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# 1 Major initiatives to improve regulation

Following the report *Rethinking Regulation* (Regulation Taskforce 2006), the Commonwealth Government has enhanced the regulation-making framework to improve the analysis applied to regulatory proposals and hence the quality of regulation.

The stated objectives in implementing the principles of good regulatory process and consultation (detailed in the *Best Practice Regulation Handbook*) are to:

- achieve a robust system of regulatory oversight that encourages sound policy development and implementation by ensuring officials and ministers consider the potential costs and adverse implications, as well as benefits, of regulatory proposals
- ensure the Government maintains appropriate control over decision-making processes and the capacity to implement policy quickly where necessary
- ensure that ultimate responsibility for regulatory quality rests with individual ministers, departments and agencies, boards, statutory authorities and regulators.

Regulation is pervasive and initiatives to improve it are required at all levels of government. The Commonwealth's initiatives will be less effective if state, territory and local governments are not also committed to improving regulation. The Council of Australian Governments (COAG) has recently strengthened its regulatory impact analysis requirements for national regulation making and for similar arrangements in the states and territories (see appendixes C and E).

## 1.1 Improving the quality of new regulation

To improve the analysis applied to regulatory proposals and hence the quality of regulation, a three-tiered system has been instituted for assessing all regulatory and quasi-regulatory proposals. To determine which level of analysis is appropriate, a preliminary assessment must be undertaken for all regulatory proposals to establish whether they are likely to involve an impact on business and individuals or the economy.

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- For proposals that will have *no or low* impacts on business and individuals or the economy, no further regulatory analysis is required.
  - For proposals that are likely to involve *medium* business compliance costs, a quantitative assessment of the compliance cost implications must be carried out using the Business Cost Calculator (BCC) or an approved equivalent.
  - For proposals that are likely to have a significant impact on business and individuals or the economy (whether in the form of compliance costs or other impacts) a more detailed analysis must be undertaken and documented in a Regulation Impact Statement (RIS). If the impacts include medium or significant business compliance costs, the RIS should include a full (quantitative) assessment of these costs using the BCC or an approved equivalent.

## **Key phases of the regulatory impact analysis cycle**

A stylised representation of the Commonwealth's regulatory impact analysis process is shown in figure 1.1. All phases of the cycle may not be appropriate for every regulatory proposal. Also, as a policy develops, feedback loops may be needed. The key phases of the cycle are outlined below. (The *Best Practice Regulation Handbook* provides more detail.)

### *1. Annual Regulatory Plan*

The Government is committed to effectively engaging with business and other stakeholders in developing regulation. To this end, each department or agency is required to develop an Annual Regulatory Plan in consultation with the OBPR. (See *Guidelines for Annual Regulatory Plans* at [www.obpr.gov.au](http://www.obpr.gov.au).) The Annual Regulatory Plan is required to be published on the agency's website in July each year. It contains information about proposed regulatory activity, including a description of the issue, information about consultation opportunities and an expected timetable.

