Final Report

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The Regulation of Commercial Activities in Victoria's National Parks and Melbourne's Waterways

A National Competition Policy Review

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Preface

This report has been prepared on behalf of the Department of Natural Resources and Environment but does not necessarily represent the views of the Department or the Victorian Government.

The Allen Consulting Group Review Team wishes to thank all those parties who took the time to participate in interviews and prepare written submissions.

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Abbreviations

CoAG	Council of Australian Governments
CPA	*Competition Principles Agreement*
DNRE	Department of Natural Resources and Environment
IGAE	Intergovernmental Agreement on the Environment
LCC	Land Conservation Council
MCAV	Mountain Cattlemen's Association of Victoria
NCC	National Competition Council
NCP	National Competition Policy
ORR	Office of Regulatory Reform
PIN	Penalty Infringement Notice
s.	section
sub-cl.	sub-clause
sub-s.	sub-section
VNPA	Victorian National Parks Association

Chapter One

Executive Summary

As part of Victoria's commitments under National Competition Policy (NCP), The Allen Consulting Group was engaged by the Victorian Department of Natural Resources & Environment (DNRE) to undertake a review of legislation that regulates commercial activities in parks managed under the *National Parks Act 1975*, sections of Part 4 of the *Water Industry Act 1994* relating to waterways licences and the metropolitan rate (parks charge),[1] and related subordinate legislation.

This review follows the principle laid down in sub-cl.5(1) of the inter-governmental *Competition Principles Agreement* (*CPA*), which states that legislation or regulation should not restrict competition unless it can be demonstrated that:

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

1.1 National Competition Policy's Broad Focus

NCP seeks to ensure that legislation is effective (ie, achieves its legitimate objectives) and is efficient (ie, achieves the objectives in the most cost–effective and least restrictive manner). To this end, NCP is not simply about ensuring that there is a 'level playing field' between parties, but also that the regulatory system as a whole is appropriate and not an undue burden on particular groups or the community as a whole.

In effect, one of the implicit goals of the legislation review process is to create 'better' regulation.[2] This may mean:

- greater regulation if pro-competitive frameworks need to be established, market imperfections corrected or the public interest maintained; or
- less regulation where market forces provide appropriate outcomes.

Thus, the focus of NCP is on the appropriateness of regulatory regimes rather then the traditional black and white issues of 'more' or 'less' regulation.[3]

1.2 The Rationale for Government Regulation

Under the *CPA*, if regulation that restricts competition is to be retained, it must be demonstrated that the objectives of the legislation can only be achieved by restricting competition.

To undertake this assessment it is necessary to clearly articulate what the rationale for government intervention (ie, the legislative objective) is and should be.

The Council of Australian Governments (CoAG) has publicly stated that government intervention in markets should generally be restricted to situations of market failure and that each regulatory regime should be targeted on the relevant market failure or failures.[4]

The following sections address the objectives underlying the regulation of:

[1] Most provisions of Part 4 relate to Melbourne Parks and Waterways. The *Water Industry (Amendment) Act 2001* repealed these provisions on 1 December 2001. These provisions have not been reviewed. Other Parts of the *Water Industry Act* (ie, except Part 4 and Part 4A) are subject to a separate review of Victoria's water legislation.

[2] See sub-cl.5(9) *Competition Principles Agreement.*

[3] See Cope, "National Competition Policy: Rationale, Scope and Progress, and Some Implications for the ACT and the Role of Government" at the *ACT Department of Urban Services' Summer Seminar Series*, Canberra, 20 March 1998, p.17.

[4] Council of Australian Governments, *Report of Task Force on Other Issues in the Reform of Government Trading Enterprises*, released as part of the first CoAG communique, 1991, p.22.

- commercial activities in parks managed under the *National Parks Act*; and
- Melbourne's waterways and the imposition of the metropolitan rate (parks charge) by Part 4 of the *Water Industry Act*.

1.2.1 The National Parks Act

While the broad objectives of the *National Parks Act* tend to be discussed in terms of environmental protection (see the preamble and s.4), the *Act* nevertheless clearly addresses potential market failures such as those arising from:

- public goods — land and its associated natural resources may provide environmental, commercial, cultural, historical, educational, social, and recreational benefits to both current and future generations. The values that society places on such characteristics are many and varied, are often difficult to quantify, and are not able to be (or are poorly) reflected in the market system. Hence, without specific regulation, they are not adequately incorporated in land management decisions;
- negative and positive social and environmental externalities — an externality arises when production or consumption by one party imposes uncompensated costs or benefits onto third parties. Where there are benefits for third parties these positive outcomes will tend to be under-produced unless there is government involvement, and conversely, where there are costs for third parties these will tend to be over-produced unless there is government involvement. Thus, there may be a role for government to attempt to:
  - overcome the problems caused by negative externalities — some commercial activities may create negative externalities that the government may consider important enough to regulate to reduce in particular areas; and
  - attempt to facilitate and promote positive externalities — for example, the government may seek to foster the preservation of particular land where there are benefits (eg, environmentally, culturally, and so on) to third parties.
  - information asymmetries — information asymmetries may exist in that the public may not be aware of the true environmental value of land and hence there may be a rationale for the government regulation.

The Review Team suggests that there may be some benefit associated with simplifying the objectives of the *Act* as specified in s.4. However, in light of stakeholder comments, the Review Team agrees that there are ongoing benefits in clearly specifying those features that justify particular regulation for specific park types.

1.2.2 The Water Industry Act

Waterways Regulation

A number of potential market failures identified in section 1.2.1 may exist on Melbourne's waterways:

- *externalities* — externalities may arise in an environmental context and a sector-specific context. For example, there may be externalities if the construction of jetties or the operation of charter vessels create environmental consequences (eg, changed water flow patterns, riverbank erosion, etc);
- *natural monopolies* — natural monopolies may exist in a number of isolated routes, but in general are unlikely because charter services may be operated on very small scales. Concern for natural monopolies is most likely to arise with the construction and operation of jetties in narrow waterways; and

- *information asymmetries* — information asymmetries may arise in a number of circumstances:
  - with respect to environmental matters — operators and consumers may be unaware of the impact that their actions have on the preservation of the waterways; and
  - with respect to consumer protection matters — information asymmetries may exist when the passenger has little knowledge about the quality and availability of services, and is unlikely to be a repeat customer or otherwise unable to acquire knowledge about the services.

There is most likely to be a case for regulation of vessel charter, jetty and mooring licences on the grounds that there *may* be negative externalities and information asymmetries.

The Metropolitan Rate

The objective of the metropolitan rate is relatively straight-forward — to raise revenue to fund the establishment and management of certain parks, open space and waterways in the greater metropolitan area.[5]

1.3 Key Review Issues

This section discusses a range of issues that arose during the course of the review and outlines in broad terms the Review Team's findings (specific recommendations are listed in section 1.4).

1.3.1 General Restrictions Placed on Commercial Activities in Victoria's Parks

The *National Parks Act* provides a range of mechanisms which restrict the types of commercial activities that can be undertaken in the particular park types. There is a spectrum of restrictions on commercial activities that range from:

- lesser restrictions in certain categories of parks; through to
- much stronger restrictions for other categories (generally areas with significantly higher values).

Consistent with the objects in s.4 of the *National Parks Act*, this approach is justified on the basis that some commercial activities, were they to take place in a park or class of parks, would threaten the parks' environmental status.

The Review Team considers that the current arrangements are overly prescriptive in that they focus solely on inputs (ie, what can be done in a park), rather than outputs (ie, what impact will a proposed activity have upon a park and the public's enjoyment of the park).

Thus, while supporting the current restrictions as an appropriate default position, the Review Team suggests that consideration should be given to the introduction of a more flexible mechanism to facilitate activities that, while prohibited in the first instance, can be demonstrated to be able to be undertaken in a manner consistent with the regulatory objectives associated with the relevant park type. While certain options have been flagged in this report, further community debate is necessary before firm recommendations can be made.

1.3.2 The Granting of Licences, Permits, Leases, Tenancies and Occupations

Division 3 (ss.19-27A) and Division 4 (ss.28-32N) of the *National Parks Act* include a variety of general and specific provisions applying to land and

[5] The 'metropolitan area' is defined by the Governor in Council and extends to the Mornington Peninsula, Packenham and Upper Yarra areas, and includes Port Philip and Western Port Bays.

activities and uses on the land. These provisions establish a range of 'consents' including licences, permits, leases, tenancies and occupations.

The use of consents allows the government to regulate to ensure that:

- commercial operations do not impinge on the visiting public and their enjoyment of the park and do not restrict or displace the public from particular sites because of the intensity or nature of use;
- operations are compatible with the primary objective of the park;
- the potentially greater impacts on the environment that may arise from more frequent site visitation, larger group numbers and additional infrastructure are managed;
- services and facilities provided for visitors are appropriate; and
- operations are undertaken in a safe and responsible manner and operators have the necessary public liability insurance.

The Need for Consents

While there is agreement that there is a role for government to use consents to restrict certain commercial activities in some parks, there may be no need for formal licensing on environmental grounds *for certain activities in certain parks*.

The Review Team suggests that where commercial operators operate on established tracks, roads, etc, and the activity does not threaten to exceed the capacity of the park[6] (ie, the park's preservation is not endangered) then serious consideration should be given to doing away with a requirement that the operator obtain a consent.[7]

This liberalised approach should be complemented by a legislated requirement of notification and reporting for commercial tour operators. For example, tour operators could be required to provide details on a six monthly or yearly basis as to the number of people taken to each park. This information disclosure requirement would not be particularly onerous given similar current arrangements already exist in consent conditions.

The Process for Granting Consents

A clear preference of NCP is for competitive allocation processes (eg, an auction, a tender, or a ballot at an estimated market price). The advantage of competitive processes are that they provide an equal opportunity for all parties, and provide efficient outcomes.

The general preference for competitive allocation methods needs qualification because there are a range of circumstances where it may not be practicable to use a competitive allocation process and consents should not be allocated through market based mechanisms. For example:

- it may be appropriate to deviate from a competitive allocation process where particular parties are clearly best placed to undertake a commercial operation from a park management and sustainability perspective; and
- in some cases the costs for both the bureaucracy and potential consent holders may be excessive, for example, when there is unlikely to be more than one or two potential applicants for a particular consent. In such circumstances the cost associated with a formal tendering process (eg, tender preparation, tender compliance, etc) are likely to be very high in comparison to the benefits (ie, achieving the maximum price, transparency of the process, etc), and hence alternative arrangements could be considered.

While these are significant qualifications to the general proposition, the default means of consent allocation should be via a competitive process such as an auction, tender or ballot. The Review Team suggests that the

[6] Parks Victoria and DNRE have identified locations in particular parks where capacity is likely to become an issue in the future.

[7] Consents would still be required for activities such as grazing, apiaries, leases and so on.

allocation processes stipulated in the Parks Victoria *Lease & Licence Process Manual* is consistent with this view.[8]

There are, however, some allocation methods currently employed in the *Act* that have the potential to be implemented in a less than openly competitive manner. For example:

- in some cases (eg, apiary licences), consents are provided on a 'first come, first served' basis (ie, consents are issued in response to an approach by an individual party). This may be a problem under NCP when an initial party obtains a consent, but subsequent parties (who may not have known of the consent's availability) are denied an equivalent consent, or are subject to more stringent scrutiny because they are the subsequent applicants. The Review Team suggests that an allocation of consents based upon the principle of 'first come first served' should not be relied upon to allocate consents except where there is clear excess capacity of an equivalent standard; and
- the *National Parks Act* generally restricts the availability of licences and explicitly determines who are the most suitable people to have a grazing licence in the Alpine National Park on the basis of specific family ties.[9] The NCP concern is that this arrangement restricts the ability to competitively allocate licences and gives ongoing rights not only to the current licence holder, but also to his or her family. This excludes the potential for new entrants, who are not family members or who are not classified as an 'approved person', to particular areas of the Park. If alpine grazing is to continue,[10] the Review Team's preference is for a combination of a skills test and a market-based allocative mechanism. Parties should be able to bid for a grazing licence once they have pre-qualified by demonstrating their ability to manage the grazing of cattle.

1.3.3 Consent Periods

The *National Parks Act* sets out a range of consent durations depending upon the activity involved and the class of park to which the consent relates.

In establishing consent terms there is a need to balance the consent holder's desire for certainty (ie, so that they can undertake the investment required and recover those costs) with the public's interest in providing shorter consent terms to provide flexibility for park managers and to provide for more frequent competition for consents. Furthermore, there may be a NCP concern if competitors are provided differing consent terms.

The Review Team considers that there is scope for the rationalisation of the existing consent terms.

The Review Team considers that the approach adopted for parks should be consistent with that recommended in the NCP review of Victoria's Crown land management legislation.[11] The preferred Crown land approach was, rather than a plethora of maximum consent terms, to introduce a single maximum term for each consent type.

This approach should similarly be the aim of reform with respect to national park consents, although the Review Team notes that the disparity between some terms for particular types of consents are often significant[12] and there

[8] See Parks Victoria, *Lease & Licence Process Manual*, extracted from Parks Victoria Infoweb, 5 April 2001, Melbourne.

[9] s.32AD *National Parks Act*.

[10] A major feature of the stakeholder consultations — as reflected in the subsequent submissions — relates to the threshold issue of the appropriateness of grazing in the alpine parks. Some parties, such as the VNPA (submission, p.2), were adamant that, "Activities such as cattle grazing which conflict with the primary objective of the Act should cease at the earliest opportunity." Other parties, such as the MCAV, argued that for cultural and historic reasons grazing rights should be maintained. The Review Team is not qualified to comment upon the environmental appropriateness or inappropriateness of grazing in alpine regions. It notes, however, that the Government's policy is to examine ways to remove all grazing from the Alpine National Park.

[11] See The Allen Consulting Group, *Crown Land Management Legislation in Victoria: A National Competition Policy Review*, Sydney, 2000.

[12] For example, a permit for the use of a building, camping place or facility is only six weeks, a permit for an apiary is six months, and a permit for a business in a park is three years.

may be a need to have more than one duration for a particular type of consent.

1.3.4 Fees for Consents

Fees for consents can be set by a range of mechanisms:

- a market valuation can be placed upon the consent;
- calculation — a formula can be developed to provide an administratively simple mechanism for approximating a fee equivalent to a market value (or at a percentage of the market value if that is desired); or
- a minimal fee — this is an arbitrary fee. It can be set as a stand-alone fee or it may be levied if either of the previous fee setting approaches are less than this minimum (this approach is used with respect to Crown land leases).

Fees for consents are generally set on the basis of a market valuation.

In some cases, however, a formula is used to price consents. For example:

- at present the fee for commercial tour operators is set at $1.10 per client per day. It is not clear whether this fee is set to approximate the market value of consents, but that it is a flat fee irrespective of use suggests that it is not; and
- grazing licence fees are set on a per head basis, and are not necessarily reflective of market values.

The NCP concern with respect to the charging for the use of parks is that the establishment of charges may be done in a way that distorts competition in various markets. For example, if differential bases are used for the calculation of equivalent consents then there may be different charges applied to like firms, and hence a clear competitive impact.

Thus, as a default position, fees should reflect market values, either as a result of a competitive allocation process or on the basis of a calculation/formula which approximates the market value when a competitive allocation process is not employed.

Despite this general position and these concerns, there are a number of reasons why governments may provide consents below market value:

- a discount on the land's market value may be used as an inducement to attracting necessary commercial development to a park;
- the ability to choose a value without undertaking an assessment of the market value provides administrative flexibility and may reduce the costs of administration; and
- a discount may be used as acknowledgment that there are costs associated with the proper management of the land (eg, to stop erosion, keep weeds down, etc).

Any such discounts should be made in a transparent manner and made public.

1.3.5 Councils and Committees

The *National Parks Act* establishes a number of councils and committees with varying advisory and regulatory powers. These include:

- the National Parks Advisory Council advises the Minister on the administration of the *Act* and on the granting of various leases and other matters;
- the Alpine Advisory Committee has particular functions including advising on the transfer of grazing licences in the Alpine National Park;
- the Barmah Forest Grazing Advisory Committee's role is to advise on grazing matters — eg, who may be granted a licence — in Barmah State Park; and
- park advisory committees advise the Secretary on the management of parks.

The Review Team considers that there is no strong reason why advisory bodies need to be incorporated within the *Act*. While there is a concern among some stakeholders that removing the legislative basis of the bodies will lessen the ability of the community to contribute to policy and administrative matters, it is clear to the Review Team that the strength of convictions held by all the principal stakeholders means that they will continue to represent their members' interests irrespective of whether or not the advisory bodies have legislative status.

The debate about the merits of the current advisory bodies tends to be polarised:

- those who have entrenched positions within the bodies favour the *status quo*; and
- those who perceive themselves to be on the outer suggest that change is required to broaden the membership, either by including them as an acknowledged stakeholder or moving to a skills focus (which naturally includes the skill which they or their members possess).

If advisory bodies are to remain constituted under the *National Parks Act* then the Review Team suggests that membership nominations should be widely invited and the selection criteria should be specified in terms of skills and experiences. This approach is consistent with approaches adopted in recent legislation[13] and should continue to provide knowledgeable community input into decision-making processes.

1.3.6 Funding of Victoria's Parks

Park funding is currently provided through two alternative means:

- the levying and collection of the metropolitan rate — ss.139-143 of the *Water Industry Act* relate to the metropolitan rate or what is known generally as the 'parks charge'. This is an annual charge levied on residential and commercial properties throughout Melbourne. It is used to fund the purchase and management of particular open space, parks and waterways across the greater metropolitan area (including the Mornington Peninsula and Pakenham areas); and
- park entry fees — The *National Parks (Fees and Charges) Regulations 2001* sets out a range of fees associated with entry to some land managed under the National Parks Act. The nature and scale of fees for vehicle entry are set out in Appendix B.

The Review Team has made no recommendations as to the possible reform of these funding approaches because the levying of fees/charges/taxes raise 'whole of government' issues that extend beyond the scope of this review. That said, the Review Team makes the following two observations that address possible reform directions consistent with NCP principles:

- firstly, there appears to be community acceptance (possible through apathy) of the Parks Levy as an appropriate revenue raising mechanism. As such, the Review Team would understand any reticence upon governments to do away with it. However, the Review Team notes that the current levy is inequitable in that:
  - businesses bear the levy even though they are only marginally beneficiaries of the maintenance of Melbourne's open spaces — consideration should be given to applying the levy solely to residential households; and
  - in effect (ie, for approximately 91 percent of properties) the Levy is a flat tax — as such, there may be administrative savings to be gained by doing away with property values as a base and formally moving to a per residential household levy.
- secondly, the levying of entry fees on particular parks is inequitable and raises concerns about administration costs. The Review Team suggests that further thought should be made to moving to a per year permit system for vehicular entry into Victoria's parks. Such permits could be:

[13] See s.7 of the *Catchment and Land Protection Act*.

- offered at the time of vehicle registration; and
- made available from post offices, corner shops, and so on.

Fines would be levied for vehicles in Parks (and adjacent associated public car parks) which do not display a valid permit.

1.3.7 The Regulation of Victoria's Waterways

Section 135A of the *Water Industry Act* establishes a framework for the issuance of metropolitan waterway through: licences for hire and charter vessels (13 have been issued); and jetty and mooring licences (30 have been issued for private jetties, and none with respect to commercial operations).[14]

There are two general frameworks in which the licensing of vessels and jetties have generally been considered:

- the first is that such licences are a form of business licensing and hence there are likely to be clear ramifications for NCP purposes; and
- the second is that the waterways are Crown land, and the Crown, through its management agency (Parks Victoria), should be able to directly control uses and structures occurring on its land (waterways) as any property owner does. Under this view there would be no NCP concern as all that Parks Victoria is doing is enforcing its property rights.

