
1 Initiatives to achieve best practice in regulation

The past year has seen governments take some important initiatives to reduce regulatory burdens on business, and to improve the processes and institutions responsible for regulation. They include in particular, the Australian Government's actions in response to the recommendations of the Taskforce on Reducing Regulatory Burdens on Business (Regulation Taskforce) and agreement by the Council of Australian Governments (COAG) to bring greater national consistency to some key areas of regulation, as well as to institute some elements of good process in the regulation making of each jurisdiction (see box 1.1).

Box 1.1 **COAG agreements on regulatory reform February/July 2006**

At the Council of Australian Governments (COAG) meeting in February 2006, COAG agreed to establish and maintain effective arrangements at each level of government that maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition. These arrangements include:

- establishing and maintaining 'gatekeeping mechanisms';
- improving the quality of regulatory impact analysis;
- better measurement of compliance costs (such as with the Australian Government's Business Cost Calculator); and
- broadening the scope of regulatory impact analyses to include, where appropriate, the effects of regulation on individuals and the cumulative burden on business.

In addition, all jurisdictions committed to identify and address as a priority those areas where inconsistent and unnecessarily burdensome regulatory regimes are impeding economic activity. COAG agreed to make a 'down payment' on regulatory reduction by taking action to address six specific 'hot spots': namely, rail safety regulation; occupational health and safety; national trade measurement; chemicals and plastics; development assessment arrangements; and, building regulation.

At its July 2006 meeting, COAG agreed to pursue further regulatory reform in the following areas: business registration; development of bilateral agreements under the *Environment Protection and Biodiversity Conservation Act 1999*; personal property securities; and product safety regulation.

Source: Source: COAG 2006.

The backdrop to these important initiatives has been dramatic growth in regulation in all jurisdictions and the mounting concerns from business and other groups about an escalation in associated compliance burdens (RTF 2006, BCA 2005).

At the Commonwealth level, the changes underway have potentially far-reaching implications for how regulations are made and administered. They include new incentives and disciplines on departments and regulatory agencies, and an enhanced training and oversight role for the ORR as the new Office of Best Practice Regulation (OBPR). This chapter describes these initiatives, particularly relating to the new Office, and notes some matters that are likely to be crucial in ensuring sustained progress.

1.1 The Regulation Taskforce

In October 2005, the Australian Government announced the creation of an independent Taskforce on Reducing Regulatory Burdens on Business. Productivity Commission Chairman, Gary Banks, was appointed to chair the Taskforce, with a secretariat comprising members from several government departments as well as the Productivity Commission (see box 1.2). The Taskforce reported to the Prime Minister and Treasurer on 31 January 2006.

In its Report, which was released by the Government with an interim response in April 2006, the Taskforce endorsed many of business's concerns at the growth of regulation. It noted, for example, that since 1990 the Australian Parliament has passed more pages of legislation than in the nine preceding decades since Federation, and that compliance issues can consume up to 25 percent of senior management time of some large companies.

Box 1.2 Regulation Taskforce Terms of Reference

The Taskforce will examine and report on areas where regulatory reform can provide significant immediate gains to business.

It will be chaired by Mr Gary Banks, Chairman of the Productivity Commission, and will also include Mr Dick Humphry, the former Managing Director of the Australian Stock Exchange, Mr Rod Halstead, a corporate law expert with Clayton Utz, and Mrs Angela MacRae, a consultant to small business and Chairman of the Independent Contractors Association of Australia.

The Taskforce will:

- identify specific areas of Commonwealth Government regulation which are unnecessarily burdensome, complex, redundant or duplicate regulations in other jurisdictions;
- indicate those areas in which regulation should be removed or significantly reduced as a matter of priority;
- examine non-regulatory options (including business self-regulation) for achieving desired outcomes and how best to reduce duplication and increase harmonisation within existing regulatory frameworks; and
- provide practical options for alleviating the Commonwealth's 'red tape' burden on business, including family-run and other small businesses.

The Taskforce will report by 31 January 2006.

While the Taskforce will focus on areas that are predominantly the responsibility of the Commonwealth Government, it is to identify key areas in which the regulatory burden arises from overlaps with State and Territory legislation. The Taskforce will consult closely with business groups and other stakeholders.

It will be supported by a small whole-of-government secretariat and consult closely with the Secretaries of the Departments of the Prime Minister and Cabinet, Treasury and Industry, Tourism and Resources. The Taskforce's website address is www.regulationtaskforce.gov.au.

The Australian Government is determined to reduce the burden of regulatory activity. It has already decided to put in place arrangements that will involve a more rigorous use of cost-benefit analysis within government before new regulations are introduced.

