licence that comes into the National System you will be automatically taken to hold a licence under the new system when it commences for your occupational area. The system will commence on 1 July 2012 for the first tranche of occupations: plumbing and gasfitting; electrical; property agents (excluding conveyancers and valuers); and airconditioning and refrigeration. The second tranche is scheduled to commence on 1 July 2013, or as soon as possible thereafter, and currently consists of: building and building related occupations; land transport (passenger vehicles and dangerous goods only); maritime; and conveyancers and valuers.

PART 1-PRELIMINARY

Clause 1 advises that the short title of the National Law will be the National Occupational Licensing Law.

Clause 2 of the National Law provides for when it becomes effective as each jurisdiction moves to the national system.

Clause 3 details the objectives of the scheme. The objectives are those that were agreed to by COAG at clause 4.1 of the IGA and provide for the following:

a. ensure that licences issued by the national licensing body allow licensees to operate in all Australian jurisdictions;

b. ensure that licensing arrangements are effective and proportional to that required for consumer protection, and worker and public health and safety, while ensuring economic efficiency and equity of access;
c. facilitate a consistent skill base for licensed occupations;
d. ensure effective coordination exists between the national licensing body and relevant jurisdictional regulators;
e. promote national consistency in:-
    i. licensing structures and policy across comparable occupational areas,
    ii. regulation affecting the conduct requirements of licensees, and
    iii. the approaches to disciplinary arrangements affecting licensees;
f. provide flexibility to deal with jurisdiction or industry specific issues; and
g. provide access to public information about licensees.

Clause 4 provides for a number of definitions that have been inserted in the National Law and it is important to specifically note two of the following definitions as they are fundamental to how the National Law is to be interpreted:

Licence

A licence is defined as a *licence granted under this Law authorising a person to carry out a licensed occupation*. While a licence has many meanings in jurisdictional legislation such as registration, authority or permit, these are not part of the definition. The National Law will refer to all forms of licensing purely as a licence. As the intention of the National Law is that lesser forms of regulation, such as registration and accreditation can be a part of the national licensing system, this may need to be revisited, if advice is that the current definition is not adequate. The regulations for the national law will establish the types and categories of licence. Where jurisdictions currently call a licence by another name this will be reflected and catered for as part of the transitional arrangements.

Licensed Occupation

The definition for a licensed occupation is *an occupation prescribed by the regulations as being a licensed occupation*. COAG has agreed to seven occupational areas that will be admitted into the scheme. There are many other occupational areas that may

join the scheme over time. Accordingly, the occupational areas that will apply to this scheme will be specified in a generic regulation, to ensure that the Act does not need to be amended on a constant basis. It is also important to note that it will be the broad occupational areas that will be specified in the regulations – for example 'building and building related occupations'. Specific regulations will be developed dealing with building and building related occupations that will specify the individual categories of licences that are to be applied under the National Law.

Clause 5 applies Schedule 1 to the National Law. This Schedule incorporates such matters as those normally found in State and Territory Interpretation Acts and Legislation Acts. Please note that all of the above definitions, clause 4, are specific to this National Law – whereas the definitions at the back of the National Law in Schedule 1 are common to a number of National Laws.

Clause 6 & 7 stipulates that as a single national entity, the law is universal across those participating jurisdictions. This is a standard PCC approved provision to be applied to all National Law where an entity is established – such as the National Occupational Licensing Authority. This clause should not be interpreted as establishing eight entities. The phrase "has the effect that an entity established by this Law is <u>one single national entity</u>". Accordingly, where this National Law provides for the National Occupational Licensing Authority being established, it is only one Authority that is established, although each jurisdiction applies the National Law. The single entity will be known as the *National Occupational Licensing Authority* (Licensing Authority).

Clause 8 provides that the National Law binds the State, and in this context, State is taken to mean that the Crown in each jurisdiction is bound by the legislation. Accordingly State entities, for example Statutory Authorities, will be bound by the National Law. This has the consequence that a State Water Board would be required to be licensed under the National Law if work they were undertaking came within one of those licensed occupations. This provision is also a standard PCC approved provision that will apply to all future national schemes.

PART 2-LICENSING

Division 1- Licensed occupations and scope of work

Clause 9 establishes that the National Law may make regulations for the licensing of a person carrying out licensed occupations. This provision provides the head of power to enable the different categories of licences, scope of work and the different types of licences to be specified in the regulations. Categories will deal with, for example, whether there will be an electrical licence and if that licence would be for an individual, a business or contractor. The scope of work will establish what work the licensee is authorised to undertake. Finally, the types of licences will establish such matters as whether a licence is a full licence, restricted licence or a provisional licence. The actual category names for licensing, licence types and scopes of work will be established as part of the advice provided by each specific Occupational Licensing Advisory Committee (OLAC).

Importantly, clause 9(3) provides for the intent of the IGA which established that no jurisdiction would be required to licence an occupational area if they previously did not. Take for a hypothetical example: in New South Wales, Queensland and Victoria to undertake work in relation to tiling a person must be licensed. A general category of tiler may be introduced in the National Law, however the other jurisdictions who currently do not regulate tiling will not require a National Licence to undertake tiling work in that jurisdiction. However, this provision also allows a jurisdiction to opt-in to a licensing arrangement if that jurisdiction should choose to licence that specific area by the appropriate Minister actually signing the relevant regulation. To continue the above example, should South Australia wish to regulate tiling it would opt-in to the licensing arrangement under the National Law. This provision in no way constrains the ability of a participating jurisdiction to licence a separate area under their own licensing laws. The provision operates quite differently from clause 135 which deals with the inclusion of new occupational areas within the National Law.

Clause 10 provides an offence provision to carry out, or enter into a contract to carry out work unless the person is licensed to do so. The way the provision is framed the person doesn't actually have to carry out the work just make an agreement (contract) to do so. This offence would also be applicable to a licensee if that licensee went outside

the scope of work authorised under the licence. The penalty provision is applicable to an individual or a corporate entity and the maximum penalty that can be applied has not been established yet.

This provision also provides that a person may conduct work if they are not licensed if the regulations specify that a person is exempt from holding a licence. For example the regulations could stipulate where an owner builder was not required to hold a licence or encompass such matters as remote locality issues.

Clause 11 provides an offence for advertising or holding out that a person or entity is licensed when they are not. Once again this provision does not require the work to actually be undertaken. Accordingly, advertising is taking to mean tout or solicit – so any positive act representing that a person is licensed when in fact they are not is captured.

Clause 12 is an important provision as it allows an appropriate mechanism for the Licensing Authority to stop a person from either undertaking work by applying to the Supreme Court of a jurisdiction for an injunction when in breach of the National Law. This could be applied to a person advertising for business when they are not licensed.

Clause 13 prohibits a licensee from lending or otherwise allowing a person to use the licensee's licence. Lend has it's ordinary dictionary meaning – *to permit the use of, to provide temporarily*.

Division 2 - Application for Licence

Due to the broad nature of the national licensing system in its coverage of a range of different occupations, this Division provides the mechanism for the administration of the system.

Clause 14 enables regulations to be made to provide that an individual or a body corporate may apply to be licensed in a specified occupation. A decision has been made that the National Law will preclude a partnership or trust from making an application to carry out work in a national licensing occupational area as trusts and a

number of partnership arrangements are not transparent in their governance structure and membership. Unlike a corporation where it is easy to find the personnel involved in the management structure who can take responsibility for a nominee, the same cannot be said for Trusts. Trusts also create a problem where a person's identity is not discoverable and this could have an undesirable effect on licensing arrangements, for example, a disqualified person hiding behind a trust structure.