The Review Team considers that both approaches can be considered applicable to varying degrees.

The Review Team notes the Office of Regulation Reform's (ORR's) recent proposals to overhaul vessel licensing on the Yarra and associated berthing arrangements.[15] The Review Team considers that the approach suggested by the ORR acknowledges the Crown's right to regulate its own land, but seeks to do so in a least cost manner that maximises the public interest by improving safety and removing the potential for operators' disputes. As such, the Review Team support's the ORR's recommended approach.

1.4 Recommendations

This section lists all the recommendations made in the body of the report.

RECOMMENDATION ONE — the objective of the National Parks Act can be broadly summarised as preserving the parks' natural environment, and facilitating park usage by the public in a manner consistent with the preservation of the parks' indigenous flora and fauna, cultural or other features. The legislative objective is specified in some detail in s.4 and should be retained.

RECOMMENDATION TWO — Further consideration should be given to putting in place flexible arrangements that will facilitate commercial activities that, while prohibited in the first instance, can be demonstrated to be able to be undertaken in a manner consistent with the regulatory objectives associated with the relevant park type.

RECOMMENDATION THREE — Consents should remain the key measure to control and monitor commercial operations in parks. However, consents may be unnecessary when those activities do not threaten the natural values of the park. If required, when consents are considered unnecessary there should be an obligation for

[14] It should be noted that s.135A of the *Act* has been reviewed in accordance with the Terms of Reference for this review. These required the *Act*, incorporating amendments up to and including Act No.22/99, to be reviewed. However, s.135A was subsequently amended by the *Water Industry (Amendment) Act 2000*. The jetty licensing provisions remain in s.135A but the power to license vessels will be achieved through regulations that are currently being developed.

[15] See Office of Regulation Reform, *Yarra River Traffic: Managing Access — Final Report*, Department of State and Regional Development, Melbourne, 2001.

commercial operators to provide details on the commercial activity undertaken in the park.

RECOMMENDATION FOUR — An allocation based upon the principle of 'first come first served' should not be relied upon to allocate consents except where there is clear excess capacity of an equivalent standard.

RECOMMENDATION FIVE — If alpine grazing is to continue then section 32AD should be amended to specify that licences should be offered through a competitive process to those parties who can demonstrate the requisite skills. Where the number of applicants is limited a reserve price should be established that equates to the estimated market value of the licence.

RECOMMENDATION SIX — The National Parks Act should, if possible, be amended to provide standardised (or at least simplified) maximum terms for permits, licences, tenancies and leases.

RECOMMENDATION SEVEN — As a default position, fees should reflect market values, either as a result of a competitive allocation process or on the basis of a calculation/formula which approximates the market value when a competitive allocation process is not employed.

RECOMMENDATION EIGHT — Where there is any discount from a market-set fee the discount should reflect only:

- *the extra costs associated with any licence restrictions/requirements which would not be applied to licensees of comparable freehold/Crown land; and*
- *reduced productive capacity because of any special characteristics of the park.*

The discount should not reflect the particular circumstances of the licensee (eg, distance from the home property).

Any discount should be determined in a transparent manner and made public.

RECOMMENDATION NINE — Advisory bodies should be removed from the Act. This does not stop the Minister from consulting with the community through advisory bodies and other fora.

RECOMMENDATION TEN — If advisory bodies are still constituted under the Act then membership nominations should be widely invited and the selection criteria should be specified in terms of relevant skills and experiences.

RECOMMENDATION ELEVEN — Licensing of hire and charter vessels and jetties and moorings should be retained by Parks Victoria, but in a manner consistent to that recommended by the Office of Regulation Reform in its review of the Yarra River.

Chapter Two

National Competition Policy and Good Regulatory Design

This review is being conducted as part of Victoria's commitments under National Competition Policy (NCP). In order to provide some context, this chapter explains NCP's origins and some of the key principles underlying NCP.

2.1 Development of the 'Competition Test'

The inaugural Council of Australian Governments (CoAG) meeting commissioned the 'Hilmer Committee' to conduct an inquiry into the development of a more nationally focused approach to competition policy. The *Hilmer Report*[16] was presented to CoAG in August 1993.

The *Hilmer Report* described regulation by all levels of government as the greatest impediment to enhanced competition in many key sectors of the economy. It did, however, recognise that there may be a need for some government regulation when market failures occur. As a result, the *Hilmer Report* recommended:

- the reform of regulation that unjustifiably restricts competition; and
- that any restriction on competition that is to remain must be clearly demonstrated to be in the public interest.

At the April 1995 CoAG meeting, the Commonwealth, State and Territory Governments all agreed to implement a national reform agenda based on the *Hilmer Report*'s recommendations. As a result, all governments signed the inter-governmental *Competition Principles Agreement* (*CPA*), committing themselves to ensuring that new and existing legislation does not impose undue competitive restrictions:

> "The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:
>
> a) the benefits of the restriction to the community as a whole outweigh the costs; and
>
> b) the objectives of the legislation can only be achieved by restricting competition."
>
> *Competition Principles Agreement*, sub-cl.5(1).

The sub–cl.5(1) test — the competition test — is intended to establish whether particular restrictions on competition remain necessary, through an assessment of the costs and benefits of current and alternative means of achieving policy objectives.

As the competition test is built on the presumption that restrictions to competitive economic behaviour impose costs on the community, *the burden of proof is on those who wish to retain restrictions to establish the public interest case for the retention (or enactment) of legislation which restricts competition.*

2.2 The 'Public Interest Test'

NCP acknowledges that competition is not an end in itself. That is, while the introduction of competition will generally deliver benefits to the consumer, there are situations where community welfare will be better served by not affecting particular competition reforms. That is, competition is to be implemented to the extent that the benefits that will be realised from competition outweigh the costs.

[16] The Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, 1993.

The *CPA* provides for considerations other than strictly economic criteria in assessing public benefit. Sub-clause 1(3) of the *CPA* sets out the circumstances in which the weighing up process is called for, and also some of the factors which need to be taken into account in making the decision:

> "Without limiting the matters that may be taken into account, where this Agreement calls:
>
> (a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
>
> (b) for the merits or appropriateness of a particular policy or course of action to be determined; or
>
> (c) for an assessment of the most effective means of achieving a policy objective;
>
> the following matters shall, where relevant, be taken into account:
>
> (a) government legislation and policies relating to ecologically sustainable development;
>
> (b) social welfare and equity considerations, including community service obligations;
>
> (c) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
>
> (d) economic and regional development, including employment and investment growth;
>
> (e) the interests of consumers generally or of a class of consumers;
>
> (f) the competitiveness of Australian businesses; and
>
> (g) the efficient allocation of resources."

The National Competition Council (NCC) has stated that:

> "A central feature of the National Competition Policy is its focus on competition reform 'in the public interest'. In this respect, the guiding principle is that competition, in general, will promote community welfare by increasing national income through encouraging improvements in efficiency. …
>
> The aim in applying s.1(3) is to assess any special treatment in a transparent and consistent manner, with the benefits and costs of particular anti-competitive behaviour subject to public scrutiny."
>
> National Competition Council, *Considering the Public Interest Under the National Competition Policy*, AGPS, Melbourne, 1996, pp.2 & 8-9.

The NCC emphasises that sub-cl.1(3) is not exclusive or prescriptive. Rather, it provides a list of indicative factors a government could look at in considering the benefits and costs of particular actions, while not excluding consideration of any other matters in assessing the public interest

Chapter Three

An Overview of Victoria's Parks

This chapter explains in general terms the legislative framework that underpins Victoria's system of parks managed under the *National Parks Act*, and describes trends in their usage. It also summarises the relevant provisions of the *Water Industry Act*.

3.1 An Overview of the Review Legislation

3.1.1 The National Parks Act

The *National Parks Act* provides for the permanent protection and management of Victoria's national, State and wilderness parks and certain other parks and reserves. It is the primary legislation under which nearly 3.1 million hectares of the State's Crown land is managed.

Victoria has a long history of setting aside land for national parks — Victoria's oldest existing parks (Wilsons Promontory and Mount Buffalo) were set aside under the then *Land Act* as "sites for national parks" in 1898.[17]

Despite the creation of these early parks, Victoria's first National Parks Act was not passed until 1956. For the first time, specific legislation provided for the reservation and management of the State's then 13 national parks.

The *National Parks Act* consolidated and amended the legislation relating to national parks but also established a new category of park ('other parks') to cater for a wider range of types of areas and uses. Subsequently, the *Act* has been amended to provide also for State parks and wilderness parks, and for wilderness zones, remote and natural areas and designated water supply catchment areas within certain national parks (where special management provisions apply).

3.1.2 Park Regulations

The *Park Regulations 1992* provide for:

- the preservation and protection of flora, fauna, indigenous fish, and natural and cultural features, and
- the safety, enjoyment, recreation and education of visitors in parks and other areas managed under the *Act*.

The *Regulations* enable areas in parks to be set aside for particular purposes, prohibit certain activities taking place and establish appropriate behaviour for park visitors. They also establish offences in relation to various matters subject to the regulations.[18]

In addition, the *National Parks (Fees and Charges) Regulations 1990* prescribe park entry fees and charges and related offences applying to particular parks.

3.1.3 The Water Industry Act and Regulations

This review is only addressing competitive restraints in ss.135A and 139-143 of the *Water Industry Act* and the *Water Industry (Melbourne Parks and Waterways) Regulations 1996*.

Section 135A of the *Act* establishes a licensing regime for the establishment and operation of jetties, moorings and for hire and charter vessels on waterways in the greater metropolitan area.

[17] Although since revoked, Victoria's first national park dates back to 1892.

[18] Penalty Infringement Notices (PINs) may be issued for offences against the *Act* or *Park Regulations* under the *Conservation, Forests and Lands (Penalty Infringement Notices) Regulations 1992*.

Sections 139-143 relate to what is known generally as the 'parks charge'. This is an annual charge levied on residential and commercial properties throughout Melbourne. It is used to fund the management of open space, parks and waterways across the greater metropolitan area (including the Mornington Peninsula and Pakenham areas). The charge has been included on water bills since 1958 and is calculated by applying a rate to the Net Annual Value of commercial and residential properties in the metropolitan area.

Section 142 enables the Minister to enter into an agreement with a licensee under the *Water Industry Act* for the collection of any rate made and levied under s.139 and any interest payable in respect of that rate, and s.143 requires the licensees — City West Water, South East Water and Yarra Valley Water — to collect those rates and any interest.

3.2 Parks' Characteristics and Usage

3.2.1 Numbers of Parks

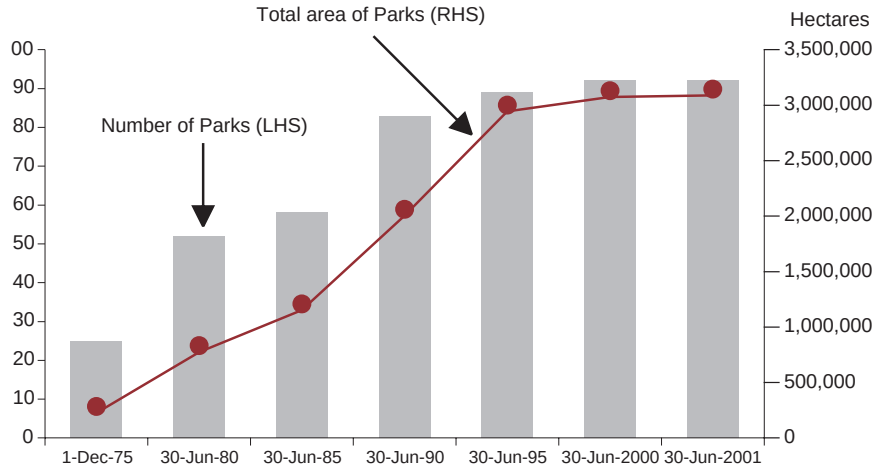
In 1975, there were 25 national parks and two other parks on the schedules to the *Act*, covering just over 200,000 hectares. Through successive amendments to the *Act* the number of parks and the area of the parks have grown substantially, as shown in Figure 3.1.

On 30 June 2001, there were 108 areas (parks and reserves) managed under the *Act*, including 92 on the schedules to the *Act*, comprising:

- 36 national parks;
- 3 wilderness parks;
- 31 State parks;
- 22 other parks (including coastal, marine, historic and regional parks, a flora and fauna reserve and a farm);
- 16 other areas managed by the Secretary under various provisions of the *Act*.

A detailed map featuring all of parks and other areas managed under the *National Parks Act* can be found in Appendix C.

Figure 3.1 — Number and Total Area of Parks



Note: Parks include: national, wilderness, State and other parks.
Source: Department of Natural Resour ces & Environment, *National Parks Act Annual Report 2000/2001*, Melbourne, 2001.

With the growth in park numbers the total area of parks on the schedules of the *National Parks Act* has grown to 3.088 million hectares, covering 13.5 percent of Victoria and 35 percent of all public land. This 15-fold increase in area since 1975 has resulted mainly from the implementation of the recommendations of the former Land Conservation Council (LCC). The LCC's recommendations have led to a system of terrestrial parks which is largely representative of the diverse natural environments occurring on public land.

3.2.2 Park Usage

Park Attendance

Victoria's parks received 13.3 million visits in 1999-00. Taking overnight stays into account the total number of visits measured in visit-days is nearly 13.9 million — see Table 3.1.

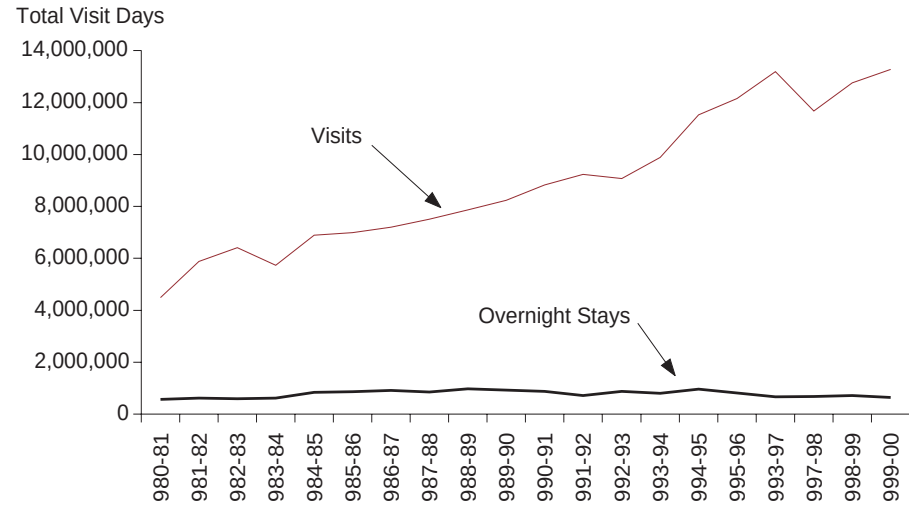
Table 3.1 — Visit Numbers by Park Type (1999-00)

Park Category	Visits	Overnight Visits	Total Visit-Days
National Parks	9,901,352	435,852	10,337,204
Wilderness Parks	1,056	525	1,581
State Parks	1,445,870	131,866	1,577,736
Assorted Other Parks and Reserves	1,931,996	70,984	2,002,980
TOTAL	13,280,274	639,227	13,919,501

Source: Department of Natural Resources & Environment, *National Parks Act Annual Report 1999/2000*, Melbourne, 2000.

The growth in visitor numbers to Victoria's parks over the previous decade has been significant. In 1980-81, fewer than 4.5 million visits were made annually to Victoria's parks, a figure which has since trebled — see Figure 3.2.

Figure 3.2 — Park Visits



Source: Department of Natural Resources & Environment, *National Parks Act Annual Report 1999/2000*, Melbourne, 2000.

This sustained growth rate far exceeds natural population growth and is a result of both the increase in the number and area of parks in Victoria, as well as the increasing frequency with which Australians visit parks for leisure and recreational activities, including activities arranged through commercial operations.

Commercial Activities

In several parks there are facilities that have been leased under various provisions of the Act. These include those that may be used by the general public as well as those leased for more specific purposes. Examples include:

- campgrounds and cabins (eg, at Lake Eildon National Park);
- kiosks (eg, Dandenong Ranges National Park); and
- chalets (eg, Mount Buffalo Chalet).

In addition, licensed tour operators play a useful role in facilitating access to Victoria's public land, in promoting its values and appropriate use, and in encouraging tourism and recreation in Victoria. As at 30 June 2000, there were 259 licensed tour operators offering 504 activities (eg, bus tours, cross-country skiing, fishing, horse riding, bushwalking, etc), of which bushwalking was the most popular. The majority of activities take place in areas managed under the *National Parks Act*. Less than 1 percent of visitor days is attributed to commercial tours.

The *Act* also provides for a range of resource uses — which would otherwise not be permitted — in specified circumstances and in certain parks. These include apiculture, grazing, timber harvesting, and exploration and extraction of earth resources. There are also provisions which enable public authorities, or bodies declared as such, and electricity companies to operate in parks.

3.3 Waterway Usage

Commercial passenger services on Melbourne's waterways are:

- centred on the lower Yarra (principally around Southgate);
- seasonal in nature (with peak periods during the warmer months from November to April and during major events); and
- service three major market segments:
  - tourist trips catering for passers-by;
  - pre-booked tourist trips; and
  - water taxis.

Of particular relevance to the licensing provisions of the *Water Industry Act*, there are currently:

- 16 licensed commercial passenger boat operators operating 39 boats; and
- 30 berths available for commercial passenger boats, most of which are permanent berths used exclusively by individual operators[19].

However, solely with respect to s.135A (the focus of this review), there are about:

- 16 operator licences for hire and charter vessels; and
- 30 licences for private jetties, and none with respect to commercial operations.[20]

Parks Victoria estimates that usage of the Yarra River traffic could increase by 53 percent over the next five years, with:

- commercial boat operators increasing by 87 percent;
- commercial boat functions increasing by 28 percent; and
- water taxis increasing by 61 percent.[21]

[19] Office of Regulation Reform, *Yarra River Traffic: Managing Access — A Review of the Yarra River Regulatory Framework, Discussion Paper*, Department of State and Regional Development, Melbourne, 2000, pp.19–20.

[20] Commercial operators want to operate from jetties in the central business district, where the river banks are reserved Crown land and hence falls outside s.135A.

[21] Parks Victoria, *Lower Yarra River — Future Directions Plan & Recreational Guidelines: Values and Principles, Discussion Paper*, 2000, as cited in Office of Regulation Reform, *Yarra River Traffic: Managing Access — A Review of the Yarra River Regulatory Framework, Discussion Paper*, Department of State and Regional Development, Melbourne, 2000, p.7.

Chapter Four

Legislative Objectives

This chapter provides an overview of the commonly advanced rationales for the maintenance of legislative provisions that regulate commercial activities with respect to Victoria's parks and Melbourne's waterways, and identifies how these objectives are addressed through Victoria's parks and waterways legislation. Its purpose is to clearly identify the rationale for government regulation to provide a basis for assessing whether the legislation should be refined to focus on the achievement of these objectives in the least restrictive manner.

4.1 The *National Parks Act*

4.1.1 Existing Legislative Objectives

The Preamble to the *National Parks Act* states the underlying purpose of the *Act* in relation to national parks in these terms:

> "Whereas it is in the public interest that certain Crown land characterized by its predominantly unspoilt landscape, and its flora, fauna or other features, should be reserved and preserved and protected permanently for the benefit of the public."