Source: RTF 2006.

The Taskforce concluded that much regulation, while addressing legitimate social or economic needs, involves unnecessary cost burdens on business and the wider community. Problematic features in the design of regulation highlighted by the Taskforce included:

- unclear or questionable objectives;

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- a failure to target the regulation sufficiently — for example, regulation that is too blunt or disproportionate to the problem;
 - undue prescription;
 - excessive reporting or other paperwork requirements;
 - overlap, duplication or inconsistency with other regulations, either within jurisdictions or between jurisdictions;
 - poorly expressed or confusing use of terms, including the use of inconsistent definitions in different regulations; and/or
 - unwarranted differentiation of local regulation from international standards.

The Taskforce made some 150 recommendations for reforms or reviews within a variety of areas of social, environmental and economic regulation. However, it went beyond this, to address what it saw as the underlying causes of the problems. It observed:

Regulation has come to be seen as a panacea for many of society's ills and as a means of protecting people from inherent risks of daily life. Any adverse event — especially where it involves loss of life, possessions, amenity or money — is laid at government's door for a regulatory fix. The pressure on government to 'do something' is heightened by intense, if short-lived, media attention.

In responding to such pressures, governments themselves are often attracted to regulatory solutions, both as a tangible demonstration of government concern and because the costs are typically 'off-budget', diffuse and hard to measure. Moreover, each regulatory solution tends to be devised within individual government agencies. Within such policy 'silos', the cumulative impact of regulation across government is poorly understood and rarely taken into account.

In this climate, a 'regulate first, ask questions later' culture appears to have developed. Even where regulatory action is clearly justified, options and design principles that could lessen compliance costs or side-effects appear to be given little consideration. Further, agencies responsible for administering and enforcing regulation have tended to adopt strict and often prescriptive or legalistic approaches, to lessen their own risks of exposure to criticism. This, in turn, has contributed in some areas to excessively defensive and costly actions by business to ensure compliance. (RTF 2006, p. i & ii)

The Taskforce accordingly made a range of additional recommendations to improve the processes and institutions responsible for regulation (see box 1.3).

Box 1.3 Summary of Regulation Taskforce recommendations to address the underlying causes of over-regulation

To improve regulation-making:

- Endorse the principles of good regulatory process;
- Undertake cost-benefit analysis (including risk assessment) of regulatory options;
- Mandate the use of the Business Cost Calculator;
- Departments/agencies to develop skills in cost/benefit analysis;
- Adopt a whole of government policy on consultation regarding regulatory issues;
- For major or complex regulatory issues, prepare a policy “green paper” and/or exposure draft;
- Establish a consultation Website;
- Strengthen the Regulation Impact Statement (RIS) adequacy requirements;
- Tighten “gate-keeping” requirements for regulatory proposals;
- Endorse strengthened requirements for regulation-making;
- Include good process requirements in the *Legislative Instruments Act 2003*;
- Elevate Ministerial oversight to regulatory processes and reforms to Cabinet level;
- Agencies to ensure that regulatory analysis is adequately resourced;

To ensure good performance by regulators:

- Provide clear advice to regulators about policy objectives;
- Ministers to emphasise policy objectives in Statements of Expectations;
- Develop broader performance indicators for regulators;
- Establish internal review mechanisms for regulatory decisions;
- Ensure timely merit review of administrative decisions;
- Ensure regulators issue protocols on consultation procedures;
- Establish consultative bodies with Stakeholders;
- Develop a code of conduct covering regulators and regulated entities;
- Establish relationship manager roles in regulators;
- Ensure regulatory appointees have industry experience;

To avoid overlap and inconsistency:

- Review areas with significant jurisdictional overlap;
- Develop a framework for national harmonisation of regulation;
- Amend the *Legislative Instruments Act 2003* to provide for 5 year sunset clauses;
- Where RIS requirements are not met, conduct selective post implementation reviews after 1-2 years;
- Assess regulations not subject to sunset clauses every 5 years; and
- Evaluate scope for cross jurisdictional benchmarking of regulatory regimes.

Source: RTF 2006, Chapter 7.

1.2 Australian Government initiatives to improve regulation

The Australian Government, which provided its final response to the Taskforce's report on 15 August 2006, accepted in full (or in part) 158 of its 178 recommendations.