Clause 15 provides that the application must be accompanied by a prescribed fee. This provision should be read in conjunction with clause 134 which provides for the general regulation making powers. Clause 134(2)(c) enables regulations to be made for fees to be paid for applications, licences and renewal of licences. This regulation making power will enable a regulation to be made in relation to how the collection and retention of fees by jurisdictions is to occur.

This clause also provides that as part of the application process, an applicant must identify the *primary jurisdiction* where work will be carried out. Primary jurisdiction is defined under clause 4 Definitions as:

> ***primary jurisdiction*** *means:*
> *(a) for an applicant for a licence, the participating jurisdiction in which the applicant primarily proposes to carry out the licensed occupation, or*
> *(b) for a licensee, the participating jurisdiction in which the licensee primarily carries out the licensed occupation.*

This will assist jurisdictions to know who is operating within their State or Territory and also has wider application to the positive obligations on a person who becomes licensed to notify the Authority of a change in circumstances. This requirement is necessary as it is intended, at the outset, that licensing fees will remain as the currently are in jurisdictions and this will stop licensees jurisdiction shopping for the lowest fees.

An application for a licence must be in the approved form. Accordingly, as this is a national scheme, the Licensing Authority will design and have all forms approved. This will ensure that the criteria and obligations for an applicant are consistent Australia wide.

Division 3 - Eligibility for Licence

This Division provides the framework for all eligibility criteria, which then can be used to develop each occupational area specific regulation. This approach ensures consistent application for the eligibility provisions that are adopted across the occupations.

Clause 16 provides the broad framework for an applicant to be eligible for a licence and the eligibility for a licensee to continue to hold a licence. Furthermore, in the case of a body corporate the regulations may state the criteria that may apply to a person within the organisation (the nominee) to enable the body corporate to be eligible. Clause 16 is designed to enable regulations to be made for any eligibility requirements and includes the following examples:

- qualifications, skills, knowledge and experience;
- personal and financial probity;
- health and fitness;
- age;
- language skills;
- insurance and contributions to a fidelity fund; and
- business skills.

However the provision should not be read as limiting what matters can be detailed in the regulations to only those matters listed. It could include a requirement that a person holds another specified licence (for example a taxi driver must hold a driver's licence). This approach will be advantageous if other occupational areas are admitted to the National System that would require more stringent considerations, such as checks and balances to ensure criminal enterprises are not involved and to deal with anti-money laundering issues.

It should be remembered that not all of these criteria will necessarily apply to each occupational area. For example, what is relevant for an applicant for a building licence may not be the same as for a real estate agent. Each occupational area regulation will

determine the specific criteria to be applied upon the advice of the relevant Occupational Licensing Advisory Committee.

Clause 17 this clause allows regulations to be made for personal probity requirements that an applicant or licensee may need to personally satisfy to be eligible for a licence, and continue to hold a licence. An important provision has been included in relation to a body corporate, namely the nominee or another relevant person. In clause 17(3) a relevant person is:

> ***relevant person****, for a body corporate, means a person who:*
> *(a) will have authority or influence in the conduct of the business of the body corporate, and*
> *(b) is prescribed under the regulations as being a relevant person for the body corporate*.

This clause has been inserted to ensure that a person can not use a corporate structure to hide behind and would be relevant where individuals who may have been banned from undertaking work within a licensed occupation use a corporate structure as a 'front'.

The National Law establishes the term 'personal probity' in place of 'fit and proper', 'general reputation' and 'strength of character'. Some examples include:

- personal probity – incorporates such matters as criminal history; traffic history; civil penalties and orders; Australian Securities and Investment Commission action disqualifying persons from being a director; and business associates

However this clause should not be read as only catering for those examples listed. This is because the example section provided in subclause (2) includes "without limiting subsection (1)". Subsection (1) clearly provides that regulations can be made of any matters that a person may need to satisfy to be eligible for a licence.

As each occupational area is different and what is relevant for one occupational area may not be for another, the actual criminal offences that may make a person ineligible will be specified under each specific occupational regulation. For example traffic

offences are specifically relevant to a person who transports dangerous goods (explosives) but they may not be relevant for an electrician.

Clause 18 allows regulations to be made for the financial probity requirements that will need to be satisfied. In this clause a person is also taken to mean a body corporate. Some examples for financial probity considerations include being an undischarged bankrupt; subject to a Deed of Arrangement; and being involved in a corporate entity that is/has been wound up, placed under administration/receivership or traded while insolvent.

The power would enable a regulation to be made regarding any aspect of financial probity including any type of financial test that would have to be satisfied.

Clause 19 of the National Law also provides for certain people to be excluded persons for a licence. This provision establishes the parameters for the most serious matters for exclusion, namely they mainly deal with cancellation of the licence, or using false and misleading information to obtain a licence. It also establishes an 'anti-phoenix' provision to ensure that licensees that attempt to subvert their obligations by establishing or going into business with another person are not able to continue as a licensee – albeit through another person or business. This will be achieved through the ability of the Licensing Authority to look at a partner or close associate of the proposed licensee.

The term disciplinary body is used in this clause. The definition section at clause 4 provides that:

> ***disciplinary body*** *means:*
> *(a) the Licensing Authority, or*
> *(b) a court or tribunal of a participating State or Territory.*

As jurisdictional regulators will be exercising delegated powers under the National Law they effectively exercise the disciplinary powers of the Licensing Authority under subclause (a).

Division 4 - Grant of Licence

Clauses 20 – 22 provides that where an applicant applies for a licence in a specified occupational area and they meet all of the eligibility requirements, the Licensing Authority must issue a licence in the approved form. As the Licensing Authority must issue the licence if the eligibility criteria are met there is no need to have a refusal provision (note: that refusing a licence is a decision that can be reviewed – discussed later). While the regulations will specify the period of time that each licence can be issued, no licence will, without the appropriate renewal, be able to be issued under the National Law for a period that exceeds five years.

Another arrangement could be to issue licences in perpetuity but require the licensee to pay an annual (or other period) fee and meet ongoing eligibility requirements. This arrangement could minimise ongoing administrative processes for renewals. However, there is also a school of thought against the concept of perpetual licences.

Clause 23 details that a licence may be subject to conditions that are provided for in the regulations or a condition that has been placed upon the licence as a result of disciplinary action. This provision is subject to the category of the licence and clause 9 becomes relevant. Clause 9 provides that the regulations may specify the categories of licences. Accordingly, this provision ensures that only those licences that have been specified under the regulations can be subject to a condition. This provision therefore can not be used to establish 'pseudo licences' that are not listed in the regulations.

Clause 24 of the National Law establishes a positive obligation on a licensee to notify the Licensing Authority of any change in circumstances as soon as possible, but within 7 days, of the change occurring. Due to the potential for serious consequences for consumers in relation to such matters as bankruptcy a short timeframe for notification has been expressed. This clause creates an offence for failing to notify the Licensing Authority. There has been some suggestion that the time period to apply to notification of changes should be in the regulations, especially for those matters that require short periods of time, such as notification of a change in a medical condition and bankruptcy. However, a 7 day notification period is far more onerous than the current requirements for many occupations.