The objectives of the *Act* (referred to in the *Act* as objects) are set out in s.4. Objects are specified for each type of park including national and State parks, wilderness parks and other parks, as well as for designated water supply catchment areas within particular parks:

> "The objects of this Act are —
>
> (a) to make provision, in respect of national parks and State parks —
>
> (i) for the preservation and protection of the natural environment including wilderness areas and remote and natural areas in those parks;
>
> (ii) for the protection and preservation of indigenous flora and fauna and of features of scenic or archaeological, ecological, geological, historic or other scientific interest in those parks; and
>
> (iii) for the study of ecology, geology, botany, zoology and other sciences relating to the conservation of the natural environment in those parks; and
>
> (iv) for the responsible management of the land in those parks;
>
> (aa) to make further provision in respect of designated water supply catchment areas in national parks [areas which form part of Melbourne's water supply catchments and buffers that are located in Kinglake and Yarra Ranges National Parks] —
>
> (i) for the protection of those areas; and
>
> (ii) for the maintenance of the water quality and otherwise for the protection of the water resources in those areas; and
>
> (iii) for the restriction of human activity in those areas for the purposes of sub-paragraphs (i) and (ii);
>
> (ab) to make provision in respect of wilderness parks [these also apply to wilderness zones located within national parks] —
>
> (i) for the protection, enhancement and management of those parks as wilderness so as to maximise the extent to which those parks are undisturbed by the European settlement of Australia; and
>
> (ii) for the protection, preservation and evolution of the natural environment including indigenous flora and fauna and of

features of ecological, geological, scenic, archaeological and other scientific significance; and

(iii) for the use and enjoyment of those parks by the public for inspiration, solitude and appropriate self-reliant recreation; and

(iv) for the study of ecology, geology, botany, zoology, archaeology and other sciences relating to the environment in those parks;

(b) in respect of parks described in Schedule Three [other parks] —

(i) to make provision, insofar as is appropriate to each such park, for the protection and preservation of indigenous flora and fauna and of features of scenic or archaeological, ecological, historic or other scientific interest; and

(ii) subject to such provision as is made under sub-paragraph (i), to make provision for the public to observe, experience or otherwise become acquainted in those parks with the countryside and rural skills, activities and pursuits and for carrying on, in those parks and for those purposes, agricultural, horticultural, or other agrarian projects and botanical, biological, ecological, geological, zoological, or other scientific studies or projects; and

(c) to make provision in accordance with the foregoing for the use of parks by the public for the purposes of enjoyment, recreation or education and for the encouragement and control of that use."

While there are some minor differences between each park category, the protection of the natural environment, indigenous flora and fauna, and cultural or other features of each park is the primary objective for all parks under the *Act*.

4.1.2 A Market Failure Approach

Background

Under the *CPA*, if regulation that restricts competition is to be retained, it must be demonstrated that the objectives of the legislation can only be achieved by restricting competition.

To undertake this assessment it is necessary to clearly articulate what the rationale for government intervention (ie, the legislative objective) is and should be.

The Council of Australian Governments (CoAG) has publicly stated that government intervention in markets should generally be restricted to situations of market failure and that each regulatory regime should be targeted on the relevant market failure or failures.[22]

Market failures may arise under a number of conditions including:

- *public goods* — these goods will tend to be under–produced because they are non–excludable (ie, people who have purchased the good cannot stop others using it up) and non–rivalrous (ie, the good is not used up with use). Common examples include aspects of the natural environment and national defence;
- *natural monopolies* — where the costs of establishment, resources or infrastructure mean that setting up competition is socially wasteful. Because a natural monopoly is socially optimal but not necessarily in the interests of all players in the market, governments may decide to regulate in the public interest;
- *externalities* — positive or negative impacts of market transactions which affect third parties and are not reflected in prices. Pollution is commonly referred to as a negative externality; and

[22] Council of Australian Governments, *Report of Task Force on Other Issues in the Reform of Government Trading Enterprises*, released as part of the first CoAG communique, 1991, p.22.

- *information asymmetries* — where information is not evenly distributed throughout the community. The uneven distribution of information may mean that production and consumption decisions do not maximise community welfare.

Governments do not normally communicate legislative objectives in terms of market failures, but will instead often rationalise government intervention in terms of:

- the desire to provide (or ensure the provision of) universal goods and/or services;
- the allocation of public resources — some industries base their operations on a public resource of limited capacity, so that a public agency must intervene to ration out that resource; and
- the protection of consumers, employees and the environment — this is intended to overcome problems of externalities and imperfect information in the market place.

These rationales may or not be classified as traditional market failures.

Relevant Market Failures

While the broad objectives of the *National Parks Act* tend to be discussed in terms of environmental protection (see section 4.1.1), the legislation nevertheless clearly addresses potential market failures such as those arising from:

- public goods (eg, the desire for clean air and the preservation of the natural environment) — land and its associated natural resources may provide environmental, commercial, cultural, historical, and recreational benefits to both current and future generations. The values that society places on such characteristics are many and varied, are often difficult to quantify, and are not able to be (or are poorly) reflected in the market system. Hence, without specific regulation, they are not adequately incorporated in land management decisions. Typically, such land-dependent natural capital exhibits, to varying degrees, the characteristics of public goods;
- negative and positive social and environmental externalities — an externality arises when production or consumption by one party imposes uncompensated costs or benefits onto third parties. Where there are benefits for third parties these positive outcomes will tend to be under-produced unless there is government involvement, and conversely, where there are costs for third parties these will tend to be over-produced unless there is government involvement. Thus, there may be a role for government to attempt to:
  - overcome the problems caused by negative externalities — some commercial activities may create negative externalities that the government may consider important enough to regulate to reduce in particular areas;[23] and
  - attempt to facilitate and promote positive externalities — for example, the government may seek to foster the preservation of particular land where there are benefits (eg, environmentally, culturally, and so on) to third parties.
- information asymmetries — information asymmetries may exist in that the public may not be aware of the true environmental value of land and hence there may be a rationale for the government regulation.

[23] Regulation to prevent negative externalities are particularly important given the potential liability for negligence actions: the High Court has established that park managers owe a duty of care to all park users — see *Romeo v Conservation Commission of the Northern Territory* [1998] HCA 5 (2 February 1998) — and commercial and not-for-profit tour operators similarly owe a duty of care to their clients. As a result of these duty of care obligations, as part of their licence conditions, tour operators are required to have $10 million public liability insurance (consistent with virtually all Australian national parks agencies).

4.1.3 Discussion

In the *Issues Paper* the Review Team suggested that:

> "the broad objective of the National Parks Act is the facilitation of park usage in a manner consistent with preserving the parks' natural environment, indigenous flora and fauna, cultural or other features."
>
> The Allen Consulting Group, *The Regulation of Commercial Activities in Victoria's Parks: A National Competition Policy Review — Issues Paper*, Sydney, 2000, p.11.

Comment on this suggested broad objective focussed on two elements: the degree to which usage of parks should be an objective; and whether it is appropriate to have a single over-arching objective for all park types. These two issues are discussed in the following sections.

Usage

A number of parties commented on the treatment of the concept of park usage within the suggested unifying objective. Suggestions include:

- that the emphasis should be on preservation, with usage of the parks a clear second order priority;[24] and
- that park usage should be specified as being for enjoyment, recreation and education.

No-one challenged the validity of the first suggestion. This objective suggests that it is appropriate for government to regulate to protect certain values under the auspices of parks.[25]

The second suggestion is more complex.

The Preamble to the *Act* states that it is in the public interest that certain areas of Crown land be reserved and preserved and protected permanently for the benefit of the *public*, and the objects of the *Act* — sub-s.4(c) — refer to the use of parks as being for the purposes of enjoyment, recreation and education of the public.[26] The objects of the *Act* make no reference to providing for any other users except the public. That is, the objects do not explicitly provide for 'private' or 'commercial' use. As the *Act* currently stands, where it is intended to permit a specific private or commercial use, there is specific provision made for it in the *Act*.

The Review Team considers it difficult to justify a strong distinction between 'public' and 'commercial'.

The claimed rationale for making the distinction is that there are important social impact considerations — ie, the effect on park visitors' experiences due to the presence of other visitors or other types of use — that may require parks to be managed through regulation in the interests of protecting park visitor experiences and their enjoyment of the parks. For example, with respect to commercial tours, commercial use of limited resources (eg, campsites on major walking tracks, bulk booking of accommodation) may be environmentally and commercially sustainable but may have the effect of displacing non-commercial use.

Whether or not the group is a private or commercial group should not matter. The aim should be to regulate conduct that is incompatible with the preservation of the park (and the general use and enjoyment by the public). This may mean regulating private groups on the same basis as commercial groups where there is the potential to monopolise a park's usage. In this respect, the term 'public' in sub-s.4(c) should not be read in too restrictive manner.

[24] Victorian National Parks Association submission, p.1.

[25] Support for this suggestion may be considered as being consistent with the precautionary principle and the principle of intergenerational equity.

[26] There are some particular other types of public use provided for in relation to Schedule Three (Other) parks but these are very limited in their application.

The Role of Objects for Specific Park Types

In the *Issues Paper* the Review Team then queried whether, "there is a need to retain the different legislative objects for each type of park or could they be replaced by a single clear objective that covers all parks?"

The Review Team suggested that there may be some benefit associated with simplifying the objectives of the *Act*. However, in light of stakeholder comments,[27] the Review Team agrees that there are ongoing benefits in clearly specifying those features that justify particular regulation for specific park types, as is done presently in s.4.

The MCAV went further to suggest that:

> "summer grazing of cattle in the Victorian high country is an activity of some significant cultural and heritage importance. … MCAV believes that the protection of summer grazing of cattle should be included as a legitimate objective of the Act, in order to protect an important, although fragile part of Australian cultural pioneering heritage."
>
> Mountain Cattlemen's Association of Victoria submission, p.4.

The Review Team suggests that the objectives should not single out any particular permitted use, and that the over-riding issue should be the use of parks in a manner consistent with the protection of the natural characteristics of the relevant park.

RECOMMENDATION ONE — the objective of the National Parks Act can be broadly summarised as preserving the parks' natural environment, and facilitating park usage by the public in a manner consistent with the preservation of the parks' indigenous flora and fauna, cultural or other features. The legislative objective is specified in some detail in s.4 and should be retained.

[27] Victorian National Parks Association submission, p.1; Mountain Cattlemen's Association submission, p.5; and Tourism Victoria submission, p.1.

4.2 The *Water Industry Act*

The *Water Industry Act 1994* provided for the reform of the water industry. The *Act* includes provisions establishing:

- licences for jetty and mooring licences and for hire and charter vessels using waterways (s.135A); and
- the metropolitan rate (ss.139-143).

The regulatory objectives underlying these provisions are discussed in the following sections.

4.2.1 Regulation of Waterways

A number of potential market failures identified in section 4.1.2 may exist on Melbourne's waterways:

- *externalities* — externalities may arise in an environmental context and a sector-specific context. For example, there may be externalities if the construction of jetties or the operation of charter vessels create environmental consequences (eg, changed water flow patterns, riverbank erosion, etc); and
- *natural monopolies* — natural monopolies may exist in a number of isolated routes, but in general are unlikely because charter services may be operated on very small scales. Concern for natural monopolies is most likely to arise with the construction and operation of jetties in narrow waterways; and
- *information asymmetries* — information asymmetries may arise in a number of circumstances:
  - with respect to environmental matters — operators and consumers may be unaware of the impact that their actions have on the preservation of the waterways; and

- with respect to consumer protection matters — information asymmetries may exist when the passenger has little knowledge about the quality and availability of services, and is unlikely to be a repeat customer or otherwise unable to acquire knowledge about the services.

This review is focusing on regulatory rationales related to environmental matters and public use.[28] In this respect, there may be a case for regulation of jetty and mooring licences on the grounds that there may be negative externalities and information asymmetries. There are also public good issues because the river and its banks are Crown land, and these licences are consents to operate commercial activities on Crown land.

4.2.2 The Metropolitan Rate

The objective of the metropolitan rate is relatively straight-forward — to raise revenue to fund the establishment and management of certain parks, open space and waterways in the greater metropolitan area.

[28] The regulatory framework for a section of the Yarra River in central Melbourne has recently been reviewed by the Office of Regulation Reform with input from of a range of stakeholders — see Office of Regulation Reform, *Yarra River Traffic: Managing Access — Final Report*, Department of State and Regional Development, Melbourne, 2001.

Chapter Five

Restrictions Placed on Commercial Activities in National Parks

This chapter identifies the broad restrictions which the *National Parks Act* places upon commercial activity in Victoria's parks. It is then considered whether, at a broad level, these restrictions are appropriate.

The *National Parks Act* provides a range of mechanisms which restrict the types of commercial activities that can be undertaken in the particular park types.[29] There is a spectrum of restrictions on commercial activities that range from:

- strong restrictions for certain categories of parks (generally areas with significantly higher values) — for example, the Minister has wide powers to limit activities in water catchment areas,[30] and the only commercial activities which are allowed in wilderness parks must not use motorised or mechanical transport or animals and must be appropriate for the appreciation and understanding of wilderness;[31] through to
- lesser restrictions in other categories of parks.

The following sections discuss, in broad terms, the benefits and costs of this approach and possible ways of maximising the net benefits associated with commercial activities in parks.

[29] It is important to note that some commercial activities in parks are also regulated by other legal mechanisms. For example, mining is also prohibited in parks through the *Minerals Resources Development Act*.

[30] See sub-s.17(2)(ba).

[31] See s.17C. This restriction places commercial activities on an equal footing with non-commercial (ie, leisure) activities.

5.1 Benefits of Restrictions

Restrictions on certain commercial activities can be justified on the basis that, were certain commercial activities to take place in a park or class of parks, they could sufficiently threaten the parks' environmental status.

This approach may be reaffirmed by reference to the 'precautionary principle'. The precautionary principle guides action in situations of scientific uncertainty regarding environmental impacts. It emphasises that when there is the possibility of *serious* or *irreversible* harm to the environment that protective action be taken *in advance of* scientific proof of harm.[32]

The environmental concerns about potential over-use of natural resources by visitors are well established:

> "Tourists may exert pressure on our land resources … In some places …, concern about camping wastes and trampling pressure of numerous tourists has led to steps to control access by camping restrictions and the use of raised footpaths. In Tasmania there is evidence that fires are more frequent along popular tourist routes and concern that tourists may significantly increase the spread of weeds and diseases.
>
> Corridors for roads, railways, pipelines and powerlines open up access and bring tourists, development, grazing animals, weeds and pests. They can

[32] The definition of the principle in the *Intergovernmental Agreement on the Environment* (IGAE) is the one most commonly used in Australia:

> "Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In application of the precautionary principle, public and private decisions should be guided by:
> (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
> (ii) an assessment of the risk-weighted consequences of various options."

For further description of the principle see: Harding, "The Precautionary Principle: Relevance to Environmental Engineering In Australia" presented at the *Environmental Engineering Research Event*, 1998.

also modify water flows and act as barriers to the movement of native organisms …"

State of the Environment Advisory Council, *Australia: State of the Environment 1996*, AGPS, Canberra, 1996, p.6-7.

Similarly, other commercial activities (eg, mining), unconstrained by regulatory oversight, are also likely to have negative environmental consequences:

"The preferred approach to controlling environmental problems in the mining industry has been one of direct regulation by government. There are a number of reasons for this relating to the size and specific location of environmental impacts. As past disasters have shown, failure to consider environmental consequences can have very substantial and long term effects. The bare hills around Queenstown in Tasmania and the scars of coal mining at Mt Leigh in South Australia are a case in point. The large potential risks associated with uranium mines adjacent to Kakadu National Park, or at other sites where there may be downstream effects from air and water pollution, are other examples."

Rolfe, "Mining and Biodiversity: Rehabilitating Coal Mine Sites" (Summer 2000-2001) *Policy* 8 at 9

But impacts go beyond environmental concerns. For example, increased use of parks for commercial activities may put pressures on 'values and meaning' in the following ways (amongst others):

- overcrowding/over-pricing of community facilities;
- invasion of privacy;
- privatisation of public space; and
- loss of access to traditional land.[33]

There is a range of benefits with the existence and use of parks that could be threatened if certain restrictions were not in place and parks became 'overused' to the detriment of the natural environment. These 'at threat' benefits can be said to include at least a portion of the following benefits identified by Bennett:

"National Parks make a marked contribution to the economic well being of the nation. Some of that is captured within the bounds of the National Accounts. For instance, National Parks are popular sites for domestic and international tourism and recreation. A proportion of the income generated by the tourism industry could therefore be attributed to the Parks estate. Still and motion pictures are also shot in National Parks. Furthermore, the estate contributes indirectly to the productive capacity of many other sectors of the economy. For instance, high quality water sourced from catchments in National Parks is used for domestic, industrial and agricultural purposes. Genetic material preserved in the estate may be used as a base for pharmaceutical developments.

Outside the framework of the National Accounts, the estate also contributes to the well being of society. 'Non-market' benefits include aesthetic appreciation of the natural environment and the enjoyment gained from the knowledge that native species of floras and faunas are protected from extinction. The magnitude of these benefits should not be underestimated. A wide range of non-market valuation studies indicate that the so-called 'non-use' values of protected natural areas are around three times the magnitude of the values generated from recreation and tourism."

Bennett, "Privatising Parks: Why the Private Sector Can Enhance Nature Protection" (Summer 2000-2001) *Policy* 3 at 4.

[33] Hyde, as quoted in State of the Environment Advisory Council, *Australia: State of the Environment 1996*, AGPS, Canberra, 1996, p.9-32.

5.2 Costs of Restrictions

While not often discussed in negative terms, parks — and their various associated restrictions on commercial activities — impose opportunity costs:

> "National Parks impose significant costs on the economy. … The opportunity costs relate to the income the economy could enjoy from the exploitation of resources otherwise quarantined by their status as National Park assets. Growing demand for resources and improved technology (effectively lowering the costs of resource extraction) almost ensures that current and/or future developmental values will be positive. Declaring National Parks therefore has a negative impact on GDP because of this foregone income. … The magnitude of … opportunity costs implies that the nation has a substantial investment in the National Parks estate. "
>
> Bennett, "Privatising Parks: Why the Private Sector Can Enhance Nature Protection" (Summer 2000-2001) *Policy* 3 at 3-4.

Furthermore, to the degree that commercial tourism is restricted there may be a range of other foregone benefits (ie, costs) if commercial activity would have otherwise:

- attracted funds which can be used for activities such as revegetation, wildlife protection, etc; or
- attracted people to particular regions and hence leads to:
  - sharing and increased understanding of people's own and other cultures;
  - stimulus to art and craft activities;
  - promotion of the conservation ethic; etc.[34]

[34] Hyde, as quoted in State of the Environment Advisory Council, *Australia: State of the Environment 1996*, AGPS, Canberra, 1996, p.9-32.

It needs to be borne in mind, however, that such costs, to the degree that they exist, are limited in that only 13.5 percent of Victoria's land is designated as park.

5.3 Finding a Policy Approach to Maximise the Net Benefit of Parks and their Associated Commercial Activities

No stakeholders challenged the view that there is a need to limit commercial activities in parks to ensure the maintenance of the parks' characteristics. However, the existence of both costs and benefits associated with commercial park activities suggests that neither:

- outright prohibitions on park use; and
- no prohibitions on park use;

are likely to maximise the community's welfare. A balance is required to find (at least conceptually) the optimal level of use.[35]

At a broad theoretical level, this balance is found when the marginal benefit of an additional commercial activity equals the marginal cost of that same activity.