To address the systemic causes of over-regulation and improve the quality of regulations, the Australian Government accepted 27 of the Taskforce's 29 recommendation in this area, including endorsing the following six principles of good regulatory practice:

- establishing a case for action;
- examining alternatives to regulation;
- adopting the option that generates the greatest net benefit to the community;
- providing effective guidance to relevant regulators and affected stakeholders;
- reviewing regulation regularly to ensure that it remains relevant and effective; and
- consulting effectively with stakeholders at all stages of the regulatory cycle.

The Government moved to ensure that these principles were followed by policy departments and by regulators, by strengthening and enhancing existing regulation review and reform processes. A new and enhanced regulatory framework was established which includes mandating higher levels of cost-benefit and risk analysis; making several 'machinery of government' changes; strengthening regulatory 'gatekeeping'; and improving community consultation arrangements.

Specifically, the Australian Government decided that:

- as previously announced by the Government in April 2006, use by government departments and agencies of cost-benefit analysis and, as appropriate, risk analysis in RISs, is to be strengthened. Appropriate levels of RIS and cost-benefit and risk analysis will be mandated;
- the Business Cost Calculator (BCC) (see box 1.4) is to be applied to regulations made by the Australian Government to ensure regulatory compliance costs are considered. The 'Quickscan' function of the BCC will be applied to all

regulation and further more detailed analysis will be required for proposals with medium compliance costs and significant impacts on business and individuals;¹

- information indicating the level of regulatory cost to business and individuals and the net benefit to the community should be included in Cabinet submissions;
- new whole-of-government principles on consultation will provide clear guidance to regulators on best practice consultation with stakeholders and the community;
- effective gate-keeping arrangements are to be established by the Cabinet Secretariat (Department of the Prime Minister and Cabinet) to prevent proposals not complying with the Government's regulatory best practice requirements from proceeding for a decision;
- where there are 'exceptional circumstances', as determined by the Prime Minister, the proposal can be considered by Cabinet or other decision-maker, but must be reviewed within 1-2 years; and
- the role of the ORR is to be enhanced by building on its strengths to establish an Office of Best Practice Regulation. This new Office will play a central role in providing a 'one-stop shop' for educating/assisting regulators in applying the principles of best practice regulation, including the new consultation arrangements, and undertaking more rigorous analysis of regulatory proposals. The Office of Best Practice Regulation is to oversee all other regulatory quality tools, including the BCC, Annual Regulatory Plans and Regulatory Performance Indicators. These functions are to be transferred from the Department of Industry, Tourism and Resources.

The grounds for assessing a RIS as inadequate have been broadened to include failure to document existing regulations or to provide an explanation as to why these would not suffice; inadequate cost-benefit and risk analysis; failure to quantify compliance costs of each of the feasible options; and failure to document and analyse applicable international standards.

¹ COAG has also endorsed use of the BCC and some States, such as South Australia, will apply the BCC to their regulation making processes with the objective of reducing regulatory compliance costs by 25 per cent over the next few years.

Box 1.4 **Business Cost Calculator (BCC)**

The Department of Industry, Tourism and Resources, has developed an interactive costing tool – the BCC – that helps measure the compliance costs of regulation and thus the impact of regulation on business (both large and small).

The tool enables the user to systematically cost the various activities or tasks a business is required to undertake to comply with a particular regulation or policy option. Categories of cost include ‘notification’, ‘education’, ‘permission’, ‘purchase cost’, ‘record-keeping’, ‘enforcement’, ‘publication and documentation’, ‘procedural’ and ‘other’.

The costing tool provides a standardised and streamlined process for a key input to policy development and complements existing regulatory process, such as the RIS.

- The ‘Quickscan’ function of the BCC provides an initial assessment of the extent of likely impacts on business and individuals or the economy.
- Where a RIS is required (see figure 1.1), the BCC report results should be integrated into the RIS.