Changes include: a change to the primary jurisdiction where work is to be undertaken; a licensee's criminal history or other change as detailed in the regulations. While this clause broadly states a change in criminal history, it would be such criminal matters that would be included in each occupational specific regulation that indicates the offences that would make a person ineligible for a licence. The other types of matters that are included in the regulations could incorporate such matters under the personal and financial probity requirements that would make a person ineligible for a licence.

Division 5 - Renewal, variation and surrender of licences

This Division enables regulations to provide for the renewal, variation or surrender of a licence and the National Law is set out in Subdivisions.

Clauses 26 - 27 make provisions that an application for renewal must be made to the Licensing Authority (please note discussion on fees at clause 15). The regulations may also include the procedure for the renewal of a licence. It also requires that when a licensee makes application for the renewal of their licence that the eligibility requirements for a licence provided under clauses 16 to 19 are applicable and that regulations can also be made in relation to other matters. For example, it may be that the regulation may require that the licensee has met certain obligations in relation to undertaking skills maintenance. The administrative arrangements for lodging licence applications will be determined once the Licensing Authority is established.

This clause makes no mention of restoration of licences and this is intentional. Restoration is a term used where a licensee has let their licence lapse, and can apply to have it restored. The regulations will establish a mechanism to ensure that the renewal process can consider the circumstances of a licensee during the renewal process. Provisions to deal with this may include deeming the licensee to be licensed for a short period of time while the renewal process is undertaken so that a consumer is not disadvantaged. It is also probable that in such circumstances the licensee may face a financial penalty, for instance a higher application or licence fee. The general regulation powers in clause 134 enables such processes to be implemented.

Clauses 28 - 29 enable a licensee to apply to vary their licence and the parameters on how a licensee's application for variation must be made to the Licensing Authority. As with the renewal of licence provisions, it also requires that when a licensee makes application for the renewal of their licence that the eligibility requirements for a licence provided under clauses 16 to 19 are applicable and that regulations can also be made in relation to other matters.

Clause 30 enables the Licensing Authority to vary a licence and outlines the procedures and requirements for this to occur. The Licensing Authority must state why the licence is being varied and what will happen as a result of that variation – for example it may be a different licence category that is proposed to be issued. However, if the Licensing Authority was to change how the a licensee's licence would be varied after the original advice had been given to the licensee, the Licensing Authority would be required to initiate the variation process from the beginning. This is due to the fact that unlike disciplinary provisions there is no hierarchy of matters that can be detailed that enables lesser approaches to be applied. The National Law adopts a best practice approach that provides for appropriate review of a decision made by the Licensing Authority.

Clause 31 provides for a licensee to surrender their licence in accordance with the requirements specified in the regulations. This clause is important as it provides the necessary linkages with fee arrangements. For example, if a licensee has paid for a five year licence and after two years no longer wishes to remain licensed they should be entitled to a pro-rata refund of their licence fee.

Clause 32 provides that the Licensing Authority may revoke a licence that has been issued by the Licensing Authority as a result of an administrative error, for example, a licence issued to a person of a similar name. However, if the licence is revoked the licensee will have a right to have that decision reviewed. Revoked has its ordinary dictionary meaning – *take back, withdraw*. It should not be confused with a cancelled licence, as a cancelled licence means that the licensee has done something that has resulted in their licence being taken away.

PART 3-DISCIPLINARY PROCEEDINGS AND ACTIONS

For the purposes of the national licensing system, this part defines disciplinary action giving attention to the range of actions that may be imposed for circumstances needing action. This area of the National Law has been assessed against best regulatory practice and introduces some procedures, such as 'immediate suspension' and 'show cause' which are not currently featured in licensing regimes in all occupational areas in all jurisdictions.

Division 1 - Preliminary

Clause 33 provides the disciplinary proceedings and action provisions can be taken against a former licensee. However, the immediate suspension provisions at clause 36 and clause 37 are not applicable to a former licensee.

Clause 34 For the purposes of the national licensing system, disciplinary action is defined by a range of actions that may be imposed. An established hierarchy of actions is provided commencing with giving a reprimand to the most extreme action of cancelling a licence and disqualifying that licensee from being able to apply for a licence for life. By establishing a hierarchy of actions, a number of issues are resolved, including that the Licensing Authority can take a different type of action than was notified provided that the action is a lesser type of action. This provision is necessary to overcome the decisions of courts in some jurisdictions that imposing a lesser action without recommencing the process is invalid.

Division 2 - Grounds for disciplinary action

Clause 35 describes the grounds that give the Licensing Authority cause to take disciplinary action against a licensee where:

- the licensee has contravened this Law or a regulation made under this Law;

- the licensee has contravened a prescribed Act or regulation of the Commonwealth or a State or Territory;
- the licensee is no longer eligible for a licence or the type of licence held by the licensee;
- the licensee has not completed any prescribed skills maintenance requirements or prescribed training requirements;
- the licensee has not paid a fee or other amount required to be paid under this Law;
- the licensee has not complied with an order made by a disciplinary body in relation to the carrying out of the licensed occupation;
- the licensee's licence was obtained on the basis of information or a document that was false or misleading;
- the licensee has contravened a condition of the licensee's licence or an undertaking given by the licensee to the Licensing Authority;
- the licensee has failed to maintain insurance the licensee is required by a regulation to maintain; or
- an immediate suspension ground exists in relation to the licensee.

The provision provides that a ground for taking disciplinary action is when a licensee has contravened a prescribed Act or regulation of the Commonwealth or a State or Territory and ensures there are the necessary linkages to other jurisdictional legislation. This means that if a licensee breached a conduct related provision in South Australia, that licensee could have action taken against his/her national licence as a result of the breach. Each State and Territory will, when applying the National Law as legislation in their own jurisdiction, name the legislation that is applicable to the National Law. This is a standard procedure for implementing such National Laws.

Clause 35(2) also provides the necessary mechanism for the regulations to state the matters where an automatic cancellation or suspension of a licence can occur. These are normally very occupational specific issues on which the Occupational Licensing Advisory Committees will provide advice. The matters that will be included in the regulations are purely administrative matters and may include the requirements relating to such matters as a corporate body losing its nominated person.

Division 3 - Immediate suspension

Clauses 36 – 37 ensure that the provision for immediate suspension action is one of 'last resort'. This is the most serious action that can be taken against a licensee in the sense that the process for an immediate suspension of a licence works backwards to normal disciplinary provisions. The licensee becomes unlicensed prior to any natural justice principles or process being implemented. The licensee is given an opportunity to make representations on why the suspension should be lifted pending the finalisation of any investigation or disciplinary action, however the regulatory authority is not obliged to 'lift' the suspension. A decision made under these clauses is reviewable. Due to the severity of consequence for the licensee it is normal that this power is exercised at a very senior officer level in each regulatory authority through the delegation process.

Provisions for immediate suspension are a regulatory best practice mechanism for matters where public health and safety are at high risk, or the public interest is so vastly compromised that the cost to the licensee is outweighed by the greater needs of the community. A decision to exercise the power to immediately suspend a licensee must be appropriately based on evidence that would meet both a public interest test and at least one of the immediate suspension grounds. This test is cumulative and both grounds must apply. For example, the public interest test would not necessarily be satisfied for a taxi driver who is declared bankrupt, however a real estate agent who controls huge trust funds would meet a public interest test if they declared bankruptcy as that trust money belongs to other persons. To meet the best regulatory practice transparency requirements, the processes to implement such as notice and service requirements and licensee rights are also explicitly detailed and expressed in the National Law.