It is assumed that, by definition, the costs of commercial activity exceed the benefits when the natural values of the park are compromised. Application of this principle can be seen in Figures 5.1 and 5.2.

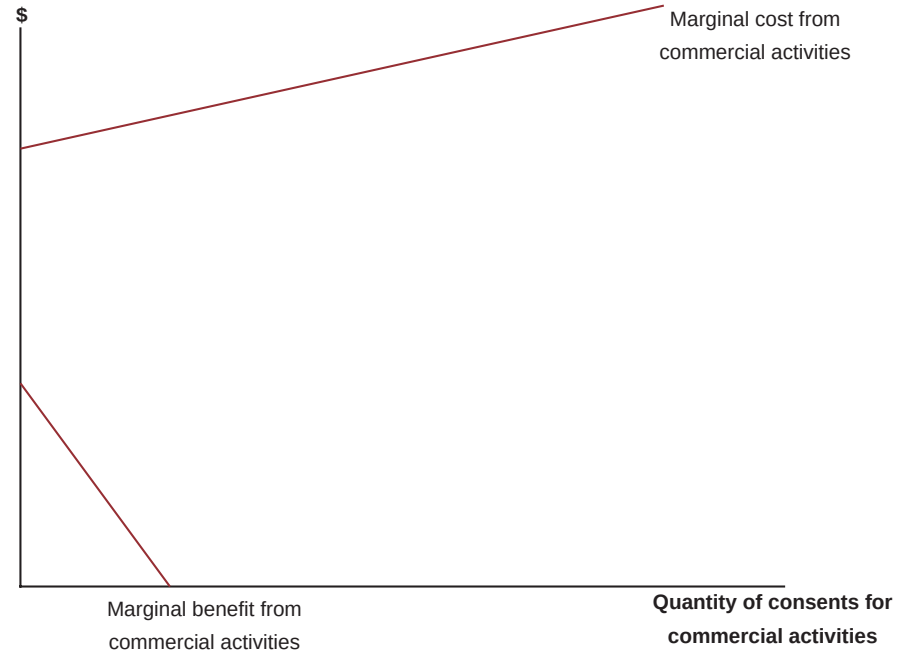
In Figure 5.1 commercial activity of a particular type in a particular park would be prohibited outright because the costs exceed the benefits at every

[35] Tietenberg, *Environmental and Natural Resource Economics*, 3rd edition, Harper Collins Publishers, 1992, pp.365-366. Similar policy issues have arisen in other policy fora. For example:

- the Productivity Commission review of gambling found that gambling involves both social and personal costs and benefits, and that policy should be directed at minimising costs while maintaining the benefits; and
- greenhouse gas policy has been predicated on the understanding that greenhouse gases have significant costs (eg, global warming), but that entirely forgoing the benefits of greenhouse gas producing activities (eg, mass electricity production) would impose net costs on society.

number of consents. In this circumstance the optimal number of consents is zero.

Figure 5.1 — Scenario in Which a Park's Nature Would be Undermined by Any Commercial Activity

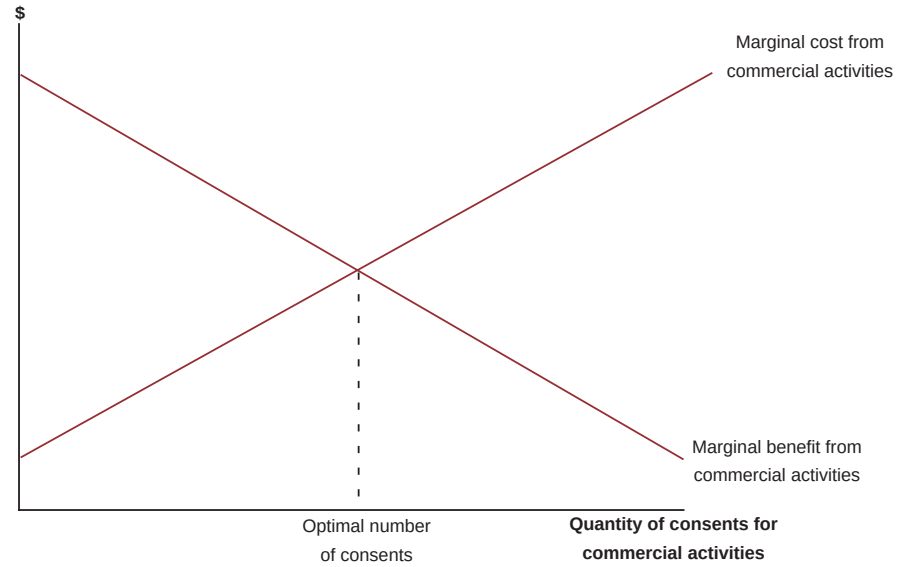


Source: The Allen Consulting Group

There is a consensus that there is a role for government to prohibit outright destructive commercial activities in parks (ie, the situation represented in Figure 5.1).

In Figure 5.2 commercial activity of a particular type in a particular park would be allowed until the marginal costs equal the benefits. That is, the first activities to be allowed should have significant marginal benefits and low marginal costs, but that these will converge as more marginal commercial activities are considered.

Figure 5.2 — Scenario in Which Some Commercial Activity Does Not Undermine a Park's Nature



Source: The Allen Consulting Group

A number of stakeholders — most vocally those associated with the mining industry — argue that in some circumstances the current restrictions assume that costs of certain activities outweigh the benefits (the Figure 5.1 scenario) when in fact the reverse is true (the Figure 5.2 scenario).

These stakeholders argue that the current *Act* focuses on inputs (ie, what can and cannot be done in parks), and ignores actual (or at least potential) outcomes. This is the concern that led the Public Land Council of Victoria to comment that, "No activity should be banned simply because of a poor

history of land utilisation and rehabilitation."[36] The Victorian Chamber of Mines noted that:

> "The primary land use management regime of all national, state and wilderness parks is that of conservation. Other land uses are sometimes tolerated in confined areas. Activities that exploit the natural resources are excluded entirely. This single purpose regime denies the opportunities that could come from a multiple or sequential land use management regime as occurs in other states and other countries. … It is recommended that the land use management regime of the NP Act be modified to a more modern multiple land use system."
>
> Victorian Chamber of Mines submission, p.2.[37]

These concerns go to the manner in which the decision is made to say that a commercial activity in a particular park falls within either the scenario presented in Figure 5.1 or 5.2.

Table 5.1 (page 28) sets out four general options as to how commercial activities can be regulated in parks, and the strengths and weaknesses of each approach — Option Two represents the *status quo*.

The Review Team suggests that a blending of Options Two and Three could provide an optimal outcome: certain commercial activities would be prohibited in certain parks, with limited exceptions, but there would also be a mechanism for the review of prohibitions on a case-by-case basis.

A concern from environmental groups is that a power to seek a review of prohibitions would 'open the floodgates' and that the integrity of the parks system would be threatened.

Acknowledging this concern, the Review Team considers that a formal system could be established along the following lines:

- a party wishing to undertake a commercial activity that is otherwise prohibited in a particular park could apply for an assessment of the impacts associated with relaxing the prohibition in that particular instance;
- the review would be independent and conducted by people with the relevant expertise and understanding of the park's values;
- the onus would be on those advocating change to demonstrate that the park's character would not be threatened by removal of the prohibition; and
- the costs of the review could be borne to some degree by the applicant. In the event of clearly frivolous applications (eg, where an application does not take into account recent reviews of a similar nature) the percentage of costs recovered could rise.[38] As an example, the fees could be structured so that there is a substantial up-front fee for the assessment (refundable if the removal of the prohibition is found not to endanger the park's status), and penalties if the application is independently considered to be frivolous.

Clearly, this approach is likely to involve some legal uncertainty (eg, the definition of what constitutes a 'frivolous application', and the degree of proof required to demonstrate the application would not harm the park) and hence correspondingly increased legal costs for applicants and the Government. These costs will themselves act as a deterrent to the 'frivolous' use of this process. Furthermore, they could be expected to decline as precedents are established (although this may take some time given that the expectation is that the process would not be frequently used).

[36] Public Land Council of Victoria, *The Management of Public Land in Victoria*, 2000, p.2.

[37] The VCM submission had attached: Victorian Chamber of Mines, *Mining Memo — Multiple Land Use in Other States*, May 1999; and Victorian Chamber of Mines, *Mining Memo — Multiple Land Use in Other Countries*, May 2000.

[38] The use of cost rules as a regulatory device is discussed in: Office of Regulation Review, *The Use of Cost Litigation Rules to Improve the Efficiency of the Legal System — Submission to the Australian Law Reform Commission Review of the Litigation Cost Rules*, Canberra, 1995.

Importantly, even if a review finds that the proposed commercial activity would not threaten the park's character, removal of the prohibition would require legislative amendment.

The aim of the *Act* is to protect parks not make them available for exploitation. It is important to stress that this multi-option approach will not open the floodgates and result in massive commercialisation of national parks. Rather, it is designed to accommodate the possibility that in a number of exceptional cases the existing regulatory regime prohibits activities that might be able to be conducted in a beneficial manner consistent with parks' objectives. By making this assessment transparent, the costs and benefits of particular commercial proposals can be assessed, and hence the costs and benefits of existing regulatory restrictions can also be made explicit.

RECOMMENDATION TWO — Further consideration should be given to putting in place flexible arrangements that will facilitate commercial activities that, while prohibited in the first instance, can be demonstrated to be able to be undertaken in a manner consistent with the preservation of the regulatory objectives associated with the relevant park type.

Table 5.1 — Alternative Approaches for Regulating Activities

Option	General Rule	Exceptions	Strengths	Weaknesses	Summary
One	Prohibit certain or all activities	No exemptions	No uncertainty	Likely to prohibit some activities that provide a net public benefit	This prohibition option is unlikely to maximise the public interest as it restricts commercial activities that may nevertheless provide a public benefit
Two	Prohibit certain or all activities	Limited enumerated exemptions	Clear — or at least relatively clear — process	May prohibit some activities that provide a net public benefit	The Review Team agrees with the concern of industry that the current arrangements may stifle activity that can clearly be shown to be beneficial from a broader public perspective
Three	Prohibit certain or all activities	Burden is on the applicant to show that activity should be allowed	Allows for clearly beneficial and appropriate activities to be approved	Increased uncertainty Imposes greater costs on parties wishing to undertake otherwise prohibited activities Potential for an assessment error to be made and a harmful activity to take place in a park	Option Three can be viewed favourably in that • it allows industry to argue their case that particular commercial activities, conducted in certain ways, will not endanger the park's values; but • it places the onus on industry to state its case However, Option Three also has the potential to create significant costs for government with respect to the assessment of proposals
Four	Allow certain or all activities	Burden is on the regulator to show that activity should be prohibited	Consistent with NCP in that it puts the onus on parties seeking to limit activities to justify those limits	Increased uncertainty Imposes greater costs on government in the event that it wishes to prohibit activities Potential for an assessment error to be made and a harmful activity to take place in a park	This option received the support of the Public Land Council of Victoria. However, Option Four fails to take into account legitimate concerns such as the precautionary principle

Source: The Allen Consulting Group

Chapter Six

The Granting of Licences, Permits, Leases, Tenancies and Occupations

Licences, permits, leases, tenancies and occupations are integral to the current regulatory structure contained in the *National Parks Act* as they regulate the commercial use of parks:

- Division 3 (ss.19-27A) contains a variety of general provisions applying to land under the *Act* and to some specific areas within particular parks. These include provisions for a variety of leases, licences, permits, consents for public authorities and electricity companies; and
- Division 4 (ss.28-32N) contains special provisions relating to particular parks managed under the *Act*. These include provisions which allow activities or uses which would otherwise not be permitted in parks, provisions for leases of particular land or buildings in parks, and provisions for access agreements for particular parks.

In the remainder of this section licences, permits, leases, tenancies and occupations are collectively referred to as 'consents'.

6.1 The Appropriateness of Restricting Use

The NCP concern is that the need for a consent to operate a commercial activity in a park has the potential to affect competitive outcomes because it imposes a barrier to entry (ie, use). This barrier may be either:

- a temporary one where there is no restriction on the number of consents — in this case the barrier is comprised of the time (an indirect expense) and direct expense (eg, a $150 application fee) associated with obtaining a consent; or
- a permanent one where the number of consents are limited — for example, if a moratorium has in the past been placed on the issuance of consents for land-based tours in national parks and so potential new providers have been excluded from competing.

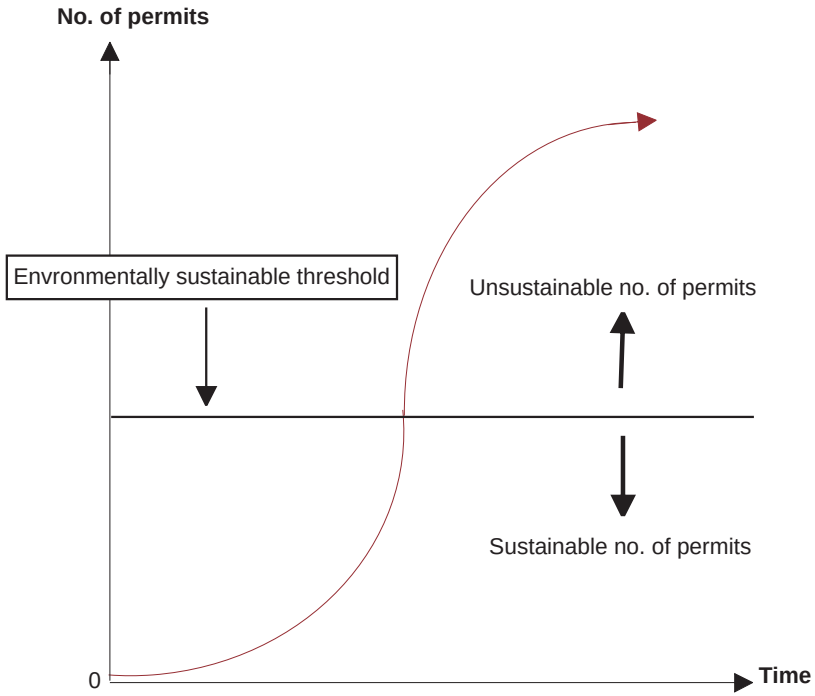
There are a number of characteristics associated with the operation of commercial activities in parks that justifies the view that it may be appropriate to establish regulatory barriers to entry. These characteristics are that:

- parks are a community resource owned by the Crown;
- some resource dependent industries rely on competing for scarce resources to ensure their survival;
- the natural features of parks — and the diversity of the flora and fauna contained within them — are the key resources for a number of industries;
- parks are a limited resource which have the potential to be over-consumed; and
- commercial tour activity in Victoria's parks is still at the development stage — this is evidenced by the growing number of operators and users of parks.

Given these characteristics, limiting the number of consents (ie, ensuring controlled use) can help control unsustainable park usage and thereby balance community demands for park access and meet the *Act*'s objectives relating to conservation and protection.

The relationship between sustainability and consent availability (as a form of a barrier to entry) is shown in a stylised manner in Figure 6.1.

Figure 6.1 — Demand For Consents And Development of a Common Resource Based Industry



Source: Derived from KPMG Management Consulting, *Review of the Wildlife Act 1975 Under National Competition Policy*, Melbourne, 1998.

Figure 6.1 can be understood in this manner:

- the left-hand axis indicates fluctuations in the total number of consents demanded. For example, as the tourism industry grows it could be expected that more tourist operators may wish to obtain a consent in order to operate in parks;
- the horizontal axis represents time and provides an indication of the general phase of the industry life cycle — initial, intermediate and mature; and
- the 'environmentally sustainable threshold' represents, in a stylised manner, a hypothetical number of consents beyond which the further issuance of consents would not be environmentally sustainable (ie, the costs exceed the benefits — see Figure 6.1).[39]

An important characteristic of allowing use of a park is that the consent holder may diminish the ability of another commercial operator to also use the park at the same time. The ability of the community to use parks is thus likely to be rival in nature — that is, at any one time only a fixed number of participants can (sustainably) use parks.

Furthermore, the use of consents allows the government to regulate to ensure that:

- commercial operations do not excessively impinge on the visiting public and their enjoyment of the park and do not restrict or displace the public from particular sites because of the intensity or nature of use;
- operations are compatible with the primary objective of the park;
- the potentially greater impacts on the environment that may arise from more frequent site visitation, larger group numbers and additional infrastructure are managed;
- services and facilities provided for visitors are appropriate; and
- operations are undertaken in a safe and responsible manner and operators have the necessary public liability insurance.

These limitations can be regulated through specific conditions attached to individual consents.

[39] See KPMG Management Consulting, *Review of the Wildlife Act 1975 Under National Competition Policy*, Melbourne, 1998.

6.2 Are The Existing Consents the Appropriate Regulatory Mechanisms?

There is broad agreement that there is a role for government to regulate certain commercial activities in certain parks using consents. For example, the VNPA's submission to this review stated that: "Any commercial use that has the potential to impact on the natural values of the park should be subject to some form of consent."[40]

The following sections consider possible alternatives to consents for those circumstances where it cannot be said that the commercial activity threatens the natural values of the park.

6.2.1 No Consent Requirements

Beyond the overarching regulatory requirements contained in the *Act*, this approach would entail the self-regulation (ie, voluntary regulation) of the firms that use the parks.[41] That is, there would be no specific entry restrictions (ie, consents) and hence no restrictions on park usage beyond the general behavioural restrictions specified in the *Act*.[42]

Such self-regulation relies on the operation of market forces. For example, firms which provide services that are inferior to the rest of the market will suffer a loss of business and hence will be encouraged to lift their game. The problem with this approach is that consumers will often not know when a service is being run in an environmentally sustainable manner and hence will fail to punish inappropriate operations.[43]

Alternatively, self-regulation may mean the coming together of industry participants to establish industry created rules or norms. Among other things, such self-regulatory schemes can encompass a range of potentially diverse issues such as:

- standards;
- complaint handling procedures;
- pricing and costing assistance; and/or
- the representation of industry views.[44]

Care needs to be taken during the establishment of a self-regulatory regime to ensure that any processes or agreements are not used to stabilise cartels.

Self-regulatory regimes will most likely be effective when:

- there is some commonality among the industry participants; and
- there exists an incentive for compliance.

While some level of commonality may exist in the Victorian tourism industry, it is difficult to imagine how a self-regulatory regime would be able to tie together disparate concerns of tour operators.

The major problems with self-regulation in this context are three-fold.

Firstly, as the commercial delivery of services in parks are growing and there is not a strong degree of commonality between providers there is reduced scope for competitive pressures and industry norms to be an effective constraint against inappropriate commercial activities. As a result, it is likely that there will be an inability to manage usage patterns effectively. This concern only really arises when the use of the park is approaching the sustainability threshold identified in Figure 6.1. This was implicitly acknowledged by the VNPA when it noted:

[40] Victorian National Parks Association submission, p.1.

[41] In some cases self-regulation is facilitated by governments.

[42] In some circumstances self-regulation may be complemented by mandatory reporting obligations.

[43] Indeed, Akerlof's classic article — Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism" (1970) *Quarterly Journal of Economics* 488 — describes how this information asymmetry may result in lower quality providers driving out higher quality providers.

[44] Trade Practices Commission, *Self-Regulation in Australian Industry and the Professions*, AGPS, Canberra, 1988, p.4.