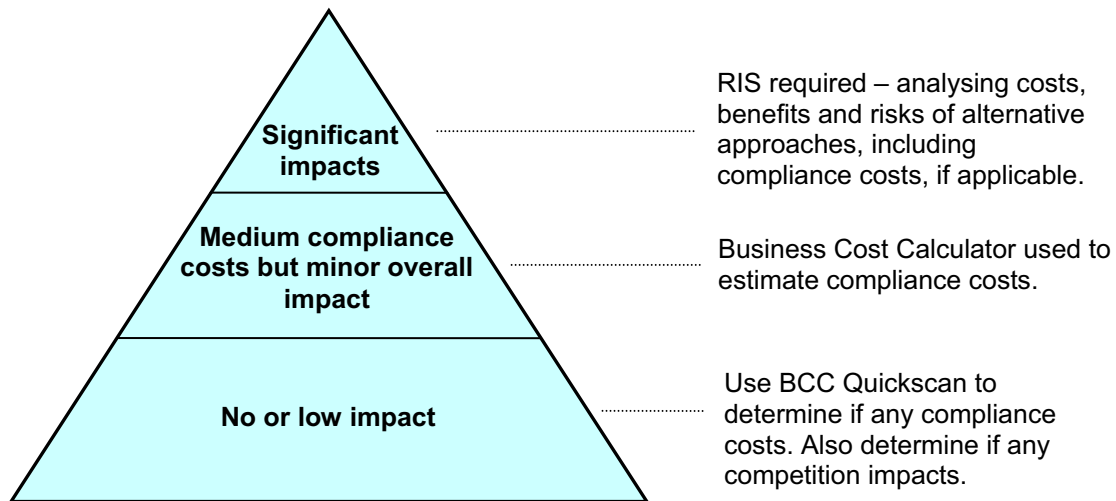
The availability of an easy-to-use method for investigating compliance costs should encourage policy-makers to assess the compliance burden of both proposed and existing regulations. In so doing, it should also lead to more effective consultation with business to generate the data the model depends on.

A three-tiered assessment system

The Australian Government has adopted a three tiered system to assess all regulatory and quasi-regulatory proposals (see figure 1.1).

- All proposals must undergo a preliminary assessment to establish whether they are likely to involve an impact on business and individuals or the economy. This applies whether or not such proposals are to be considered by Cabinet.
- If the preliminary assessment shows that a regulation does potentially involve at least ‘medium’ compliance costs, a full assessment of the compliance cost implications should be carried out and documented in a Business Cost Calculator (BCC) report.
- Regulations that have a significant impact on business and individuals (whether in the form of compliance costs or other impacts) or that restrict competition, must be subjected to more detailed analysis, and ultimately documented in a Regulation Impact Statement (RIS). If the impacts include medium or significant business compliance costs, the BCC forms part of the RIS.

Figure 1.1 The assessment pyramid



The requirements apply to:

- proposals with regulatory and quasi-regulatory obligations being brought to the Cabinet by ministers;
- letters with regulatory and quasi-regulatory obligations being referred to the Prime Minister by ministers for approval; and
- proposals (regulatory and quasi-regulatory) of ministers, boards, statutory authorities and regulators initiated by other means such as media releases or interviews.

The Government's best practice requirements for regulation apply to *all* government entities — such as government departments, agencies, statutory authorities and boards — which review or make regulations that have an impact on business and individuals, including agencies or boards with administrative or statutory independence.

1.3 The Office of Best Practice Regulation

The new Office of Best Practice Regulation is to play a central role in promoting and strengthening observance of best practice in the development of regulation.

This includes providing departments and agencies with assistance, advice and training regarding the new arrangements, including a ‘helpdesk’ to advise on the application of cost-benefit and risk analysis to regulatory proposals. Targeted training for government officials will also focus on the development and implementation of consultation strategies and data collection and quality issues.²

The Australian Government’s new requirements for regulatory analysis are set out in the ‘Best Practice Regulation Handbook’. It covers consultation processes, assessment of business compliance costs (using the Business Cost Calculator) and the analysis of other impacts and risks in a RIS. The initial steps to follow are summarised in a companion ‘Users Guide’ and ‘Quickstart to Regulatory Impact Analysis’. These documents have been publicly released in draft form for six months, so that users have an opportunity to provide comment and input on possible operational improvements.

The Office of Best Practice Regulation will also continue to provide independent advice to Ministerial Councils and national standard-setting bodies regarding COAG RIS processes.

A number of steps will need to be taken by the Office of Best Practice Regulation to fully implement relevant decisions, including:

- establishing new guidance material and a new unit to provide an independent ‘helpdesk’ function, including technical advice and training on cost-benefit and risk analysis;
- transferring responsibility for the BCC, Regulatory Performance Indicators and Annual Regulatory Plans from the Department of Industry, Tourism and Resources to the Office of Best Practice Regulation;
- working closely with other areas of government and regulators at different levels. This includes consulting with a Steering Committee comprising senior officials from central agencies which is providing feedback to the Office of Best Practice Regulation in implementing its enhanced role and ensuring the gate-keeping arrangements are effective; and
- recruiting additional staff to carry out the additional functions/responsibilities.

The new requirements will also impose additional responsibilities on Australian Government departments and agencies. For instance, the Government has specifically directed each regulator to develop skills in regulatory cost-benefit and

² Collecting relevant data has traditionally been undertaken by trained researchers. However, this is an activity that all regulators should undertake properly. Many regulators will need to develop better skills and contacts to identify and use relevant data (including understanding uncertainties and limitations).

risk analysis. A senior executive officer is also being appointed by each regulator, to liaise with the Office of Best Practice Regulation and be responsible for overseeing the application of these new processes in their department/agency.