An immediate suspension action can occur when a licensee has only been charged with an offence that under the regulations would make the person ineligible to hold a licence. Provisions relating to 'charged with an offence' have been accepted by jurisdictions when it can be justified on public safety/interest grounds. For example, a public passenger driver (school bus driver) who is charged with a sexual offence against minors or a real estate agent who is charged with misappropriation or theft of trust monies. This type of provision was recently included in the Health Practitioner Regulation National Law (which has been tabled but is not yet in operation).

Division 4 - Disciplinary matters

Clauses 38 – 41. Disciplinary matters are those matters that will require the Licensing Authority to undertake a show cause process. A show cause notice for disciplinary action is the first stage of the disciplinary process. Prior to any formal action being taken against a licensee (immediate suspension provision excluded), the National Law requires that the Licensing Authority issues a notice to the licensee inviting them to show cause why certain disciplinary action should not be taken. A licensee must then be given an opportunity to provide, within a specified timeframe, written representations as to why the disciplinary action proposed should not be implemented. Accordingly, natural justice requires that the licensee's representation must be considered as part of the disciplinary process.

To ensure that best regulatory practice is followed the matters that a show cause notice must detail are clearly set out in the National Law. The notice will include such information as the type of disciplinary action proposed, the grounds and reasons for the proposed action and that the licensee may make a written representation within a specified timeframe to the Licensing Authority regarding the proposed action. As a proposed hierarchy of actions has been established under clause 34, if the action that is to be taken after due consideration is a lesser action than what was initially proposed the Licensing Authority may substitute the lesser action without commencing an additional disciplinary process. It should also be noted that the Licensing Authority may take one or more actions in the hierarchy. The Licensing Authority may not impose a higher penalty under this arrangement without commencing an additional disciplinary process notifying the licensee of the higher penalty.

It is noted that some jurisdictional legislation does not currently permit the regulatory authority to take disciplinary action against a licensee's licence (court or tribunal action only), while other jurisdictions may take action without even notifying the licensee before the action is taken. Both approaches provide difficulties that are not easy to reconcile. One of the objectives for best practice regulation is to minimise the cost, both to the community and individuals being regulated. There was concern from some jurisdictions that do not currently adopt a 'show cause' disciplinary process of the possible resource implications and costs to regulatory areas for introducing it. While this is a valid

concern, public policy dictates that the net benefits to the community must be taken into consideration. Similar processes for disciplinary action are now being implemented by many governments due to the recognition that these processes provide an timely resolution for licensees, have an overall cost saving to governments, especially in relation to the expense for court systems, representation costs (whether government solicitors or external legal practitioners) and the amount of time required for the preparation of legal documents for court action as opposed to an administrative process. Proving an appropriate administrative review mechanism in the National Law ensures that this process fulfils the public policy intent far better than a judicial process.

A show cause disciplinary regime approach provides better outcomes for licensees by having a quicker, less costly and more transparent process from the start of any proposed disciplinary action. While it is recognised that some jurisdictions have easy access to tribunals who may make the initial disciplinary decision, this is not the case in most jurisdictions. Show cause notices ensure procedural fairness and natural justice processes are applied to disciplinary decision making and the licensee is given appropriate objective reasons for the disciplinary decision. It is also notable that applying robust statutory considerations and objective reasoning for decision making processes will minimise the likelihood of a licensee proceeding with an internal review or ultimately a review by a tribunal or court.

This raises the question whether the National Law should specify what matters should be considered when making a decision, for example the licensee's history, seriousness of the offence, etc. Other relevant details for that specific occupation could be also be specified in the regulations as 'any other relevant licensing matter'.

Currently the National Law does not detail some of the types of matters the Licensing Authority must take into consideration when making a disciplinary decision, for example the licensee's history and length of time they have held a licence. Provisions which address this may be necessary for national consistency in application of the disciplinary scheme and provide transparency for the licensee and have not yet been settled.

PART 4-MONITORING AND ENFORCEMENT

The monitoring and enforcement provisions have not been settled at this stage as there are a number of options available. The options include:

1. leave the provisions as currently provided for in this National Law (subject to possible amendments);
2. refer the monitoring and enforcement provisions back to current jurisdictional legislation; or
3. reference the National Law to the Australian Consumer Law or duplicate provisions of the Australian Consumer Law in the National Law.

Option one is the clauses you can currently see in the National Law. Option one has been preferred amongst most regulators as it provides certainty on the powers and functions for authorised officers and the necessary tools to ensure that authorised officers can be effective within a regulatory regime. These clauses have been developed as a result of analysis of each jurisdiction's occupational legislation and consolidates coverage for existing powers.

Option two is for authorised officers continue to exercise the same powers that they currently exercise under their relevant legislation. This has the advantage that authorised officers would not be working under two streams of powers. However, it does not ensure that all authorised officers have the same powers in each jurisdiction and this may have a negative impact on licensees being dealt with consistently across jurisdictions.

Option three acknowledges that there are also a number of parallel processes that are currently being undertaken, one of which is the harmonisation of the Australian Consumer Law (ACL). As part of this process there is a move to try to implement a nationally consistent monitoring and enforcement regime. That would mean that an authorised officer in South Australia would have the same powers of entry as an authorised officer in Tasmania. The work of the ACL is in its infancy. To date, option three has not received a favourable response from jurisdictions.

The National Law will provide for enforcement tools to promote compliance with the licensing regime. Although some of these enforcement and compliance powers may be more relevant to conduct provisions than licensing provisions, they have been included in anticipation of conduct provisions moving into the NLS over time.

Authorised officers will be appointed under the National Law for a range of functions. Appointment of authorised officers and powers that are given to each authorised officer are intrinsically linked to the National Law. As the National System is to encompass a broad range of occupational areas the broad range of enforcement powers provided under the National Law processes are established to ensure that regulatory authorities, and through them authorised officers, can only exercise those powers necessary for the occupational area. For example, while it might be necessary for an authorised officer to be able to stop a driver of a public passenger vehicle it would not be appropriate for such an authorised officer to have a power for general entry to the driver's premises. However, a regulatory authority who conducts enforcement and compliance for electricians requires a general power of entry to premises to enable inspections.

Importantly a wide range of regulatory powers exists under the National Law to cater for the diverse nature of the National System. However it must be noted that not all powers will be available to all authorised officers and that the powers of authorised officers is consistent with such powers that currently exist under legislation in each jurisdiction. Each jurisdiction will nominate the regulatory authority CEO to whom the powers are delegated. As the CEO will have the power to sub-delegate it will be the CEO's responsibility to determine which authorised officer has which powers.

When interpreting the provisions for monitoring and enforcement clauses the use of the term 'document' is used extensively in the National Law and is defined under Schedule 1 to the legislation Schedule as:

document *means any record of information and includes:*
(a) any paper or other material on which there is writing, or
(b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them, or

(c) any computer, disc, tape or other article or any material from which sounds, images, writings or messages are capable of being reproduced (with or without the aid of another article or device),
(d) a map, plan, drawing or photograph.