> "It is suggested that the use of existing park facilities (roads, tracks, walking paths, picnic areas, etc) by commercial tourism operators may not warrant the issue of a consent unless there is a need to provide park managers with some perspective in respect to the level and volume of use."
>
> Victorian National Parks Association submission, pp.1-2.

The remaining problems are that:

- as many visitors on commercial tours are likely to be one-off visitors, there is little scope for repeat customers to 'punish' inappropriate providers; and
- without some form of notification it is difficult for the government to keep track of how parks are being used and to plan for their longer-term management.

Together, these three limitations are significant. As a result, self-regulation could only be considered as appropriate if:

- the second and third problems are considered insignificant; and
- park capacity is not threatened by commercial operations.

As it may be difficult to manage parks without adequate information on the types and patterns of activities undertaken, a self-regulatory approach (ie, where there are no consents or other specific government-imposed entry barriers) would need to be accompanied by a requirement, put in place by a Regulation, for notification and reporting by commercial tour operators. For example, tour operators could be required to provide details on a six monthly or yearly basis as to the number of people taken to each park. This information disclosure requirement would not be particularly onerous given similar current arrangements exist in consent conditions, and hence would not create a significant barrier to entry.

6.2.2 Negative Licensing

Negative licensing is designed to ensure that operators (companies or individuals) who have demonstrated by their prior action that they are incompetent or irresponsible are precluded from operating. As a result, the most egregious offenders against the set standards are removed from the industry, without, at the same time, placing an undue burden of licensing upon the entire industry.[45]

Negative licensing may be preferred when there is a desire to exclude individuals and firms with certain characteristics, such as convictions for prior environmental damage, rather than to specify via regulation any positive requirements for licensing.

Negative licensing has the advantage of providing notification to the government, but may be perceived as problematic because it does not apply any positive test of appropriateness to commercial providers. That is, like self-regulation, the regulatory focus is on punishing inappropriate activities this approach may be said to contravene the precautionary principle. For this reason, the Review Team considers it inappropriate to rely on negative licensing of commercial activities in Victoria's parks.

6.2.3 Accreditation

An alternative to licensing is accreditation. While accreditation schemes can vary dramatically in their detail, the essence of such schemes is that parties are given some form of official imprimatur or sanction in return for meeting certain standards.

Advantages of accreditation schemes are that they:

- may themselves be an effective indicator of good performance; and/or

[45] As an example, a negative licensing regime operates in NSW with respect to those businesses which wish to sell cigarettes.

- provide consumers with the choice between accredited and non-accredited operators.

The limitation associated with accreditation is that patterns of park usage cannot be absolutely controlled; even if accreditation is withdrawn an operator can operate as a non-accredited provider of commercial services. As a result, it is likely that the same limitations exist as discussed for self-regulation (ie, see section 6.2.1) and that self-regulation would be a less restrictive and administratively burdensome approach.

6.2.4 Co-Regulation

Co–regulation is a system of government regulation in which administrative responsibility is handed over, to a greater or lesser degree, to the industry itself.

A co-regulatory system could be structured so that:

- the Government would issue requirements for licensing and licence conditions (eg, service standards); and
- the licensing of commercial providers would be undertaken by an industry body, applying the Government-mandated tests;
- alleged contraventions of the system could be investigated by the industry body, and possibly even decided by the same body in the first instance; and
- the operations of the industry body could be monitored by the Government.

Co-regulation works most effectively when there is one or more existing industry bodies with broad industry coverage.[46] The Review Team's concern is that commercial operations in parks are undertaken by a broad range of firms and individuals across so many areas that there are no industry bodies with sufficient coverage or willingness to adopt a formal regulatory role.

6.2.5 Government Licensing

While section 6.1 listed a number of potential concerns associated with licensing — ie, licensing may impose a barrier to entry because of the time it takes to obtain a consent, and the direct expense of the application fee — barriers to entry are minimal in the case of park consents:

- the time frame for granting licences has never been a sticking point — the consent process requires the applicant to engage with park staff, which has benefits for the operator as well as the park staff (creates networks, access to information, enables realistic expectations to be established, etc). It also helps to flag trends in expected use/potential conflicts to field staff and aids in decision-making; and
- the $150 application fee is insubstantial — this is demonstrated by the fact that in the 1996 Tour Operator Licensing Reforms undertaken by the Department (in conjunction with the peak industry body (VTOA) and other operators) accepted to pay a consent administration fee of $350. Also, the need to obtain a tour operator licence was not highlighted as an issue.

6.2.6 Conclusion

Given the analysis of options presented in this section, the Review Team supports the primacy of consents — licensing through consents is justified on the basis that:

- otherwise, the extent and type of commercial activities in parks are decided by the commercial operators and the economic imperatives that are driving them, not the park managers;
- there is no significantly less burdensome means of obtaining visitor numbers and details than through the consent system;

[46] Co-regulation has been adopted most commonly in professional areas (eg, the legal profession and cadastral surveying) as there are already established professional associations with broad coverage.

- they ensure that commercial operators have appropriate public liability insurance (see sections 4.1.2 and 6.1); and
- they have conditions relating to standards of behaviour so that potential for harm to individuals or impacts on the environment are minimised.

However, a more flexible self-regulatory approach may be utilised in circumstances whereby the activity does not threaten the natural values of the park.

RECOMMENDATION THREE — Consents should remain the key measure to control and monitor commercial operations in parks. However, consents may be unnecessary when those activities do not threaten the natural values of the park. If required, when consents are considered unnecessary there should be an obligation for commercial operators to provide details on the commercial activity undertaken in the park.

6.3 The Process for Granting Consents

The *Act* and administrative procedures determine what process are adopted for the allocation of licences, permits, leases, tenancies and occupations (ie, consents) under the *National Parks Act*.

A number of alternative allocation approaches are possible, with varying outcomes against the following general criteria:

- competitiveness — is the process competitive? A competitive process should deliver the consent to the person who values it the most;
- appropriateness — does the process deliver the consent to someone who can use it in a manner consistent with the park's objectives?
- openness — are people aware that the consent is available?
- transparency and accountability — does the allocation process have sufficiently transparent standards of assessment?

A brief overview of alternative methods is provided in Table 6.1 (next page), with explanation provided in the subsequent sections.

NCP principles suggest that the *National Parks Act* should aim to encourage the use of *per se* competitive allocation processes (eg, auctions, ballots and tenders).[47] This view is consistent with that advocated by a number of stakeholders.[48] Similarly, the NCP review of the *Forests Act* noted:

> "The Act should specify broad criteria or guidelines for licences where these relate to rights to commercially exploit forest produce. These should require: … market-based allocation where *practicable.*"
>
> KPMG Management Consulting, *NCP Review of the Forests Act 1958*, Melbourne, 1998, p.92. Emphasis added.

It is important to note the KPMG qualification as to practicability. The general preference for competitive allocation methods needs qualification because there is a range of circumstances where it may not be practicable to use a competitive allocation process and consents should not be allocated through market based mechanisms. For example,

- it may be appropriate to deviate from a competitive allocation process where particular parties are clearly best placed to undertake a commercial operation from a park management and sustainability perspective; and
- in some cases the costs for both the bureaucracy and potential lessees/licencees may be excessive, for example, when there is unlikely to be more than one or two potential applicants for a particular consent. In such circumstances the cost associated with a formal tendering process (eg, tender preparation, tender compliance, etc) are likely to be very high in comparison to the benefits (ie, achieving the maximum

[47] See The Allen Consulting Group, *Grants of Leases and Development Approval Processes — A National Competition Policy Review of the ACT's Land (Planning and Environment) Act 1991*, Final Report, Sydney, 2000.

[48] Victorian National Parks Association submission, p.2; and VRFish submission, p.1.

price, transparency of the process, etc), and hence alternative arrangements could be considered.

While these are significant qualifications to the general proposition, the default means of consent allocation should be via a competitive process such as an auction, tender or ballot. The Review Team suggests that the allocation processes stipulated in the Parks Victoria *Lease & Licence Process Manual* is consistent with this view.[49]

There are, however, some allocation methods currently employed in the review legislation that have the potential to be implemented in a less than openly competitive manner. The following sections address these methods against the NCP preference for competitive allocative processes.

[49] See Parks Victoria, *Lease & Licence Process Manual*, extracted from Parks Victoria Infoweb, 5 April 2001, Melbourne.

Table 6.1 — Possible Consent Allocation Methods

Allocation Method	*Description*	*Competitive Process*	*Appropriateness*	*Openness*	*Transparency & Accountability*	*Comment*
'First come, first served'	Provision of the consent on a 'first come, first served' basis	No	No	No	Yes	The process is clear (ie, given to those parties who ask first), but this approach fails each of the other criteria
Beauty parade	Provision of the consent to the person determined to be the most suitable recipient	Possibly	Possibly	Possibly	Possibly	This may be a formal or informal process of varying duration and thoroughness. The specifics of the criteria used and the manner of their application determines the attractiveness of this approach. It can be used in conjunction with other approaches (eg, a beauty parade can be applied as a precondition to participation in a ballot, auction, tender, etc)
Auction	Consents are awarded to the party who is prepared to bid the most over one or more rounds	Yes	No	Probably	Yes	There are various auction techniques that can be employed. Can be linked with pre-qualification requirements (eg, a beauty parade) to address appropriateness
Tender	Similar to an auction, but has a single round of bids	Yes	No	Probably	Yes	Can be linked with pre-qualification requirements (eg, a beauty parade) to address appropriateness
Ballot	This assumes that the ballot is for land at an accurately estimated 'market value'	Yes	No	Probably	Yes	Can be linked with pre-qualification requirements (eg, a beauty parade) to address appropriateness

Source: The Allen Consulting Group; Salant, "Auctions and Regulation: Reengineering of Regulatory Mechanisms" (2000) 17(3) *Journal of Regulatory Economics* 195; and Property Advisory Council, *Appropriateness of Dealing with Developers Outside a Competitive Process*, Canberra, 1999, p.4.

6.3.1 First Come First Served

In some cases (eg, apiary licences), consents are provided on a first come first served basis (ie, consents are issued in response to an approach by an individual party). This may be a problem under NCP when an initial party obtains a consent, but subsequent parties (who may not have known of the consent's availability) are denied an equivalent consent, or are subject to more stringent scrutiny because they are the subsequent applicants.

The first two of these options may raise competitive concerns as an advantage is provided to one particular party because other parties have been excluded from being provided the same opportunities to seek the consent. This raises the potential that particular interests may be favoured over others.

For example, in the context of apiary licences, anecdotal evidence was presented that suggests that the 'first come first served' allocation method could be capriciously exercised and will tend to favour incumbents in an industry who know the processes and the likelihood that licences will come available on a certain day. Similarly, in its review of the *Forests Act*, KPMG found that, "there may be adverse consequences for competition including the … virtual automatic renewal of short term licences such that they operate as perpetual licences".[50]

RECOMMENDATION FOUR — An allocation based upon the principle of 'first come first served' should not be relied upon to allocate consents except where there is clear excess capacity of an equivalent standard.

[50] KPMG Management Consulting, *NCP Review of the Forests Act 1958*, Melbourne, 1998, p.84.

6.3.2 Designation of Suitable Persons

There are some particular circumstances in which the *National Parks Act* generally restricts the availability of licences and explicitly determines who are the most suitable people to have a licence. For example, with respect to grazing in the Alpine National Park, s.32AD states that:

> "(1) The Minister may grant licences in respect of the alpine and bush grazing licence areas in accordance with the agreement on provisions for alpine and bush grazing licences endorsed by the Minister on 25 May 1989.
>
> (2) A person who--
>
> (a) immediately before the commencement of section 7 of the National Parks (Alpine National Park) Act 1989, was the holder of a cattle grazing licence in respect of any part of the alpine and bush grazing licence areas; and
>
> (b) applies in writing to the Secretary within 60 days after that commencement
>
> is entitled to be granted a licence under sub-section (1).
>
> (3) The Minister may grant licences in respect of the park described in Part 37 of Schedule Two in accordance with the agreement on provisions for alpine tourism licences endorsed by the Minister on 25 May 1989."

The Agreement referred to in sub-s.32AD(1) provides that:

> "6. A licence granted under this Agreement may be transferred or assigned by the holder, with the consent of the Minister after consultation with the Alpine Advisory Committee, to a person whom the Minister is satisfied is a member of a family of Mountain Cattlemen or any other approved person.
>
> 7.(1) If a holder of a licence dies, the personal representative of the holder may, within 12 months after the death, transfer or assign the licence in accordance with clause 6 as if the personal representative were the holder.

(2) In the event of licences lapsing, for any reason, the licence may be re-allocated by the Minister after consultation with the Alpine Advisory Committee to a member of a family of Mountain Cattlemen and/or any other approved person."

The NCP concern is that this arrangement restricts the ability to competitively allocate licences and gives ongoing rights not only to the current licence holder, but also to his or her family. This excludes the potential for new entrants, who are not family members or who are not classified as an 'approved person', to particular areas of the park.

Evans argues that the provision in sub-cl7(2) of the Agreement that provides for a transfer to 'any other approved person' means that the provisions are not restrictive.[51] The Review Team disagrees on the basis that the restriction is given effect because there is an advantage provided to members of the Mountain Cattlemen's families because they do not have be 'approved' when there are no criteria upon which the assessment of approval is made. (In both cases, however, the consent of the Minister is required to transfer the licence.)

A number of stakeholders argued that the specification of particular licence recipients reflects an acknowledgment of the historical links of that group with the land and that this historical association should be preserved. For example, Evans notes that:

> "The Alpine National Parks Act is unusual in that it not only created a very large new national park, but at the same time legislatively and very specifically recognised the heritage of mountain cattle grazing by 'Mountain Cattlemen' families over a period of 150 years."
>
> Evans submission, p.1.

The implicit assumption of this allocative process is that members of a Mountain Cattlemen's family are the most appropriate persons to undertake grazing in alpine regions. This is problematic because:

- the definition of 'family' is so broad that someone who has never set foot in Victoria (let alone Australia) has priority over all other parties; and
- there is no mention as to the precise skills or characteristics that make family members of Mountain Cattlemen more appropriate than other parties.

There are a number of approaches that could be adopted in preference to the existing hereditary right:

- specification of the skills necessary to graze in the alpine region — rather than a test unrelated (or at best poorly related) to skills. This approach appears to be consistent with the MCAV's view that, "If changes are to be made to the current legislation then MCAV is of the strongest opinion that any change must specify that any person/company taking up a grazing licence area must be able to clearly demonstrate that they have the practical skills necessary to successfully manage any high country grazing run. The emphasis must be placed on a demonstration of *practical* ability."[52] This test of practical ability would have to be clearly defined and applied to all applicants. The Review Team suggests that any 'practical ability' test should not be read so narrowly as to exclude people who can demonstrate that they have (or can acquire through staff appointments) the knowledge and experience gained through experience and education (including from other fields) such that they can graze cattle in a manner consistent (to the degree feasible) with the objectives of the park.

[51] Evans submission, p.1.

[52] Mountain Cattlemen's Association of Victoria submission, p.6. Emphasis in the original.

- market-based allocative mechanisms — this mechanism would allow parties who value the land the most to bid for the right to graze. Some stakeholders argued this would be inappropriate if it allowed people to obtain licences who:
  - did not have the skill and knowledge to graze cattle — the Review Team does not accept this argument on the grounds that no similar skill test is applied to family members of the Mountain Cattlemen; or
  - did not want to use the licence to actually graze on the tract of land — this is a problem if it is the stated policy of the government to continue grazing in the alpine regions for historical and cultural reasons.

If alpine grazing is to continue,[53] the Review Team's preference is for a combination of a skills test and a market mechanism. Parties should be able to bid for a grazing licence once they have pre-qualified by demonstrating their ability to manage the grazing of cattle.

RECOMMENDATION FIVE — If alpine grazing is to continue then section 32AD should be amended to specify that licences should be offered through a competitive process to those parties who can demonstrate the requisite skills. Where the number of applicants is limited a reserve price should be established that equates to the estimated market value of the licence.

[53] A major feature of the stakeholder consultations — as reflected in the subsequent submissions — relates to the threshold issue of the appropriateness of grazing in the alpine parks. Some parties, such as the VNPA (submission, p.2), were adamant that, "Activities such as cattle grazing which conflict with the primary objective of the Act should cease at the earliest opportunity." Other parties, such as the MCAV, argued that for cultural and historic reasons grazing rights should be maintained. The Review Team is not qualified to comment upon the environmental appropriateness or inappropriateness of grazing in alpine regions. It notes, however, that the Government's policy is to examine ways to remove all grazing from the Alpine National Park.

The Review Team suggests that when a consent expires there should again be a preference for a competitive process.[54]

6.4 Consent Periods

The *National Parks Act* sets out a range of consent durations depending upon the activity involved and the class of park to which the consent relates. An overview of the various consent terms is shown in Table 6.2.

Table 6.2 — Consent Terms

Consent Type	*Activity*	*Maximum Duration*
Permit	Use of building, camping place or facility	6 weeks
Permit	Apiary	6 months
Licence	Grazing in Barmah Park, Lysterfield Park	1 year (renewable)
Permit	Commercial tour operators	3 years
Permit	Business in a park	3 years
Tenancy or licence	Pre-existing use	7 years
Tenancy	Camping ground or building in a park	7 years
Tenancy or permit	Manage or occupy a building or facility on land acquired for a park	7 years
Licence	Grazing in the Alpine National Park	7 years
Tenancy	Riding school at Arthurs Seat	7 years

[54] This position is supported in: Victorian National Parks Submission, p.2; and VRFish submission, p.2.

Consent Type	*Activity*	*Maximum Duration*
Licence	Cattle grazing by public authorities in Mornington Peninsula National Park	10 years
Tenancy	Not more than one hectare for use as a kiosk cafe or store or for scientific research or for a ski tow	20 years
Tenancy	Rover Scout Chalet in the Alpine National Park	20 years
Lease	Arthurs Seat chairlift	20 years
Lease	In Mount Buffalo National Park: public buildings, skiing runs, ski lifts or ski tows, and any other purpose consistent with the objects of the Act	21 years
Lease	O'Shannassy Lodge — Yarra Ranges National Park	21 years
Tenancy	Lifesaving clubs in Mornington Peninsula and Port Campbell National Parks	21 years
Lease	Electricity generation company in the Alpine National Park	99 years
Consent	Public authorities	Unspecified
Agreement	Electricity companies	Unspecified

Source: *National Parks Act 1975*

In establishing consent terms there is a need to balance the consent holder's desire for certainty (ie, so that they can undertake the investment required and recover those costs) with the public's interest in providing shorter consent terms to provide flexibility for park managers and to provide for more frequent competition for consents. Furthermore, there may be a NCP concern if competitors are provided differing consent terms.

Amongst stakeholders there was a general view that current consent durations are 'about right'.[55] However, as can be expected, some parties suggested that consents in which they have an interest should be of a longer duration. For example, Arthur's Seat Scenic Chairlift noted that, "In the case of high investment value infrastructure lease term should at least equal the depreciation rate ie. 25 years plus."[56]

The Review Team considers that there is scope for the rationalisation of consent terms.[57]

The Review Team considers that the approach adopted for parks should be consistent with that recommended in the NCP review of Victoria's Crown land management legislation.[58] The preferred Crown land approach was, rather than a plethora of maximum consent terms, to introduce a single maximum term for each consent type. This should be the aim of reform with respect to national park consents, although the Review Team notes that the disparity between some terms for particular types of consents are often significant[59] and there may be a need to have more than one duration for a particular type of consent.[60]

A key advantage of a standardised (and often shorter[61]) consent term would be that the government could re-assess the consent's details at more frequent intervals, taking into account:

55 Victorian National Parks Association submission, p.2.

56 Arthur's Seat Scenic Chairlift submission, p.1.

57 This view was supported in the Tourism Victoria submission, p.2.

58 See The Allen Consulting Group, *Crown Land Management Legislation in Victoria: A National Competition Policy Review*, Sydney, 2000.