These new Australian Government arrangements were implemented and came into effect in November 2006. To facilitate a smooth transition, over the first six months the focus will be on assisting departments and agencies understand and implement the new arrangements. The adequacy thresholds for analytical and other content of the new processes will then be progressively raised, as departments and agencies become more familiar with what is required.

The Office of Best Practice Regulation is releasing additional guidance material and providing training for officials in the use of RISs, cost-benefit analysis and the BCC.

Implementation challenges

The new regulation-making arrangements represent a significant enhancement over previous processes and, if effectively implemented and observed, will in time lead to better regulatory outcomes. The fact that departments and agencies have had difficulties complying with the lesser requirements of the past, however, suggests that considerable efforts will be required to meet the new standards. Areas where the bar has been raised include, in particular, the need for more rigorous cost-benefit analysis, with estimation of compliance costs using the BCC, and the requirement to consult effectively, consistent with the principles laid down by the Government. Neither area has been well dealt with to date.

While the capacity of the OBPR to assist agencies in these endeavours will be greater than that of its predecessor — particularly in relation to cost-benefit analysis and the BCC — additional effort (and perhaps resourcing) within departments and agencies will also be needed. However, as the Regulation Taskforce notes, given that the Government's new requirements involve activities that would generally need to be undertaken anyway in pursuit of good public policy, any additional resourcing may be more appropriately seen as rectifying previous under-resourcing.

Related to this, while the OBPR will be active in providing training and assistance to officials, responsibility for good regulatory practice remains with agencies themselves. The OBPR, like the ORR, is required to provide independent assessment of the need for a RIS and of the adequacy of department or agency compliance. Its focus in assisting officials will be on helping them follow good practice, not identifying the best regulatory solutions to areas within their responsibility.

If anything, the importance of the independence of the Office in its vetting and monitoring roles has been elevated by the Government's decision to prevent regulatory proposals that have not met the best practice requirements, as assessed by the OBPR, from proceeding.

This strengthening of the gatekeeping arrangements will play a crucial role in promoting good process. The Government has recognised this by indicating that the Prime Minister will be the arbiter of whether there are exceptional circumstances that override the obligation to meet the BCC and RIS requirements (such as in the event of an emergency). Early decisions in this area will be very important in conditioning the expectations of ministers and their departments/agencies, ultimately determining the quality of regulatory assessment itself in the future.

For those few cases deemed to be exceptions to the need to have complied with the best practice processes, there is the important default obligation of a post-implementation review within 1-2 years. This provides an important safeguard against unintended costs and consequences of hurried regulatory solutions persisting. It will be important to keep track of such cases and to ensure that adequate reviews are conducted. The OBPR will play a role in monitoring developments.

Equally, the Government's decision to review every five years all regulation that does not already have a sunset provision, will require systems to ensure effective compliance. In cases where the regulation has significant impacts, an independent review may be called for.

Over the next five years, the Productivity Commission will be required to conduct an annual stocktake of regulation that will target key areas requiring attention (see box 1.5). This should be structured to complement the Regulation Taskforce's report in providing a more in-depth assessment across different sectors/industries of any remaining problem areas in the existing stock of regulation. It will also provide an opportunity to monitor actions taken in response to the Regulation Taskforce's report.

Box 1.5 Related Productivity Commission studies**Annual stocktake**

Targeted regulatory reviews are to be undertaken by the Productivity Commission. This will be a new annual review process, following on from the Regulation Taskforce, to identify an annual red tape agenda. The Productivity Commission will call for public submissions in key areas, based on a direction from the Treasurer.

Performance Benchmarking

The Productivity Commission is undertaking a research study on performance indicators and reporting frameworks across all levels of government, to assist the Council of Australian Governments (COAG) to implement its in-principle decision to adopt a common framework for benchmarking, measuring and reporting on regulatory burden on business.

The study has 2 stages. The first stage will develop a range of feasible quantitative and qualitative performance indicators and reporting framework options. Following agreement by COAG, the second stage would apply the preferred indicators, review their operation and assess the results. The Commission is to report on Stage 1 by February 2007.

Similarly, the Productivity Commission's current study for COAG into approaches to benchmarking the performance of all jurisdictions' regulatory regimes — particularly in relation to compliance costs — complements these other initiatives and may assist in promoting good process and minimum effective regulation as sources of competitive advantage for Australia.