Clauses 42 – 43 provide the powers of an authorised officer in relation to 'people' and not just licensees. These two provisions allow for an authorised officer to obtain information generally and to require attendance before an authorised officer. As this section does apply not just for licensees, a person does not have to comply with an authorised officer's request if that request would incriminate them. Any such belief that complying with the request would incriminate the person must be reasonably held. Clauses 42 and 43 provide offence provisions.

Clause 44 – 45 provides that a licensee must produce documents and allow an authorised officer to inspect documents that the licensee is required to keep under the National Law. While clause 44 allows a licensee to have a reasonable excuse not to comply with the request, the fact that the licensee is required to maintain those documents under the Law places a high threshold on the licensee to comply. However, 'reasonable excuse' may be offered for non-compliance as there may be cases where, due to a technology failure or similar, those documents can't be produced. It is for a Court to decide whether any failure was reasonable in all the circumstances as this is an offence provision that may only be prosecuted in a Court.

Clause 46 provides the powers for authorised officers to enter and inspect a relevant place. A 'relevant place' is defined under the Definition section at clause 4 as:

> ***relevant place*** *means a place at which prescribed work has been, is being, or is about to be, carried out.*

Prescribed work is further defined as:

> ***prescribed work*** *means work that under a regulation is within the scope of work that may be carried out under the authority of a licence.*

Legislation that provides for a power of entry by authorised officers normally relates to business premises, with a proviso that entry to a residence is generally under a court-issued warrant. However, this approach is not suitable for the National Law due to the divergent nature of the occupational areas being admitted to the system. These definitions ensure that an authorised officer may enter any premises to inspect work where such work is being undertaken by a licensee. This clause is especially important to the building trades which may be undertaking work in a residence or a residential complex.

Clause 46(1) provides that:

> An authorised officer may enter and inspect a relevant place for the purpose of investigating:
> (a) whether this Law is being complied with; or
> (b) whether work being carried out under a licence has been, or is being, properly carried out.

This definition is especially important when reading any of the clauses under monitoring and enforcement where an authorised officer is exercising a power of entry and that clause also mentions investigation.

Authorised officers may enter a relevant place:

1. with consent of the occupier or person in control (clause 46(2)(a));
2. by general right of entry (clause 46(2)(b)&(c)); or
3. under warrant (clause 46(2)(d)).

Clauses 47 – 50 provide for the procedures for applying for and executing a search warrant. These are standard provisions that are detailed in most legislation dealing with regulatory matters. Clause 48(2(a) provides that a warrant must state that an authorised officer may, with necessary and reasonable help and force, enter the place and exercise their powers. Authorised officers may if required, seek police, or other, necessary assistance to execute a warrant within their jurisdiction.

Clauses 51 – 52 provide for the powers of authorised officers after entering places and create offences for a person who does not comply with a request while those powers

are being lawfully exercised. An authorised officer may require the occupier or any other person at the place to give the authorised officer requested 'information' to establish whether the National Law is being complied with. This would include a person having to provide their details, licence numbers, etc.

Clause 52 provides the offences for a person who does not comply with a request by an authorised officer when they are exercising their powers under clause 51. These offences are not just limited to licensees but also apply to any other person on the relevant premises.

Clause 53 provides the power for an authorised officer to stop and search vehicles. This may be done without consent or warrant and with any assistance reasonably required. Offence provisions are also included for not complying. One issue is that the meaning of vehicle is not defined and may not capture such things as vessels (boats), aircraft, trains or other conveyances. This clause will need to be reconsidered to ensure that those conveyances are included under the National Law.

Clauses 54 – 62 provide for the processes and procedures in relation to the seizure of things. These clauses deal with such matters as seizure of evidence, securing seized things, tampering, receipt, forfeiture, return and access to seized things.

Clauses 63 – 66 of the National Law deals with specific offences for a person who gives false or misleading information, false or misleading documents, or who obstructs or impersonates an authorised officer.

PART 5-REVIEWS AND APPEALS

This Part deals with the arrangements for review and/or appeal of decisions made by the Licensing Authority that affect a licensee. Reviews are internal processes conducted by the Licensing Authority and appeals relate to having matters heard in a tribunal or court (whichever is applicable for each jurisdiction).

An issue that has not been settled is whether a licensee must first have the decision reviewed internally or if they may automatically elect to have the matter reviewed by an external body such as a tribunal or court.

Division 1 – Reviews

Clause 67 – 71. Not all decisions that the Licensing Authority will make will be subject to a review process. A reviewable decision is defined under clause 67 as a decision to:

- refuse to grant a licence;
- refuse to renew or vary a licence;
- vary a licence at the Licensing Authority's initiative;
- take disciplinary action against a licensee; and
- revoke a licence.

The regulations may also state for which decisions a licensee may apply for a review as some of those decisions will occur under the occupational specific regulation provisions.

The National Law details the necessary provisions for an internal review, including:

- that the time frames in which an application for a review of the decision must be made by the licensee;
- a review decision must be made by a more senior person who did not make the initial decision; and
- any rights of the licensee to seek an external review if the licensee wishes to have the decision review by a court or tribunal.

The reason that these provisions have been included in the National Law is to ensure that the process is fully transparent – both to the delegates for the Licensing Authority and the licensee.

The decisions that the reviewer can make are:

- confirm the reviewable decision;
- amend the reviewable decision(this is often called varying a decision); or
- substitute another decision for the reviewable decision.

Division 2 - Appeals

Clause 72 provides that a licensee who feels aggrieved by a decision after an internal review processes, may seek an external review under each jurisdiction's current

process such as an administrative tribunal or court. Administrative law regimes usually impose a condition on the licensee that they must have sought an internal review within the statutory timeframes. As noted above it has been suggested that a licensee should be able to elect to have the matter heard before the court or tribunal in the first instance, however the value of an election of this nature has not been determined.

The National Law provides that regulations can be made on how an internal review is to be sought, or otherwise conducted and decided. Such arrangements will provide guidance to Courts and Tribunals and will ultimately assist moving towards a nationally consistent approach.

PART 6-MINISTERIAL COUNCIL

Clause 73 provides that there will be a Ministerial Council responsible for the effective implementation and operation of the national licensing system. Clause 5 of the IGA details the broad governance arrangements for the Ministerial Council. These provisions have not been included as it is not appropriate that the duties of a Ministerial Council be specified under specific legislation. COAG has assigned responsibility for the implementation of the national licensing system to the Ministerial Council for Federal Financial Relations.

Clause 74 Clause 74 makes it clear that while the Ministerial Council may give directions to the Licensing Authority in relation to the policies to be applied, that no Minister or the Ministerial Council can intervene in any decision relating to licence eligibility (for a person or a particular application) or licensee disciplinary proceedings. This will ensure that there is a clear separation of policy and operational functions between the Ministerial Council, Ministers and the Licensing Authority.

PART 7 – NATIONAL OCCUPATIONAL LICENSING AUTHORITY

The IGA provided for a national licensing body to be established as a statutory authority governed by a board of directors with operational functions being undertaken by a Chief Executive Officer. The functions listed in the IGA require the national licensing body to develop policy for the consideration of the Ministerial Council in accordance with the

objectives and principles outlined at clause 4 of the IGA. It should be noted that the physical location of the national licensing body has not yet been determined.