59 For example, a permit for the use of a building, camping place or facility is only six weeks, a permit for an apiary is six months, and a permit for a business in a park is three years.

60 For support of this qualification see Victorian National Parks Association submission, p.2.

61 The Review Team does not have definitive consent terms in mind, but suggests

- the long-term future of the park;
- the immediate and medium-term financial returns; and
- the desirability of retaining the incumbent tenant.

Park managers would be able to offer a consent up to the specified maximum.

RECOMMENDATION SIX — The National Parks Act should, if possible, be amended to provide standardised (or at least simplified) maximum terms for permits, licences, tenancies and leases.

that the final standard terms should be developed by DNRE in consultation with relevant stakeholders having regard to the objectives of the legislation.

Chapter Seven

Fees for Licences, Permits, Leases, Tenancies and Occupations

Fees for consents can be set by a range of mechanisms:

- a market valuation can be placed upon the consent;
- calculation — a formula can be developed to provide an administratively simple mechanism for approximating a fee equivalent to a market value (or at a percentage of the market value if that is desired); or
- a minimal fee — this is an arbitrary fee. It can be set as a stand-alone fee or it may be levied if either of the previous fee setting approaches are less than this minimum (this approach is used with respect to Crown land leases).

Fees for consents are generally set on the basis of a market valuation.

In some cases, however, a formula is used to price consents. For example:

- at present the fee for commercial tour operators is set at $1.10 per client per day. It is not clear whether this fee is set to approximate the market value of consents, but that it is a flat fee irrespective of use suggests that it is not; and
- grazing licence fees are set on a per head basis, and are not necessarily reflective of market values.

The NCP concern with respect to the charging for the use of parks is that the establishment of charges may be done in a way that distorts competition in various markets. For example, if differential bases are used for the calculation of equivalent consents then there may be different charges applied to like firms, and hence a clear competitive impact.

The manner in which permits are allocated is inherently tied to the issue of how prices are determined. Table 7.1 provides an indication of the price possibilities associated with the various allocation methods.

Table 7.1 — Allocation Methods and Pricing Implications

Allocation Method	*Pricing Implications*
'First come, first served' basis	Any price is possible
Following inquiries as to who may be most suitable to have a lease/licence	Any price is possible
Ballot	Any price is possible
Auction	Market price
Tender	Market price

Source: The Allen Consulting Group

The Review Team suggests that consents may result in a subsidy to the party receiving the consent if it is consciously provided at a valuation less than market value.[62] There are two broad concerns that arise under these circumstances.

Firstly, pricing upon anything but a market basis may lead to allocative inefficiencies if land is not put to its most 'productive use'. In a market environment the productive use of land is normally determined by its price. The higher land is valued the more productive it is assumed to be. However, where there are externalities (or other market failures) the price will not

[62] If estimating a market value this should also include the full cost to the government of granting the lease/licence as staff time involved in providing assistance, such as facilitation and liaison, has a cost in terms of salaries, on–costs and opportunity costs — Victorian Auditor–General's Office, *Promoting Industry Development — Assistance by Government*, Special Report No.37, October 1995, p.52.

necessarily reflect the productivity of the land.[63] For example, governments often regulate to provide parks in circumstances where the natural environment would not be adequately valued through a market process (ie, there are positive externalities), and sometimes discounts from the market value are provided as an acknowledgment that the land has broader values that need protection by the lessee. A consent at less than market value will maximise the productive use of the land where the Government can identify that the allocation of the land via the market will not take into account relevant negative and positive externalities, and any deviation from the market value represents the value of any such externality.

Secondly, where a consent is provided at less than market value a range of further distortions and inefficiencies may arise:

- while the government revenue foregone because of a less than market value consent may be offset by reduced outlays from particular programs (eg, reduced environmental management costs), and the revenue foregone may be offset by higher tax revenue (eg, payroll tax associated with a commercial venture operating in a park), a decline in revenue from one sector (keeping aggregate spending constant) must be offset by higher taxation on other sectors. This is likely to dampen competition and innovation in the 'penalised' sectors and is likely to impose a net cost on the economy as a whole;[64]
- in addition to indirect costs (and their negative multiplier effects), there may also be negative consequences flowing from providing assistance to a particular firm — such as a loss of revenue or jobs for other competing firms; and
- the establishment of differential charges may be done in a way that distorts competition in downstream markets. For example, if differential bases are used for the calculation of different consents then there may be different charges applied to like firms.

Given these concerns the Review Team suggests that the default position should be that consents should be offered at market value. While this is the preferred default approach, the Review Team acknowledges that this may be impractical in some situations where it is difficult to determine a market value for some uses.

RECOMMENDATION SEVEN — As a default position, fees should reflect market values, either as a result of a competitive allocation process or on the basis of a calculation/formula which approximates the market value when a competitive allocation process is not employed.

Despite this general position and these concerns, there are a number of reasons why governments may provide consents below market value:

- a discount on the land's market value may be used as an inducement to attracting necessary commercial development to a park;
- the ability to choose a value without undertaking an assessment of the market value provides administrative flexibility and may reduce the costs of administration; and
- a discount may be used as acknowledgment that there are costs associated with the proper management of the land (eg, to stop erosion, pest control, to keep weeds down, etc).

While there was little discussion regarding the valuation of consents generally, there was considerable discussion by stakeholders regarding the valuation of the alpine grazing licences:

[63] In this case externalities need to be demonstrable and exceptional. The 'demonstrable and exceptional' requirement arises because, to some degree, all activities have positive and negative impacts upon third parties.

[64] Industry Commission, *Inquiry into State, Territory and Local Government Assistance to Industry*, AGPS, Canberra, 1996, p.573.

- one party (ie, the VNPA) claimed that the licences do not reflect their market value;[65] and
- another party (MCAV) argued that the licences are a true reflection of the market. They argue that the existing fees reflect the management costs associated with the land.

It is important to stress that the problem of specifying a particular rent will largely be overcome if competitive consent allocation methods are employed in preference to managed processes (see section 6.3).

In the event that there is a continuing reliance upon negotiated fees the Review Team suggests that there are a couple of issues that should be addressed:

- the MCAV argues that fees should be discounted from commercial agistment rates because of, "the distance from the home property".[66] The Review Team disagrees with this proposition. If there is to be a discount from the commercial agistment rate then that discount should reflect matters intrinsic to the land's use, and not the identity of the licensee;
- the apparent high returns from grazing in alpine regions should be explicitly considered. Evidence for this observation includes:

> "studies on alpine grazing have found that cattle returning from runs are usually 'in first class condition and can bring top prices' due to a perceived increase in quality (Chisholm & Fraser 1997). At special autumn sales in Mansfield and Myrtleford, stock grazed in alpine areas have historically attracted prices 10 per cent higher than other stock from Victoria and southern New South Wales (pers. comm. Office of Valuer General 1998)."
>
> *North East Victoria Comprehensive Regional Forest Assessment*, 26 August, 2000.

RECOMMENDATION EIGHT — Where there is any discount from a market-set fee the discount should reflect only:

- *the extra costs associated with any licence restrictions/requirements which would not be applied to licensees of comparable freehold/Crown land; and*
- *reduced productive capacity because of any special characteristics of the park.*

The discount should not reflect the particular circumstances of the licensee (eg, distance from the home property).

Any discount should be determined in a transparent manner and made public.

[65] See Barrett, "What Price Alpine Grazing?" (September 1990) *Park Watch* 10.

[66] The Mountain Cattlemen's Association of Victoria submission, p.9.

Chapter Eight

Councils and Committees

The *National Parks Act* establishes a number of councils and committees with varying advisory and regulatory powers. These are:

- the National Parks Advisory Council, which advises the Minister on the administration of the *Act* and on the granting of various leases and other matters;
- the Alpine Advisory Committee, which has particular functions including advising on the transfer of grazing licences in the Alpine National Park; and
- the Barmah Forest Grazing Advisory Committee, which advises on grazing matters — eg, who may be granted a licence — in Barmah State Park.

In addition the Minister may appoint a park advisory committee to advise the Secretary on the management of particular parks.

8.1 National Competition Policy Concerns

An NCP concern that may be said to arise with respect to the establishment of particular councils and committees is that mandatory inclusion of particular stakeholders means that there may be the potential for 'regulatory capture' such that advice and decisions are skewed in favour of groups represented on the councils and committees.[67] Furthermore, NCP is concerned with ensuring that legislation is focused on achieving the legislative objectives and is not made unnecessarily complex.

Problems with particular councils and committees are identified in the following sections.

8.1.1 The National Parks Advisory Council

A concern with respect to the establishment of the National Parks Advisory Council is that the specification of the Council's membership gives a privileged position to members of a number of distinct organisations. For example, sub-s.10(1) of the *National Parks Act* provides that:

> "For the purposes of this Act, there shall be a National Parks Advisory Council consisting of the Director and eight other members appointed by the Governor in Council of whom —
>
> (aa) one shall be the Secretary or his or her nominee;
>
> (a) one shall be nominated by the Minister from a panel of not less than three names submitted by Environment Victoria Inc.;
>
> (b) one shall be nominated by the Minister from a panel of not less than three names submitted by the Victorian National Parks Association;
>
> (c) one shall be a professor or teacher of ecology biology or earth science at a University in Victoria who is nominated by the Minister;
>
> (d) one shall be nominated by the Minister from a panel of not less than three names submitted by the Municipal Association of Victoria within the meaning of the Municipal Association Act 1907; and
>
> (e) four shall be persons (at least two of whom resides outside the metropolitan area as defined in section 201 of the Melbourne and Metropolitan Board of Works Act 1958) with experience in matters affecting the interests of the community nominated by the Minister."

While sub-s.10(1)(e) provides for the appointment of people from any organisation, the concern is that there may well be suitably skilled and/or qualified parties beyond these specified organisations who would have an

[67] This concern is demonstrated by the calls by parties who are not members to be included — see VRFish submission, p.2.

interest in serving on the Council but who are not provided the automatic right of representation.[68]

8.1.2 Alpine Advisory Committee

Similar to the concerns expressed with respect to the National Parks Advisory Council, the Alpine Advisory Committee's membership is specified in sub-s.32AE(3) in organisational terms:

> "(3) The Alpine Advisory Committee shall consist of —
>
> (a) five persons nominated by the Minister, one of whom shall be appointed by the Minister as chairperson; and
>
> (b) eight persons, each of whom shall be appointed by the Minister from a panel of three persons nominated by each of the following--
>
> (i) Victoria National Parks Association;
>
> (ii) Conservation Council of Victoria;
>
> (iii) Victorian Federation of Bush Walkers;
>
> (iv) Victorian Farmers' Federation;
>
> (v) Mountain Cattlemen's Association of Victoria Inc.;
>
> (vi) Victorian Field Naturalists Club;
>
> (vii) Australian Deer Association Inc.;
>
> (viii) Victoria Association of Four Wheel Drive Clubs Inc.; and
>
> (c) one person who is engaged in commercial tourism activities in the area nominated by the Director of the Victorian Tourism Commission; and
>
> (d) two persons appointed by the Minister from a panel of six persons nominated by the Municipal Councils whose municipalities adjoin the park described in Part 37 of Schedule Two."

Again, the concern is that the *Act* explicitly favours certain organisations and may exclude other organisations or skilled individuals with interests and concerns that may be different to those from the specified organisations. For example, the VNPA argues that, "The Alpine Advisory Committee membership is too specifically defined in relation to sectional interests with commercial interests in parks."[69]

8.1.3 Barmah Forest Grazing Advisory Committee

Yet again, the concern with respect to the establishment of the Barmah Forest Grazing Advisory Committee is that privileged positions are provided to particular organisations. For example, sub-s.32F(2) provides that:

> "(2) The Advisory Committee consists of eight members appointed by the Minister of whom —
>
> (a) one is to be appointed by the Minister as the convenor; and
>
> (b) three are to be persons nominated by the Barmah Forest Cattlemens Association; and
>
> (c) one is to be a person nominated by the Yielima Forest Graziers Association; and
>
> (d) three are to be officers of the Department of Natural Resources and Environment."

In this case this is a particular concern as the nominated organisations may have an interest in excluding new competitors from grazing.

[68] The potential anti-competitive concerns associated with representation on advisory bodies is demonstrated by the Australian Competition and Consumer Commission's concern about 'over-representation' on technical standards committees — see GWA International Limited, *Undertaking to the Australian Competition and Consumer Commission Given Pursuant to Section 87B of the Trade Practices Act 1974*, Undertaking No.97/23M, Brisbane, 25 March 1997.

[69] Victorian National Parks Association submission, p.4.

8.1.4 *Park Advisory Committees*

Section 14 of the *Act* enables the Minister to appoint advisory committees for a park or parks to advise the Secretary on the management of parks. There are currently no committees established under this section. However, Parks Victoria, as manager of the parks, has appointed several non-statutory committees to advise it.

There is no NCP concern with respect to park advisory committees.

8.2 Possible Reform Approaches

8.2.1 *Retain the Status Quo*

Stakeholders who are represented on the bodies were generally happy with current arrangements:

> "Historically councils/committees comprising stakeholders have been successful. There has been a sense that the Minister has consulted widely, and that the community are [sic] properly represented and able to put recommendations forward. There has been transparency within the committees which also leads to acceptance of majority decisions."
>
> Mountain Cattleman's Association of Victoria submission, p.11.

However, stakeholders who were not represented on existing bodies (or who felt under-represented) were generally concerned that they lacked the access provided to other organisations.

8.2.2 *Focus Membership on Skills*

An alternative approach to that in sub-s.10(1) is to cast membership in terms of skills. An example of this general approach is provided for by s.7 of the *Catchment and Land Protection Act 1994*. It provides that:

> "(1) The Council consists of not more than 10 members who are to be appointed by the Governor in Council on the recommendation of the Minister.
>
> (2) The following provisions apply to the membership of the Council—
>
> (a) in recommending persons for appointment, the Minister must have regard to the need for the composition of the Council to reflect the major land and water uses in the State, including rural, urban, private and public uses; and
>
> (b) in recommending persons for appointment the Minister must have regard to the need for the Council members to have between them experience and knowledge of land protection, water resource management, primary industry, environment protection and conservation and local government; and
>
> (c) one member is to be a nominee of the Secretary."

The focus of this approach is the specification of skills and interests rather than organisational allegiances.

A major concern expressed by a number of stakeholders is that a focus on skills would shift membership from being representative of stakeholders to one of technical experts.[70] The Review Team does not think that this need be the case.

8.2.3 *Using Stakeholder Panels to Select Members*

An option presented by a number of bodies is to seek a stakeholder consensus as to a committee's membership:

> "a Minister could ask several like-minded stakeholder groups to nominate a panel of names from which just one person would be selected. This would encourage these like-minded groups to get together and all

[70] For example, see Mountain Cattlemen's Association of Victoria submission, p.11.

nominate a preferred person or at least to make sure they nominate highly suitable people."

Public Land Council of Victoria, *Government Advisory Committees*, Melbourne, 2000, p.1.

The Victorian Farmers' Federation (VFF) also proposed a similar arrangement, modelled on practices adopted for appointments to Commonwealth statutory bodies.

While this option is attractive when there is a number of stakeholders with similar backgrounds, it is problematic when there are potentially many disparate individuals or stakeholder groups.

8.2.4 Remove the Legislative Basis for Advisory Bodies

It is often the case that it is not necessary to have an advisory council specified in the legislation. For example, even without a legislatively-backed consultative mechanism it is often the case that Ministers will seek the advice of stakeholders, and in any case stakeholders will often proffer their advice to the Minister.

An alternative arrangement would be to continue to have advisory bodies, but to remove their legislative status. For example, the Minister could simply appoint an advisory panel.

One concern with any move to a non-legislative advisory structure is that the Minister is not required to seek advice, and hence there may be a perception that the community has little input into decision-making processes (ie, less transparency). This concern was echoed by the MCAV:

> "MCAV is also firmly of the view that advisory councils and committees are better if formally legislated. This makes for transparency as to the organisations providing membership to the committee, and will assist in requiring the Minister to consult over a broad spectrum of those with a vital interest in any committee decisions."
>
> Mountain Cattleman's Association of Victoria submission, p.11.

8.2.5 Discussion

The debate about the merits of the current advisory bodies tended to be polarised:

- those who have entrenched positions within the bodies favour the status quo; and
- those who perceive themselves to be on the outer suggest that change is required to broaden the membership, either by including them as an acknowledged stakeholder or moving to a skills focus (which naturally includes the skill which they or their members possess).

The Review Team suggests that in order to overcome the entrenched advantages provided to the groups specified in the *Act* (ie, they have a guaranteed role on an advisory body) is to remove the bodies from the *Act*.[71] This approach is consistent with the practical use of park advisory committees (see section 8.1.4) and the view that NCP focuses on having the 'minimum effective' regulation — the Executive Director of the National Competition Council (NCC) has stated that:

> "the NCP legislation review program is about:
>
> — ensuring that, where government does regulate, that regulation is necessary, effective and well designed;
>
> — ensuring that regulation is not used to prop up the incomes and conditions of vested interest groups, at the expense of the rest of us; and
>
> — replacing the 'maximum visible regulation' of the past with 'minimum effective regulation', which can pass the test of 'net public benefit'."
>
> Cope, "National Competition Policy: Rationale, Scope and Progress, and Some Implications for the ACT and the Role of Government" at

[71] See, for example, The Allen Consulting Group, *Surveyors Act 1967: A National Competition Policy Review*, Final Report prepared for the ACT Department of Urban Services, Canberra, 1998, pp.46-51.

the *ACT Department of Urban Services' Summer Seminar Series*, Canberra, 20 March 1998, p.17.

Under this approach, unless advisory bodies need to be constituted under the *Act* then they should be constituted through non-legislative means.

The concern expressed by some is that this approach gives the Minister discretion which is potentially more restrictive and less transparent than the current arrangements. The Review Team disagrees with this view and considers that there is no overwhelming reason why advisory bodies need to be incorporated within the *Act*:

- while there is a concern that removing the legislative basis of the bodies will lessen the ability of the community to contribute to policy and administrative matters and may be less transparent, it is clear to the Review Team that the strength of convictions held by all the principal stakeholders means that they will continue to represent their members' interests irrespective of whether or not the advisory bodies have legislative status. The removal of the special privileges for certain stakeholders puts all such interest groups on an even footing;
- accountability and transparency can be provided by greater disclosure of advisory committee minutes and conclusions rather than relying on the representation provided by specified stakeholders;
- legislative stipulation of an advisory committee's membership does not actually guarantee transparency in respect of the process for seeking advice. That is, the Minister may nevertheless choose to disregard the advice of the committee and seek advice from others. While this may be seen as an argument in support of the *status quo* (ie, advice can be sourced flexibly from a variety of parties) it demonstrates that the legislated specification of members to a legislated advisory committee does not make transparent the provision of advice to the Minister; and
- even when an advisory body is created by an Act this provides no additional guarantee that the Minister will take the advice of the body.

RECOMMENDATION NINE — Advisory bodies should be removed from the Act. This does not stop the Minister from consulting with the community through advisory bodies and other fora.

If advisory bodies continue to be constituted under the *Act* then the Review Team suggests that the selection criteria should be specified in terms of interests, skills and experiences and membership nominations should be widely invited. This approach is consistent with approaches adopted in recent legislation[72] and should continue to provide knowledgeable community input into decision-making processes.

RECOMMENDATION TEN — If advisory bodies are still constituted under the Act then membership nominations should be widely invited and the selection criteria should be specified in terms of relevant skills and experiences.

[72] See s.7 of the *Catchment and Land Protection Act*.

Chapter Nine

The Licensing of Jetties and Vessels Under the *Water Industry Act*

Section 135A of the *Water Industry Act* establishes a framework for the issuance of metropolitan waterway through: licences for hire and charter vessels (16 have been issued); and jetty and mooring licences (30 have been issued for private jetties, and none with respect to commercial operations)[73].

9.1 An Overview of the Licences

9.1.1 Licensing of Hire and Charter Vessels

To provide some broader context, s.135A requires all commercial passenger vessels that operate on the Yarra (the major relevant waterway) to hold a current licence from Melbourne Parks and Waterways (through Parks Victoria as the manager). The licence is subject to any covenants, conditions, reservations and restrictions set by Parks Victoria, and may be cancelled if these terms and conditions are breached. The provisions of the licence are such that:

- the licence is for a specified time;
- the licence holder may be restricted to the use of specified berths;
- the licence is non-transferable;
- the licensee is to ensure its good public behaviour with respect to a number of conditions, including any specified standards of service;
- the licensee is to maintain and, on request, provide Parks Victoria with information relating to a complete and proper record of all charters and business involving the Vessel, including the purpose of the particular charter or business; and
- a commercial passenger boat operator can hold more than one licence (none do so) which may include an unlimited number of boats.

The selection criteria set by Parks Victoria for granting a commercial passenger boat operator's licence require the operator to have a business plan which includes service standards, and boats to meet safety and service standards.

9.1.2 Licensing of Jetties and Moorings

Licensing of jetties and moorings provides a consent to have such structures on Crown land.

The obtaining of a s.135A licence is merely one step in a complicated approvals process. People wishing to erect a jetty require a council planning permit, a council building permit, and approvals from the waterway authority for building on a floodplain.

Beyond the power to rescind a licence if the jetty is not being used for the purpose for which the licence was granted (ie, necessitating the removal of the jetty), the *Act* is not clear as to what further purpose the licensing of jetties is intended given the regulation of jetties provided through other regulatory regimes.

[73] Commercial operators want to operate from jetties in the central business district, where the river banks are reserved Crown land and hence falls outside s.135A. It should be noted that s.135A of the *Act* has been reviewed in accordance with the Terms of Reference for this review. These required the *Act*, incorporating amendments up to and including Act No. 22/99, to be reviewed. However, s.135A was subsequently amended by the *Water Industry (Amendment) Act 2000*. The jetty licensing provisions remain in s.135A but the power to license vessels will be achieved through regulations that are currently being developed.

9.2 Discussion

There are two general frameworks in which the licensing of vessels and jetties have generally been considered:

- the first is that such licences are a form of business licensing and hence there are likely to be clear ramifications for NCP purposes; and
- the second is that the waterways are Crown land, and the Crown, through its management agency (Parks Victoria), should be able to directly control uses and structures occurring on its land (waterways) as any property owner does. Under this view there would be no NCP concern as all that Parks Victoria is doing is enforcing the Crown's property rights.

The Review Team considers that both approaches can be considered applicable to varying degrees. As a result of this duality, there are a number of contradictory impacts/observations that were identified by the Review Team:

- as Crown land, the Crown has a right to control the use on its land — in this case, the waterways — as it wishes;
- however, there are clear ramifications for businesses because of the licensing obligations;
- and, beyond principle, the rationale for regulating the use of waterways is limited at this time given that
  - the waterways are not pristine, and so usage is not meaningfully degrading the natural quality of the waterways; and
  - the waterways are not congested to the point that there is a need to exclude parties on a consistent basis;[74]
- but, as noted by the Office of Regulation Reform (ORR) with respect to vessel licensing, "The selection criteria does not appear to impose any significant barriers to entry."[75] However, there have been concerns about the lack of berthing facilities in some high usage areas.[76]

The Review Team notes the ORR's recent proposals to overhaul vessel licensing on the Yarra and associated berthing arrangements.[77] Upon reflection, the Review Team considers that the approach set out by the ORR acknowledges the Crown's right to regulate its own land, but seeks to do so in a least cost manner that maximises the public interest by improving safety and removing the potential for operators' disputes. As such, the Review Team support's the ORR's recommended approach.

RECOMMENDATION ELEVEN — Licensing of hire and charter vessels and jetties and moorings should be retained by Parks Victoria, but in a manner consistent to that recommended by the Office of Regulation Reform in its review of the Yarra River.

An issue that concerns the Review Team, and which was not addressed by the ORR, is the duplicative processes involved in gaining approval to construct and operate jetties and moorings. This may need to be an issue considered on a whole-of-government basis.

[74] See Office of Regulation Reform, *Yarra River Traffic: Managing Access — Final Report*, Department of State and Regional Development, Melbourne, 2001, p.7.

[75] Office of Regulation Reform, *Yarra River Traffic: Managing Access — A Review of the Yarra River Regulatory Framework, Discussion Paper*, Department of State and Regional Development, Melbourne, 2000, p.13.

[76] Office of Regulation Reform, *Yarra River Traffic: Managing Access — Final Report*, Department of State and Regional Development, Melbourne, 2001, p.8.

[77] See Office of Regulation Reform, *Yarra River Traffic: Managing Access — Final Report*, Department of State and Regional Development, Melbourne, 2001.

Chapter Ten

Parks Funding

This chapter analyses the current system of park funding under both the *Water Industry Act* and the *National Parks (Fees and Charges) Regulations* and assesses the merits of possible alternative funding approaches.

The current funding mechanisms are discussed jointly because, as noted by the VNPA:

> "The establishment of Parks Victoria as the body responsible for the management of both the metropolitan parks and open space areas under the National Parks Act 1975 provides the opportunity for the funding arrangements for park management to be reviewed and rationalised."
>
> Victorian National Parks Association submission, p.5.

10.1 Current Approaches

10.1.1 The Levying and Collection of Rates Under the Water Industry Act

Sections 139-143 of the *Water Industry Act* relate to the metropolitan rate or what is known generally as the 'parks charge'.

This is an annual charge levied on residential and commercial properties throughout Melbourne. It is used to fund the purchase and management of particular open space, parks (including national parks) and waterways across the greater metropolitan area (including the Mornington Peninsula and Pakenham areas). It is also used to fund the Melbourne Zoo and the Royal Botanic Gardens.

Section 139 empowers the Governor in Council to make, and for the rating authority (the Minister) to levy, a rate in relation to land within a specified area (part of the greater metropolitan area). Sections 139-141 specify the basis to the rate (in terms of the valuation of the rateable land) and other matters applying to the recovery of the rate.

The charge has been included on water bills since 1958 and is calculated by applying a rate to the Net Annual Value of commercial and residential properties in the metropolitan area. A minimum charge — $43.80 in 2001–02 — applies to the vast majority of ratepayers (ie, approximately 91 percent or 1.265 million properties which contribute 77 percent of revenue raised by the levy).

10.1.2 Park Entry Fees

The *National Parks (Fees and Charges) Regulations 2001* sets out a range of fees associated with entry to land managed under the *National Parks Act*. The nature and scale of fees for vehicle entry are set out in Appendix B.

10.2 Principal Concerns

This section highlights a number of concerns that may be said to exist with respect to the current funding mechanisms.

10.2.1 Horizontal and Vertical Equity

Horizontal Equity

Under the principle of horizontal equity people with the same economic circumstances should be treated the same. The current funding mechanisms violate this principle in a number of ways:

- because the parks charge is only levied on residential and commercial properties in Melbourne, people and corporations outside of Melbourne (who may be in the same economic circumstances as those in Melbourne) do not have to pay the parks charge;

- as some people in Melbourne also visit parks, this effectively means that they pay both the entry fee and the parks charge while people and corporations in similar economic circumstances outside of Melbourne may not make any contributions to the preservation and maintenance of Victoria's parks; and
- some parks have entry fees, but most don't. This concern was expressed forcefully by the VNPA:

> "The current arrangements in respect of the charging of vehicle entry fees are antiquated and in urgent need of review.
>
> The basis for charging vehicle entry to parks arises from the days when there were only a small number of parks which were managed by committees of management and charging vehicle entry fees was one way for the committees to raise revenue to fund park operations.
>
> Only a small number of parks currently have vehicle entry fees and in many instances these fees are charged only on a seasonal basis.
>
> It is acknowledged that it is not possible or practical to charge vehicle entry fees to the majority of parks because most parks have multiple entry points.
>
> High visitation parks such as Port Campbell and the Grampians National Parks do not charge entry fees."
>
> Victorian National Parks Association submission p.3.

Vertical Equity

The principle of vertical equity suggests that people in different economic circumstances should be treated differently (ie, those on higher incomes should pay more). Several constructs have been suggested for measuring economic circumstances, including the *ability to pay* principle which proposes that charges be related to the ability of each person to pay. In this instance the parks charge, which is based on the Net Annual Value of commercial and residential properties is advocated as a principle of fairness because the different economic circumstances of people and corporations are taken into account in determining the charges due.

While property values are used as an indicator of economic circumstances, the parks charge violates the principle of vertical equity because it also imposes a minimum charge — $43.80 in 2001-02. As this minimum charge applies to the vast majority of ratepayers in Melbourne (91 percent) the majority of people and corporations are not charged fees according to their economic circumstances. Also as park entry fees are charged on a flat rate people and corporations, regardless of economic circumstances, are treated the same (in relation to entry fees charged under the *National Parks (Fees and Charges) Regulations 2001*, there is the power to discount fees or give some exemptions to the payment of fees).

10.2.2 Relative Prices

Externalities created by the maintenance of parks (eg, the community's general feeling of wellbeing knowing that environmental values are being maintained or enhanced through park maintenance) do not increase — or at least do not increase significantly — with increases in the use of parks. This is in contrast to the 'textbook' treatment of externalities, for example pollution from a factory, which, because it is unpriced, leads to too much production from that factory. A typical solution in this case is to tax the output of the factory sufficiently so that the social optimum in terms of factory output and pollution is reached.

As the parks charge is levied on residential and commercial properties in Melbourne this marginally increases the cost of owning property. While residential owners must bear the cost of maintaining parks, commercial operators frequently can be expected to pass this cost on in the form of increased prices for goods and services, although the extra impost is insubstantial.

In theory, entry fees on some parks could cause distortions to relative prices and therefore affect users' consumption decisions. A concern is that under

the current system of entry fees the relative level of fees imposed between parks could have an impact upon which parks the public use, and consequently may affect operators in different parks. For example, a relatively 'high' level of entry fees may divert the public away from that park and to either a park with lower fees or a recreation facility. This would place commercial operators in national parks with fees at a competitive disadvantage when compared to commercial operators in national parks without fees and those outside national parks. Evidence suggests, however, that the differential is not so significant as to materially affect usage patterns — the significant fee differentials experienced by Wilson's Promontory and Mount Buffalo in comparison to most other parks do not appear to have clearly reduced public demand for entry.

10.2.3 Administrative Costs

The current arrangements for collecting the parks charge are relatively straightforward in that water retailing licensees — City West Water, South East Water and Yarra Valley Water — collect the parks charge and any interest payable in respect of the charge. This revenue is then passed on to DNRE to fund the purchase and management of particular open spaces, parks and waterways. The benefit of this system is that it takes advantage of synergies associated with existing processes and infrastructure set up to collect funds.

As shown in Appendix B entry fees are charged in five national parks throughout Victoria. A number of stakeholders were concerned that the costs of collecting charges was significant in comparison to the revenue raised.

10.3 Stylised Analysis of Alternative Funding Models

The Review Team has identified four types of funding mechanisms for the preservation and management of Victoria's parks. They can be described according to whether or not they are levied by reference to park usage, and whether they are calculated on a lump sum or per unit basis — see Table 10.1 for a matrix of options.

Table 10.1 — Matrix of Funding Options

	Per unit or differential tax/charge	***Lump sum tax/charge***
Consumption and production taxes/charges	*Approach One* Entry charge	*Approach Two* Annual charge
Taxes or charges unrelated to production and consumption	*Approach Three* Related to income, property value, etc	*Approach Four* A special levy added to municipal rates, whether it is collected once or quarterly over a period of time

Source: The Allen Consulting Group

The following sections described these generic options.

10.3.1 Consumption and Production Taxes/Charges

Funding options which emphasise levies on users raise a number of issues of allocative efficiency as well as horizontal equity. As discussed above, production and consumption taxes or charges may be levied on a per unit or lump sum basis.

Approach One — Per Unit Taxes or Charges

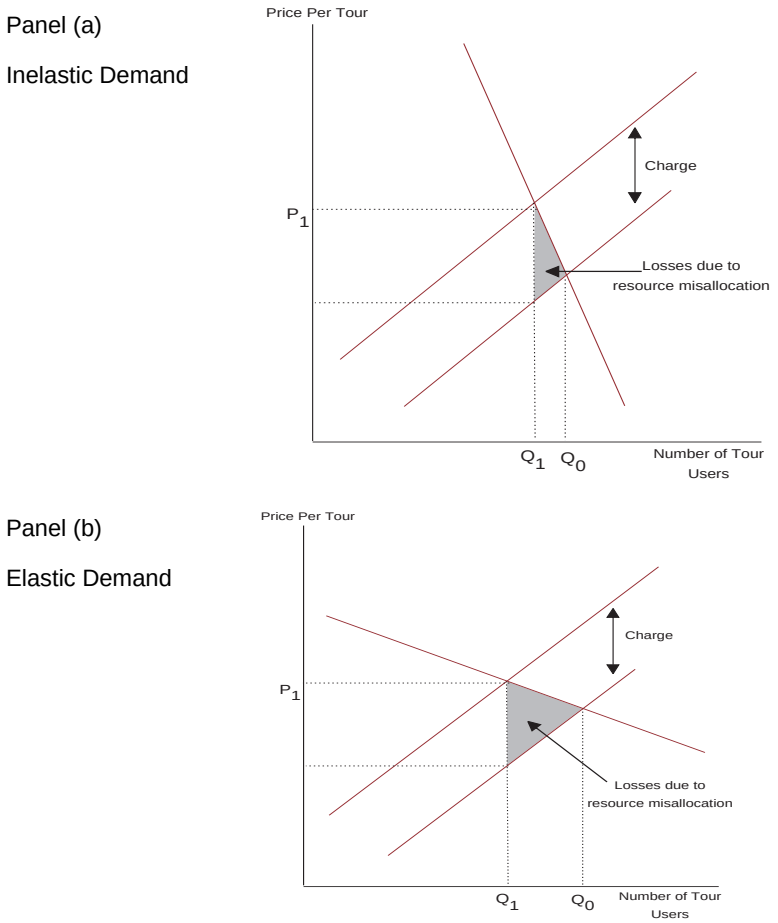
Per unit charge on park entry distort relative prices and therefore affect users' consumption decisions, in the sense that they consume less than the optimal amount of the service (ie, a tax on the park entry increases the cost of entry, and at the margin some households which would otherwise use the park will choose to go elsewhere). Similarly, per entry fees on commercial tour operators raises their distribution costs and distorts their distribution decisions (eg, a fee on tour operators pushes up the cost of tours in parks and at the margin it is uneconomic to provide the service to some consumers who would otherwise want it).

The extent of distortion associated with a volume–based levy depends on the elasticity of supply and demand. The lower the elasticity of supply and demand, the less the change in the behaviour that will be induced by a given per unit charge. As an illustration, consider a per person charge on park usage (eg, an entry fee). Two demand scenarios are depicted in Figure 10.1:

- in panel (a), demand is relatively inelastic — this means that consumers are insensitive to price changes. For example, a large price increase will cause only a few tour users to decide against going on a tour; and
- in panel (b) demand is relatively elastic — this means that consumers are sensitive to price changes. For example, a small price increase will cause relatively many tour users to decide against going on a tour.

As the Figure 10.1 illustrates, if the demand for park entry is relatively inelastic (at current levels), then tour operators can increase the tour fees to pass on the charge and there will be only a negligible reduction in the number of people using commercial tours (ie, a negligible distortion in the resource allocation). The converse is true if demand is elastic.

Figure 10.1 — Per Unit Taxes/Charges and Allocative Efficiency



Source: The Allen Consulting Group

This analysis has implications where the good or service is predominantly for final consumption. For example, as between services, any per unit charge should fall more heavily on the service that in the aggregate faces a more inelastic demand. For example, if the demand for small bus entry is

less elastic than the demand for large bus entry, (ie, is less sensitive to price changes) then from an efficiency perspective, small bus operators should bear a disproportionate share of any charge; and

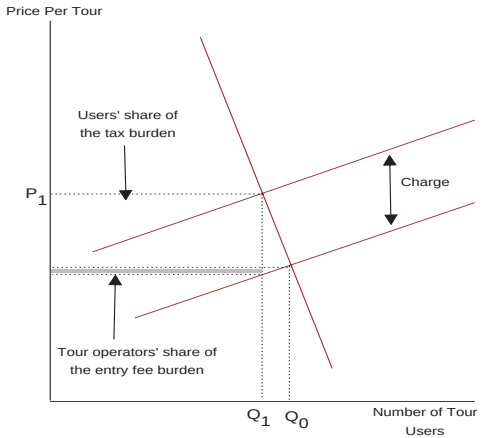
Consumption and production charges also raise horizontal equity issues. There are two aspects:

- first, it is only park users and tour operators who bear the burden of the levy. Other beneficiaries of parks (eg, those people who value a park's existence and maintenance for its own sake and have no desire to use it) do not contribute to the cost at all; and
- second, as regards the distribution of the burden between users of commercial operators as a group and the operators, this will depend upon the elasticity of demand and supply and not the proportion of benefits received. If demand is relatively inelastic and supply relatively elastic, then users bear the burden of the levy. The converse is true if demand is elastic and supply is inelastic. If demand and supply have similar elasticity, the burden of the levy will be shared evenly between tour users and operators. The three scenarios are illustrated in Figure 10.2.

Figure 10.2 — Sharing the Burden of a Per Unit Tax/Charge

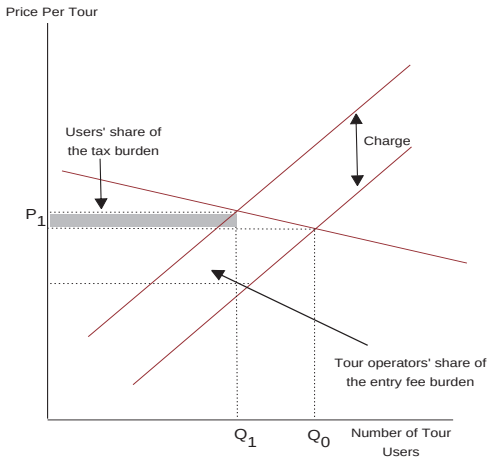
Panel (a)

Inelastic demand, elastic supply



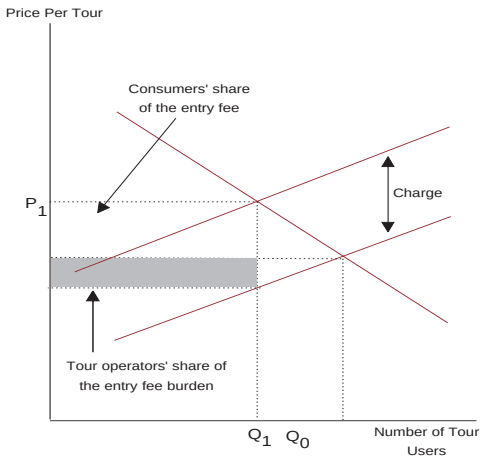
Panel (b)

Elastic demand, inelastic supply



Panel (c)

Similar demand and supply elasticity



Source: The Allen Consulting Group

Consider panel (a). If, for example, the demand for tours is inelastic and the supply is elastic, a levy on commercial tour operators would be almost completely passed on to tour users. Since users are not the only recipients of the benefits, this funding method disproportionately allocates the costs of park maintenance to users.