This Part provides for the establishment and governance arrangements for the National Occupational Licensing Authority (referred to as the national licensing body in the IGA), the National Occupational Licensing Board (referred to as the national licensing board in the IGA), the chief executive officer of the Licensing Authority, authorised officers, staff (including consultants and contractors) and Occupational Licensing Advisory Committees (OLAC).

Division 1 – Establishment, functions and powers

Clause 75 of the National Law establishes the National Occupational Licensing Authority (the Licensing Authority) as a statutory authority. It is a body corporate with perpetual succession and may sue and be sued in its corporate name. Although the provision states that the Licensing Authority represents the 'State', the ACT and NT will include a provision in their application legislation that provides that a reference to a State includes their respective Territory.

Clause 76 – 77 deals with the general powers of the Licensing Authority and provides extensive functions for the Licensing Authority which were detailed in the Decision Regulation Impact Statement. It is important to note that the Licensing Authority does not have the power to automatically approve policy. This is because the National Law specifies the matters that must be made by regulation which the Ministerial Council must agree to and make.

Clause 78 of the National Law provides that the Licensing Authority has a legislative obligation to ensure the stakeholders from licensed occupations and the wider community are consulted when it reviews or develops policy or legislation. The term 'stakeholders' should not be read as limiting consultation to only include industry participants, but includes all stakeholders, for example regulators. Under clause 123 the Licensing Authority must, in their annual report, detail the consultation processes that were undertaken.

Clause 79 gives effect to the 'delegated agency' model specified in the IGA. The clause provides that the Licensing Authority may delegate any of its functions, other than developing licensing policy or the power of delegation, to a chief executive officer of an entity or department of government nominated by the member of the Ministerial Council that represents that jurisdiction. The chief executive officer may sub-delegate any of those functions. A delegation is the authority to ensure that work can be appropriately undertaken. Without it the National Law would be constrained and ineffective in many areas, including the crucial ability to issue licences. There has been some concern expressed about delegations where some jurisdictions want the power of delegation to be approved by the Ministerial Council. This would naturally encompass approving, varying and withdrawing delegations. It is considered that any such arrangement involving specific Ministerial Council approval would cause significant administrative burden upon the Licensing Authority, jurisdictions and the Ministerial Council (who should not be involved in such a detailed level of decision making).

Clause 77(2)(d) specifically requires that <u>if agreed</u> with a participating jurisdiction the Licensing Authority is to delegate specified functions. Clause 134 (2)(m) provides that regulations can be made in relation to any matter that is necessary or convenient to be stated in the regulations for the carrying out or giving effect to the National Law. Accordingly, the Ministerial Council (who makes all regulations), could provide in the regulations the actual process for the giving and withdrawal of delegations by the Authority (for instance any withdrawal of a delegation must have specified time criteria applying so that a delegation can't be removed or varied on an ad hoc basis). Importantly, it must be remembered that each jurisdiction's covering legislation that picks up the National Law will also specify the responsible regulatory authorities as part of the delegation process. As all delegations will be made by the Licensing Authority to a chief executive officer of one of those regulatory authorities indicated in each jurisdictions covering legislation, the actual arrangements for the sub-delegation will be the responsibility of that chief executive officer – in other words it will be appropriately settled by individual states and territories.

Division 2 Governing Board of Licensing Authority

Subdivision 1 Establishment of functions

Clauses 80 - 81 provides for the Licensing Authority to be governed by a board to be known as the National Occupational Licensing Board (the Licensing Board). The composition of the Licensing Board reflects COAG's agreement as detailed in clause 5.6 of the IGA. All Board members are to be appointed by the Ministerial Council. The function of the Licensing Board is to ensure that the Licensing Authority performs its functions in a proper, effective and efficient way.

Clause 81 provides the overarching functions of the Licensing Board and does not seek to limit the functions of the Board.

Subdivision 2 Members

Clauses 82 - 88 provide for administrative matters associated with the Licensing Board and include: terms of office; remuneration; vacancies; advertising of vacancies; acting in the public interest and disclosure of conflicts of interests. Clause 87, clause 88 and clause 81 taken together require members ensure that the functions of the Board are performed in a proper, effective and efficient way and provide a very high threshold on behaviour and importantly, decision making.

Subdivision 3 Meetings

Clauses 89 – 95 deal with the general procedures for Licensing Board meetings including: quorum, chief executive officer attendance; presiding member; and voting arrangements. A clause is also included that provides that decisions of the Licensing Board are not invalidated because of an irregularity or defect in the appointment of any member of the Board. The Licensing Board will establish its own procedures for any matters that are not specifically provided for in the National Law.

Division 3 Chief executive officer

Clauses 96 - 97 provide that there will be a chief executive officer of the Licensing Authority who will be responsible for the day to day operations of the Authority.

Division 4 Staff, consultants and contractors

Clauses 98 – 99 provide that the Licensing Authority may also employ staff for the purposes of exercising it functions. It has not been settled at this stage what employment arrangements will be applied for staff of the Licensing Authority. Staff may be employees of government agencies or the Commonwealth or may, as public servants, be seconded to the Licensing Authority. The actual arrangements/terms for secondments is an administrative matter between the government agency and Licensing Authority and any arrangements in relation to whether those employees would retain their existing government benefits will be a matter for each jurisdiction's covering legislation applying the National Law.

Division 5 Authorised officers

Clauses 100 – 108 specify the powers and functions (some of which are outlined in clauses 42-66) of authorised officers. These provisions will be required for the Licensing Authority's staff and chief executive officer. Standard provisions have been included in relation to how authorised officers will be appointed, limitations and conditions on powers and the production of an identity card when exercising those powers. Authorised officers will be deemed to cease to hold office in specified circumstances or they may resign. In both instances a positive obligation is placed on the authorised officer to return their identity card and failure to do so will be an offence.

Clause 104(3) also provides that the issuing of an authorised officer's identity card may also specify other Laws or Acts that the authorised officer may perform as an authorised officer. This will ensure that an authorised officer under the National Law can have just one identity card if that is the process that a jurisdiction wants to implement.

Division 6 Occupational Licence Advisory Committees (OLAC)

Clause 109 provides for OLACs to be established under the National Law. The Licensing Authority must establish an OLAC for each broad occupational area specified in the regulations.

The IGA specifies Interim Advisory Committees (IACs) will operate from now until the OLACs are established under this legislation. The membership of IACs for the first tranche of occupational areas to be included in the national licensing system has recently been agreed by the Ministerial Council and can be accessed through the

National Licensing website at:
https://www.govdex.gov.au/confluence/display/COAGNL/Home

Clause 110 provides for the general functions of the OLACs, which is the provision of advice to the National Authority on the development, maintenance and performance of policy in relation to specific occupational areas for which they have been established.

Clause 111 provides that the membership of OLACs will consist of a range of expertise relevant to the licensed occupation in the following areas:

- regulation of the licensed occupation;
- occupational operations and practices, including from a union and employer perspective;
- workplace health and safety;
- consumer advocacy;
- training; and
- insurance (where appropriate).

Nominations for membership of the OLACs will be required from peak bodies including:

- trade unions and employer bodies;
- occupational professional associations;
- consumer advocacy organisations;
- bodies that regulate the licensed occupation;
- if relevant, peak insurance bodies; and
- bodies involved in the national training system.