Approach Two — Lump Sum Taxes/Upfront Connection Charges

An upfront charge (or any other lump sum charge on consumption or production) is (potentially) less distortionary than a per unit tax. The upfront fee will only influence the initial decision to visit a park, and once that decision is made the charge has no bearing on the number of visits, or services produced and/or consumed.

If the upfront fee is set equal to or less than the value (in economic terms, the surplus) each users obtains from the tour, then the pattern of usage will be unchanged. In practice, governments cannot discriminate this finely (and even where possible, the administration costs will be prohibitive). It is possible to vary the fee between broadly defined classes of users, but such a tariff structure will be based on averages and may effect the purchasing or usage decisions of some consumers.

The horizontal equity considerations are the same as those arising out of a per unit charge — the cost of park maintenance is borne by tour users, tour operators and other park visitors, with their respective shares determined by the elasticity of demand and supply.

10.3.2 Charges Unrelated to Consumption or Production

Government taxes which are unrelated to production or consumption of tours do not distort production and consumption decisions in relation to those services, and from an efficiency perspective are to be preferred. Nonetheless, these taxes may violate horizontal equity, depending on how they are levied — whether as a lump sum or by reference to some economic variable.

Approach Four — Lump Sum Taxes or Charges

Lump sum taxes do not distort decisions to buy and sell, and thus do not distort the allocation of resources. The amount due from each taxpayer is fixed irrespective of their consumption or production behaviour. Furthermore, lump sum taxes are relatively easy to collect and administer, and difficult to avoid. However, lump sum taxes may raise equity issues related to capacity to pay, which were discussed above in relation to the parks levy.

In short, charges or levies that are unrelated to consumption of services do not distort production and/or consumption decisions in relation to those services, and from an efficiency perspective are to be preferred. Nonetheless, these taxes may violate horizontal equity depending on how they are levied — whether as a lump sum or by reference to some economic variable — and at what level — regional or local.

Approach Three — Differential Taxes or Charges

Unlike lump sum taxes, differential or proportional taxes do distort economic behaviour. Because a proportional tax must be related to some economic variable (eg, income or property rental values), it will affect economic decision making in relation to that variable. For example, taxes levied as a percentage of income can create a disincentive for taxpayers to earn income. Similarly, taxes levied on goods and services at differential rates change the relative prices of goods and services and thus distort consumption and production decisions in relation to those goods and services. This can create upstream or downstream distortions.

Governments generally use a combination of lump sum and proportional taxation mechanisms. Consequently, funding options which draw on general revenue (whether it be at the Commonwealth or State level) will involve a combination of the above considerations.

10.4 Possible Reform Approaches

From the four types of funding approaches discussed in the previous section it is possible to formulate a range of policy responses that address concerns raised in section 10.2 and the issues raised in section 10.3. It is clear from the discussion in Table 10.2 that there is no single policy response that addresses all concerns.

The Review Team is conscious that the matters raised in the context of the funding of Victoria's parks raise 'whole of government' concerns to the degree that general taxation is raised. Thus, it would not be appropriate for the Review Team to make definitive recommendations. That said, the Review Team makes the following observations:

- firstly, there appears to be community acceptance (possible through apathy) of the Parks Levy as an appropriate revenue raising mechanism. As such, the Review Team would understand any reticence upon governments to do away with it. However, the Review Team notes that the current levy is inequitable in that:
  - businesses bear the levy even though they are generally only marginally beneficiaries of the maintenance of Melbourne's open spaces — consideration should be given to applying the levy solely to residential households; and
  - in effect (ie, for approximately 91 percent of properties) the levy is a flat tax — as such, there may be administrative savings to be gained by doing away with property values as a base and formally moving to a per residential household levy.
- secondly, the levying of entry fees on particular parks is inequitable and raises concerns about administration costs. The Review Team suggests that further thought should be made to moving to a monthly, quarterly or annual permit system for vehicular entry into Victoria's parks.[78] Such permits could be:
  - offered at the time of vehicle registration; and
  - made available from park offices, post offices, corner shops, and so on.

  Fines would be levied for vehicles in Parks (and adjacent associated public car parks) which do not display a valid permit.

[78] This approach currently exists in a discretionary form.

Table 10.2 — Current Concerns and Possible Reforms

Concerns	Possible Solutions	Comments
1. Commercial properties bear the parks levy even though most businesses bear little (if any) of the benefit[79]	Remove commercial properties from the base	With the 'parks charge' being levied on commercial operators it is unlikely that the levy is strongly aligned with the beneficiaries of parks. Although some businesses do benefit, this levy is generally passed on to consumers in the form of increased charges for goods and/or services. In addition, as the majority of commercial operators are businesses or individuals who also own residential property, the removal of commercial properties from the levy base will reduce the possibility of commercial operators and their customers having to pay more than their fair share. There may be a concern, however, that if commercial properties were not levied then there would be a funding shortfall. In this event, the levy would need to be increased for residential properties.
2. The Parks Levy only applies within a defined geographic region	Broaden the geographic base of the Parks Levy	In order to operate a more equitable system and since the enjoyment of open spaces, parks and waterways is not confined solely to residential and commercial property holders in Melbourne, an option is to increase the scope of the levy to include non-metropolitan areas and other beneficiaries. This would result in the overall costs of park maintenance being borne relatively equally by the community. A state-wide levy is appropriate only to the extent that the benefits generated have a regional component (ie, to the extent that every member of the State benefits). Similarly regional or local funding is appropriate where there is a regional or local component to the benefit. Some of the benefits of preserving Victoria's parks do not simply accrue to the individual households or commercial operators. There is a real sense in which 'outsiders' benefit too. For example, visitors from interstate and overseas benefit from the experiencing the natural environment while others benefit from simply knowing that the parks are preserved. Given the number and geographical dispersion of Victoria's parks, waterways and open spaces, the benefits of preserving Victoria's parks are likely to accrue to the majority of residents of Victoria, and to a lesser extent to the residents of other States and countries. Therefore a state wide levy would seem appropriate.
3. Property value is largely unrelated to parks	Make the Parks levy a uniform levy on households	As lump sum fees do not distort the allocation of resources and they are relatively easy to collect and administer, they are preferred to per unit charges or levies. For example the scale of lump sum taxes or charges can vary from a state tax on all income earners to a charge levied locally by councils which is added to the rates only of those households within a certain distance of a park. This levy may be levied on

[79] There are, however, some notable industries which do benefit from parks (eg, the tourism and hospitality industries).

Concerns	Possible Solutions	Comments
		individuals, businesses or households, with the potential for exclusions on pre-determined criteria (ie, unemployed, pensioners, etc). However, as lump sum taxes may raise equity issues relating to ability to pay, it is preferable for them to be related to another variable such as income or property value.
4. As the current entry fee structure stands, there are only ten national parks for which entry fees apply. Selective charging of entry fees creates distortions to relative prices and raises horizontal equity issues, because it is only users of parks with charges (and not users of parks in general) who bear the burden of the cost of maintaining parks. Other beneficiaries, such as those that frequent parks without user charges and those who benefit from knowing that parks and open spaces are being preserved do not contribute to the cost of preserving those parks.	Scrap all park entry fees	Scrapping of entry fees will remove distortions to prices and the possibility of people and corporations contributing more than their fare share towards the maintenance of Victoria's parks. However, this option will result in violations to the principle of vertical equity and create potential shortfalls in revenue.
	Modify existing entry fees	Entry fees could be modified by either increasing or decreasing prices, or by increasing the number of parks which charge entry fees. Changes to existing prices will not correct distortions to prices or remedy horizontal equity concerns. An increase in the number of parks that charge entry fees will, to a certain extent, correct these concerns. However as many parks have numerous entries (eg, the Grampians) the costs associated with collecting entry fees are likely to well exceed the potential benefits.
	Create a lump sum entry fee which permits entry to all of Victoria's national parks	Another option is to create a lump sum entry fee to all of Victoria's parks covered under the Acts. Responsibility for checking valid entry passes could be given to rangers who could undertake this task whilst carrying out general duties. This would reduce the administrative costs associated with manning the entry booths (although additional resources may be required by rangers), increase the potential revenue base and create a mechanism by which beneficiaries of parks (ie, those who use them) would be required to contribute to their maintenance. A lump sum entry pass could be purchased on a monthly, quarterly or annual basis. A derivative option is to create a series of flat fee passes that address particular demand characteristics. For example, there could be a general pass that covers most parks, but a 'ski pass' for use in skiing parks during the ski season. The current regulations include a flat fee pass that covers all nominated parks.
5. The interaction of both the parks levy and entry fees create a range of horizontal and vertical inequities.	Rely on general government taxation	Governments generally use a combination of lump sum and proportional taxation mechanisms. Consequently, funding options which draw on general revenue (whether it be at the Commonwealth, State, or local level) will involve a combination of the above considerations.

Source: The Allen Consulting Group

Appendix A

Terms of Reference

Legislation to be Reviewed

The National Competition Policy review of the *National Parks Act 1975* and specified provisions of the *Water Industry Act 1994* has been commissioned by the Minister for Environment and Conservation. The review will examine the case for reform of any legislative restrictions on competition contained in the *National Parks Act 1975* and the rating provisions of Part 4 of the *Water Industry Act 1994* and the respective subordinate legislation (including Regulations, Orders, Instruments, Ministerial Declarations and Declarations).

Approach of the Review

In particular, the review will:

- clarify the objectives of the legislation;
- identify any market failure the legislation is intended to address;
- identify the nature of the restrictions on competition arising from the legislation or from its administration;
- analyse the likely effect of the restriction on competition and on the economy in general;
- assess and balance the costs and benefits of the restriction; and
- consider alternative means of achieving the same result including non-legislative means.

Evidence and findings in relation to the above are to be provided in the report.

Reform Options

In relation to the *National Parks Act 1975*, without limiting the scope of the review, the review should specifically address the appropriateness of provisions for:

- granting licences, permits, leases, tenancies and occupations in national parks for commercial purposes; and
- placing restrictions on activities in national parks.

In relation to the specified provisions of Part 4 of the *Water Industry Act 1994*, without limiting the scope of the review, the review should specifically address the appropriateness of provisions for the levying and collection of rates.

Review Arrangements

This review is to be established and conducted in accordance with the scale of complex-minor contained in the Victorian Guidelines. The Review will be undertaken by an external consultant appointed and supported by a Departmental Project Team. A draft report will be considered by the Departmental Steering Committee.

National Parks Legislation to be Reviewed

National Parks Act 1975 (incorporating all amendments up to and including Act No. 50/2000)

National Parks (Fees and Charges) Regulations 1990 (incorporating all amendments up to and including S.R. No. 67/2000)[80]

Park Regulations 1992 (incorporating all amendments up to and including S.R. No. 154/1997)

[80] Replaced with the *National Parks (Fees and Charges) Regulations 2001.*

Water Industry Legislation to be Reviewed

Part 4 (sections 135A, 139-143) of the *Water Industry Act 1994* (incorporating all amendments up to and including Act No. 22/99)

Water Industry (Melbourne Parks and Waterways) Regulations 1996 (incorporating all amendments up to and including S.R. No. 73/1998).[81]

[81] Repealed on 1 December 2001.

Appendix B

Vehicle Entry Charges

	Motorcycle	*Car*	*Small Bus*	*Large Bus*	*Others*
Dandenong Ranges National Park	$1.70	$5.50	$17.00	$26.00	
Kinglake National Park	$1.70	$5.50	$17.00	$26.00	
Wilson's Promontory National Park	$2.30	$9.00	$29.00	$54.00	
		$27.00 — 5 day pass			
Wilson's Promontory National Park	$2.50	$9.00	$29.00	$50.00	
	$4.00 — 2 day pass	$14.00 — 2 day pass	$44.00 — 2 day pass	$75.00 — 2 day pass	
		$27.00 — 5 day pass	$87.00 — 5 day pass	$150.00 — 5 day pass	
		$45.00 – annual pass	$203.00 – annual pass	$350.00 annual pass	
Mt Buffalo National Park (when ski lifts not operating)	$2.50	$9.00	$29.00	$50.00	
		$14.00 — 2 day pass			
		$18.00 — 3 day pass			
Mt Buffalo National Park (when ski lifts operating)	$3.00	$12.50	$47.00	$71.00	
		$19.00 — 2 day pass			

	Motorcycle	Car	Small Bus	Large Bus	Others
		$25.00 — 3 day pass			
Mt Buffalo National Park		$45.00 annual pass	$94.00 — off-season multiple day pass (1 October to 30 June)	$161.00 — off-season multiple day pass (1 October to 30 June)	
			$257.00 annual pass	$413.00 annual pass	
Baw Baw National Park — Mt St Gwinear Area		$9.00	$29.00	$50.00	
Mornington Peninsula National Park — Ocean Beaches	$1.50	$4.00 $20.00 — annual pass	$12.00	$20.00	Day parking Annual
— Point Nepean					$3.50 child day pass $7.00 adult day pass $17.50 family day pass
Yarra Ranges National Park — Mount Donna Buang Area	$2.00	$7.00	$22.00	$38.00	

Source: Schedule 2 *National Parks (Fees and Charges) Regulations 2001*.

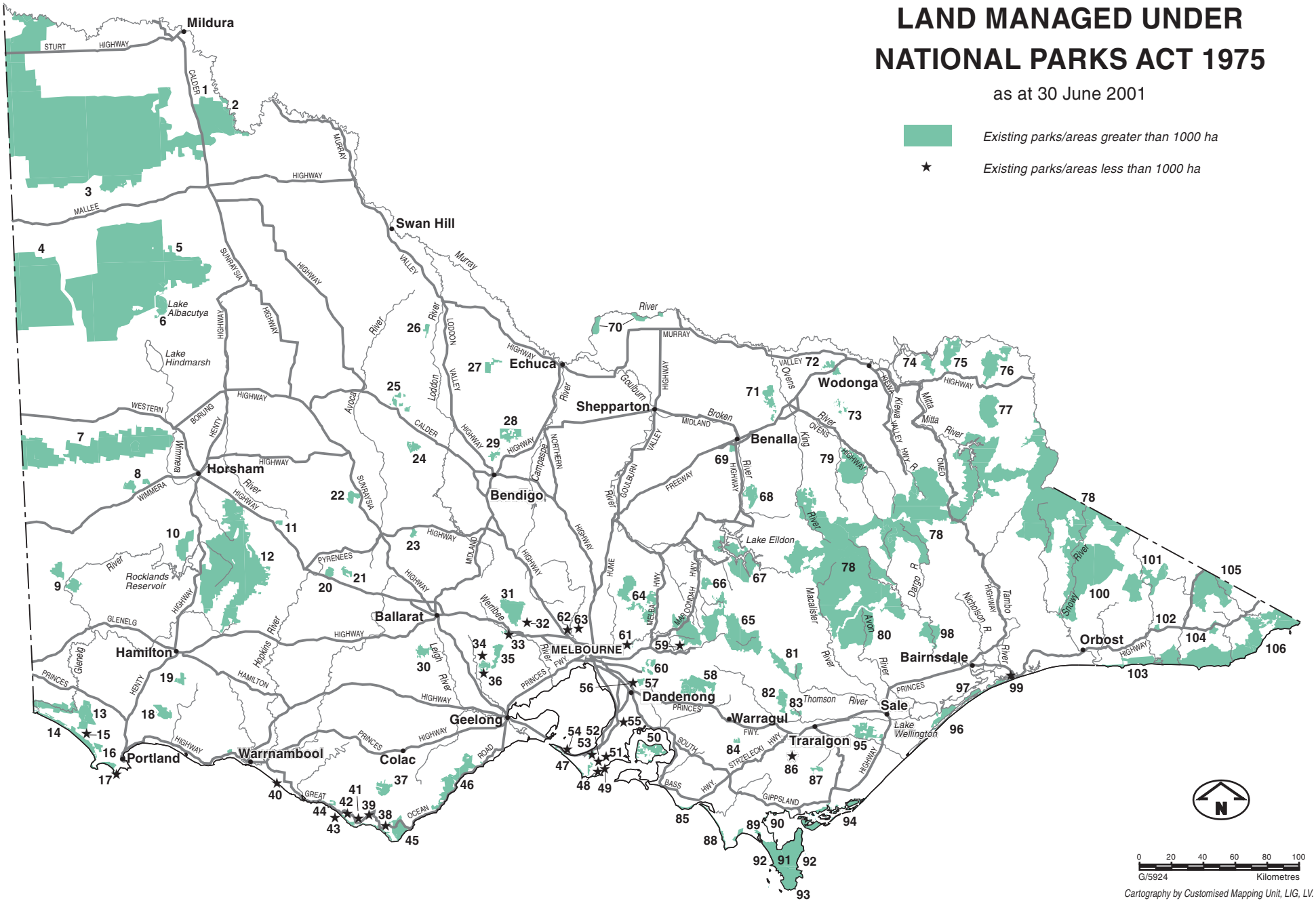
Appendix C

Victoria's Parks

Victoria's parks are shown on the map on the next page.

LAND MANAGED UNDER NATIONAL PARKS ACT 1975

as at 30 June 2001



Cartography by Customised Mapping Unit, LIG, LV.

Appendix D

Stakeholder Consultation

This review was determined by DNRE to require a targeted consultation process and the placement of an advert in relevant newspapers notifying people of the availability of an *Issues Paper* and requesting submissions.

Table D.1 lists those parties who requested an *Issues Paper* and how feedback was received.

Table D.1 — Public Involvement in the Review

Organisation	*Representatives*	*In-person or phone meeting*	*Submission*
Alpine Advisory Committee	Mary Howson	✓	
Barmah Forest Grazing Advisory Committee	David Harvey		
National Parks Advisory Council	Arnis Heislers & Paul FitzSimons	✓	
Environment Victoria	Esther Abram		
Victorian National Parks Association	Amanda Martin & Ken Mawdsley	✓	✓
Victorian Tourism Operators Association	Mark Hancock	✓	
Mountain Cattlemen's Association of Victoria	Sue Silvers & Harry Ryder	✓	✓
Victorian Apiarists Association	Graeme Matthews & John Edmonds	✓	
Municipal Association of Victoria			
Victorian Farmers Federation	Kate Lockart & Clay Manners	✓	
Mt Buffalo Chalet	Dean Belle		
Fraser Campground and Cabins	Russell Webb		
Public Land Council of Victoria	Tim Barker & Ian Hamilton	✓	✓
Victoria Chamber of Mines	Chris Fraser	✓	✓
Prospectors and Miners Association	Max Muir		✓
VR Fish	Patrick Washington		✓
Arthurs Seat Chairlift	Richard Hudson		✓
Tourism Victoria	Wayne Kayler-Thomson		✓
Omya Southern Pty Ltd	David Scott		✓
Victorian Association of Forest Industries	Jon Drohan		✓
Individuals	David Evans		✓
	Ian Roper		✓

Appendix E

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