PART 8—INFORMATION AND PRIVACY

Division 1 – Privacy & Division 2 - Disclosure of information and confidentiality

.**Clauses 112 – 116** provide for a number of clauses that deal with privacy, confidentiality and exchange of information between regulatory authorities. Both the Commonwealth *Privacy Act 1988* and the *Freedom of Information Act 1982* have been applied to the National Law at this stage. The application of both Acts to the National Law can be modified through the regulations to ensure that the privacy protections work

efficiently and effectively for the National Licensing System. This approach will give licensees and consumers a consistent level of national protection in relation to information collected by the Licensing Authority.

The Licensing Authority will have specific national obligations in relation to information that it will hold. Take for instance the National Licensing Register. Although States and Territories will be responsible for inputting information into the register, it is the Licensing Authority which is ultimately responsible for the security of the information contained within the register.

Application of the Commonwealth Acts means that a reference to the Commonwealth Office of the Privacy Commissioner is taken to be a reference to the National Occupational Licensing Privacy Commissioner. As an example, the WA Privacy Commissioner for the purposes of privacy issues in WA related to national licensing would be known as the National Occupational Licensing Privacy Commissioner.

Provisions not to disclose protected information have been provided to place a positive obligation on a person exercising functions under the National Law. "Protected information" means information that comes to a person's knowledge in the course of, or because of the person exercising functions under the National Law.
Clause 115 provides for a number of circumstances where the release of information is approved, namely where:

a. the information is disclosed in the exercise of a function under, or for the purposes of this Law; or
b. the disclosure is authorised or required by any law of a participating jurisdiction; or
c. the disclosure is otherwise required or permitted by law; or
d. the disclosure is with the agreement of the person to whom the information relates; or
e. the disclosure is in a form that does not identify the identity of a person; or
f. the information relates to proceedings before a court or tribunal and the proceedings are or were open to the public; or
g. the information is, or has been, accessible to the public, including because it is on or was recorded in a National Register; or

h. the disclosure is to an entity prescribed in a regulation or otherwise authorised by a regulation.

Clause 116 also provides for the disclosure of information to jurisdictional regulators and Commonwealth, State and Territory entities. This provision does not authorise a jurisdictional regulator to disclose information to the Licensing Authority for matters that are not in relation to licensing – for example conduct breaches or investigations. It will be necessary for States and Territories to have consequential amendments made under their legislative regimes as part of the process for applying their legislation to the National Law so that regulators are able to disclose this type of information to the Licensing Authority.

Division 3 - Registers and other records

Clause 117 gives effect to the COAG decision that a national register of licensees be established for the National Licensing System. The National Law provides that regulations may be made that will set the parameters for what information can be held on the register that will be kept by the Licensing Authority. The National Law will clearly distinguish the information to be held and available to regulatory authorities and that information which will form the public component of the register. While the policy governing what information would be disclosed on the public register has not been developed at this stage, this provision enables the National Law to specify the information that is to be included in the public register as part of the regulations.

PART 9—MISCELLANEOUS

Part 9 of the draft Bill deals with many of the administrative arrangements for the Licensing Authority and contains aspects of legislation that are normally located in other jurisdictional Acts. The reason for the inclusion of these administrative arrangements in the National Law is to give effect to a consistent national licensing scheme.

Division 1 - Finance

Clause 118 provides for the establishment of an authority Fund for the Licensing Authority. Importantly, this clause ensures that any money that accrues to the Licensing Authority does not form part of the consolidated revenue for States, Territories or the Commonwealth.

Clause 119 provides for circumstances where money may be paid into the fund. Clause 119(d) specifically provides that all money directed or authorised to be paid into the Fund by or under this Law, or any law of a State, Territory or the Commonwealth. This clause needs to be considered in light of the arrangements to be established. The key words here are directed or authorised. Where the National Law may provide that an applicant must submit an application to the Licensing Authority with the prescribed fee, it must not be taken that this money will automatically come into the Fund.

It is intended that jurisdictions will set and collect fees initially, but the National Law has been structured to support the payment of national fees, if the national licensing system moves in this direction. Regulations for fees as part of the regulation making power, (provided under clause 134), will determine what happens to those fees. This clause ensures that if circumstances change and new occupational areas that are admitted into the system or if an occupational area gives full powers of regulation over to the Licensing Authority, that the National Law will not have to be amended. As the Ministerial Council must make the regulation, and accordingly any fee arrangements, it is guaranteed that States, Territories and the Commonwealth will be able to give effect to the financing arrangements, including who collects and retains fee revenue, which may vary over time.

Clause 121 provides that the Licensing Authority may make investments, however any such investment strategy adopted must be low risk to minimise the Fund's exposure to loss. Clause 122 also specifies the financial management duties of the Licensing Authority and provides the necessary mechanisms for audit arrangements.

Division 2 – Reporting and planning arrangements

Clause 123 incorporates the requirements for an annual report. As consultation is recognised as one of the fundamental aspects for the success of the national licensing system, clause 123(2)(a)(ii) specifically requires the Licensing Authority to provide details about the consultation processes that were undertaken in reviewing and developing policy and legislation in each annual report. Annual reports will be tabled in each house of Parliament and will be placed on the Licensing Authority's website once tabling has occurred.

Clause 124 requires the Licensing Authority to prepare strategic and operational plans. Strategic plans are to be developed for each three year period and operational plans will be required on an annual basis. The strategic and operational plans must be approved by the Ministerial Council.

Division 3 – Provisions relating to persons exercising functions under Law

Clause 125 specifies standard provisions relating to the performance of functions under the National Law and incorporates many of the duties and obligations for public servants that are normally contained under jurisdictional Public Sector Management legislation. For instance, there is a requirement to act with a reasonable degree of care, diligence and skill and, importantly, not make improper use of the person's position.

Clause 126 provides that the *Commonwealth Ombudsman Act 1976* is taken to apply as a law of a State or Territory for purposes of the national licensing system at this stage. The Commonwealth Ombudsman will be taken as a reference to the National Occupational Licensing Ombudsman for the national system. The Commonwealth Act would be subsumed into the regulations with any necessary modifications to ensure that it meets the needs of the National System.

Clause 127 provides protection from personal liability for persons exercising functions under the National Law when done in good faith. Clause 127(3) provides for the persons that will be protected. An authorised officer has been inserted at clause 127(3)(d) instead of a jurisdictional regulator. This is to ensure that those jurisdictions that delegate functions such as investigations to specialised agencies that are not typically government have appropriate protection under the National Law.

Division 4 – Legal Proceedings

Clauses 128 – 129 provide for the limitation for starting proceedings, three years for an offence committed, under a court of law and the acknowledgement of evidentiary certificates of a court. Some jurisdictions provide that an offence can not be prosecuted after a certain amount of time from the offence being committed. Unlike other jurisdictions that provide that the time period applies from the discovery of the offence.

Division 5 – Miscellaneous

The provisions contained in this Division are administrative matters that are not dealt with elsewhere under the National Law.

Clause 130 has been inserted to allow the Licensing Authority to approve the forms that may be used for the purposes of licensing. This will ensure that forms such as application forms for a licence not only look the same, but requires them to provide consistent information regardless of the jurisdiction. This has the added benefit of ensuring transparency as an applicant will know that the information they are required to submit and the application process is identical in every jurisdiction that is part of the national system.

Clause 131 The policy intent behind this provision ensures that COAG's decisions in the IGA can be used to clarify matters relating to this National System, if required.

Clause 132 ensures that when the Licensing Authority is required under the National Law to serve a document on a person that there is a nationally consistent approach. To remove all doubt, serving a document applies to any expression to 'deliver', 'give', 'notify', 'send' or words of similar usage. The serving of documents is normally associated with documents involved in such processes as disciplinary matters and decisions where reviews of the decision can be made.

Clause 133 requires the National Law and the operation of the national licensing system to have regular independent public reviews. This is to ensure the system and the National Law continue to comply with the objectives of the National Law, the principles outlined in clause 4.2 of the IGA (set out in the introduction) and COAG's *Principles of Best Practice Regulation*.

To ensure public transparency of any such review there is a requirement that the outcomes of reviews are to be tabled in each house of Parliament within three months of the end of the review.

Division 6 – National Regulations

One of the consequences for the National Law with the different range of occupational areas to be included initially and in the future in the national licensing system is that many of the requirements for each occupational area will be specified in occupational area specific regulations.

Clause 134 provides that although many of the requirements for the matters to be dealt with by regulations are contained in various clauses in the National Law, there are a number of general items that have not been included but will be subject to regulations. This general regulation making power is standard practice to deal with any matters which over time may require specification, but are not necessarily predictable. A lack of such a power would result in the frequent amendment of the National Law. The regulation making power should not be read as limiting any requirements for the Ministerial Council to be able to make regulations.

Clause 134(1) gives the Ministerial Council the power to make regulations under the National Law and clause 134(2) lists matters for which regulations can be made.

Clause 134(2)(a) is the mechanism that will apply the National Law to an occupational area.

Clause 134(2)(b) provides for the regulation making powers for applications, eligibility for licences and the granting and renewal of licences.

Clause 134(2)(c) and (d) provide for the regulation making powers in relation to fees and the publication of fees.

Clause 134(2)(e) provides for the regulation making powers in relation to compliance and enforcement. This provision will ensure that all necessary matters can be catered for if conduct matters come into the National System. It includes such matters as monitoring and auditing, complaints and demerit and infringement notice schemes.

Clause 134(2)(f) & (g) have been inserted to ensure that regulations can be made to capture the responsibilities of persons who are directors of corporate entities or employers.

Many of the items listed will only become relevant for specific occupational areas and will not apply to all occupations. For instance, clause 134(2)(h) provides for regulations that can be made for persons who are receivers, managers or administrators to wind up or otherwise administer or operate businesses conducted by licenses. While this provision is unlikely to be used for public passenger vehicle drivers, it is required for occupations such as real estate and building.

Clause 134(2)(i) provides that there will be a maximum monetary penalty that can be imposed under the regulations. The maximum monetary penalty to apply is still to be determined.

Clause 134(2)(j) of the regulation making powers has been inserted to ensure that the Licensing Authority operates in a transparent way. This regulation making power enables the Ministerial Council to make regulations in relation to the criteria and procedures that the Licensing Authority must undertake when developing policy or when considering the admission of new occupational areas into the system.

Clause 134(2)(k) provides the regulation making power to enable the Licensing Authority to name and shame licensees who have had disciplinary action taken or been convicted for offences under the National Law.

Clause 134(2)(l) is an important regulation making power that will provide for the transition to the National System. This power is especially relevant to current licensees who as part of the transitional will be deemed across to the new system. Clause 6.9(p) of the IGA requires that the legislation provides for the arrangements for current licensees. So a person who currently holds a licence that comes into the National System will be <u>automatically</u> taken to hold the most equivalent licence under the new system.

One question that may be asked is why the transitional clauses do not go into detail about which licences will actually come into the system. As discussed in the introduction area of this Explanatory Paper, the National System currently has a number of occupations that have been identified as coming into the system due to their national importance to the economy. Two of those initial occupations are being assessed under other national reform projects, for instance maritime and land transport, and these areas may be transferred to a more appropriate initiative. However there is also the issue regarding what occupations may come into the National System in the future. This is why the occupational areas that this National Law will apply to are to be specified in the regulations.

As the admission of occupations into the National Licensing System is also to come in two stages, for instance plumbing in the first stage and building in the second stage, much of the work on the actual licence types and categories has not been developed. The Interim Advisory Committees, who will undertake the work of the Occupational Licensing Advisory Committees before the legislation becomes law, have only just been formed. It is these committees and their expertise that are fundamental to establishing the licence types and categories. Therefore it would be premature and detrimental to current licensees detailed transitional arrangements to be included in the National Law before those committees have been able to make the appropriate policy decision on licence types and categories. This is another fundamental reason that the National Law does not specify the exact licences.

The saving and transitional arrangements will also cater for existing matters under each jurisdiction's legislation to enable those matters to be taken as having occurred under the National Law – for example matters may include:

- an application lodged for a licence that was not issued prior to the commencement of the legislation:
- disciplinary action that was underway that was not finalised before the commencement of the legislation;
- any suspension, cancellation or disqualification to hold a licence;
- any prosecutorial action initiated prior to the commencement of the legislation that would affect the licensees ability to hold a licence;
- any review or appeal process regarding a licensees suitability to hold a licence that were initiated prior to the legislation commencing; and

- time periods that are used to calculate the eligibility to hold a specific licence.

Clause 134(2)(m) also provides an overarching regulation making power that allows the Ministerial Council to make any regulation that is necessary or convenient for the carrying out of, or to give effect to the National Law.

Clauses 134(3) – (5) provide for the mechanism of how the regulations will be made and how they will be published. For this National Law once regulations have been agreed by the Ministerial Council they are published by the Victorian Government Printer under their normal regulation making processes.

Clause 135 provides for the inclusion of new occupations into the National Law. This clause allows for a jurisdiction to make a nomination to the Ministerial Council that an occupation should be included. If all jurisdictions agree to include the occupation, a regulation will be made giving effect to that decision. However, it may not always be appropriate for each jurisdiction to license an occupation at a specified point in time. Accordingly, clause 135(4) provides that a majority of the Ministerial Council may agree and make a regulation. That regulation would specify in what jurisdictions the occupation would be licensed under the national system. However, if a regulation is made that only includes a number of jurisdictions that regulation must be reviewed annually by the Ministerial Council.

Clause 136 - Parliamentary scrutiny of the regulations made under the National Law is preserved as this clause provides that a regulation may be disallowed in a participating jurisdiction by a House of Parliament. However, a regulation that is disallowed does not cease to have effect in that jurisdiction, or any other jurisdiction unless the regulation is disallowed in a majority of the jurisdictions. The disallowance of a National Law regulation in a majority of jurisdictions has the same effect as a repeal of the regulation. The exact procedure to be adopted by the Ministerial Council for making regulations will depend on the Ministerial Council itself. Some Councils make regulations by having all Ministers sign the regulation, while other Councils provide that only two Ministers are required to sign the regulation. These provisions are standard provisions for National Law schemes and were most recently used for the Health Practitioners Regulation National Law.

SCHEDULE 1—MISCELLANEOUS PROVISIONS RELATING TO INTERPRETATION

Given the nature of the national licensing system, consistency of interpretation across jurisdictions is paramount. Consequently, interpretation provisions of a kind usually contained in the Interpretation Act of a State or Territory will not apply to the National Law.

Rather, Schedule 1 to the Schedule provides for the matters dealing with interpretation and application of the Law for all jurisdictions participating in the national system. This is a standard Schedule that is used by PCC in all national schemes, most recently the Health Practitioners Regulation National Law.