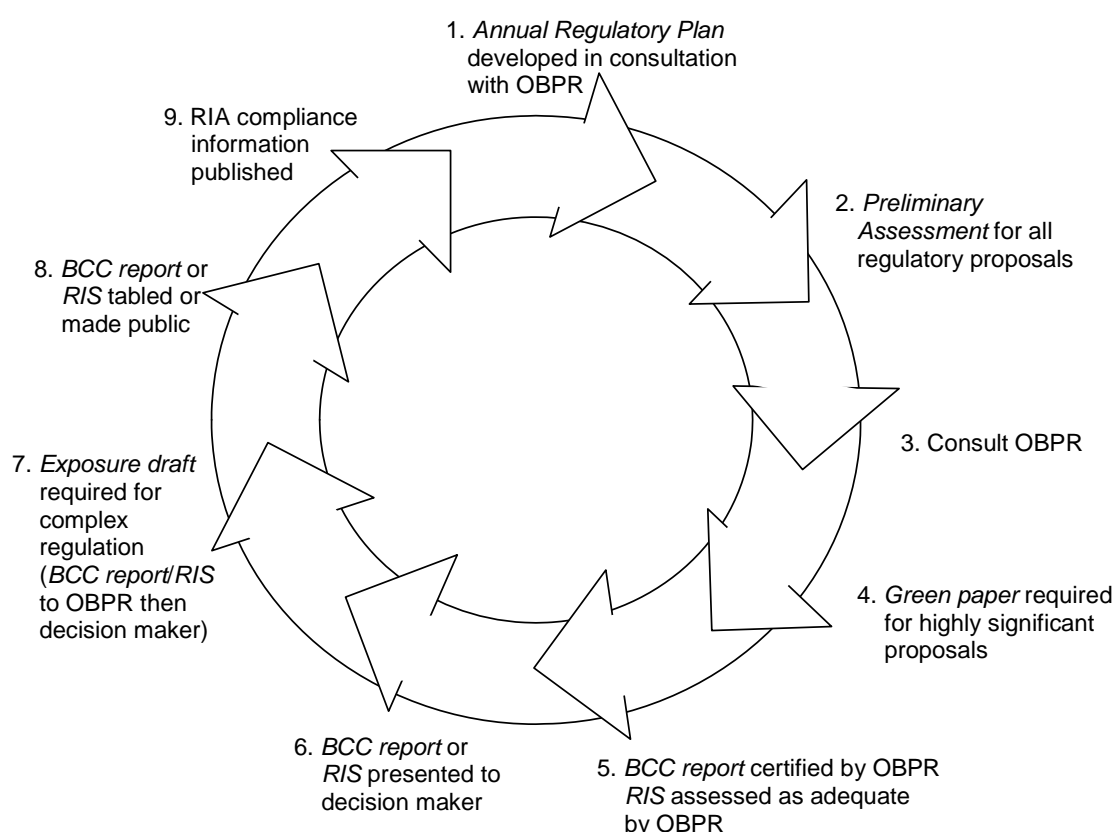
The Plan should include a consultation strategy for all regulatory proposals which require a BCC report or RIS to be prepared in the next twelve months or so. To provide transparency and embed best practice consultation practices, the Plans should address the following.

- What consultation has already occurred on the proposal?
- What is the objective of each consultation round?
- Who will be consulted at each round?
- In what form will consultation occur at each round?

- When will each round of consultation commence?
- How long will the round last?

The *Best Practice Regulation Handbook* provides more information on Annual Regulatory Plans. The OBPR's website (and the Business Consultation website at [www.consultation.business.gov.au](http://www.consultation.business.gov.au)) provides links to all the Plans.

**Figure 1.1 The Government's regulatory impact analysis cycle<sup>a</sup>**



<sup>a</sup> Where a regulatory proposal involves COAG, a ministerial council, a national standard-setting body or a related body, the COAG *Principles and Guidelines* should be used (COAG 2004). COAG requires a RIS for consultation and a RIS for the decision-making stage, which is made public.

## 2. Preliminary assessment

The new arrangements require the identification of any potential impacts on business and individuals or the economy, which could potentially flow from a regulatory proposal.

The impacts may involve business compliance costs (associated with notification, education, permission, purchase costs, record keeping, enforcement, publication and documentation or procedural) or other impacts (such as potentially affecting the

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number and range of business in an industry, altering a business's incentive to compete or impacting on consumers). If the proposal has yet to be included in the Annual Regulatory Plan, a preliminary assessment form (see [www.obpr.gov.au](http://www.obpr.gov.au)) can be used to assess the impacts.

If it is clear that there will be no/low impacts (that is, that any impacts would be trivial or negligible), no further regulatory analysis is required — otherwise the OBPR should be consulted. A preliminary assessment report should be sent to the agency's Best Practice Regulation Coordinator. The OBPR is required to report non-compliance if the preliminary assessment is subsequently found to be incorrect.

### *3. Consult the OBPR early*

Departments and agencies should consult with the OBPR early in the policy development cycle to ensure that the regulatory impact analysis requirements are met. The OBPR works with departments and agencies to gain an understanding of the proposal. The OBPR may then advise that:

- the proposal is likely to have no/low impacts and no further analysis is required
- the proposal is likely to have medium compliance costs and a quantitative assessment of compliance costs should be prepared using the BCC (or an approved equivalent) or
- the proposal is likely to have significant impacts and a RIS should be prepared (box 1.1). An assessment of compliance costs may be required in the RIS.

The OBPR may also advise that a green paper and/or exposure draft of the regulations should be prepared where the impacts are highly significant and/or the regulation is complex.

The OBPR provides support and advice about preparing BCC reports, RISs (including cost-benefit analysis), green papers and exposure drafts of regulations. In line with the policy development process, agencies are encouraged to provide draft documents to the OBPR so it can provide timely advice.

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**Box 1.1 What is a Regulation Impact Statement?**

Regulation Impact Statements (RISs) have been required in varying degrees at the Commonwealth level since the 1980s. In brief, a RIS formalises and provides evidence of the key steps taken as part of a good policy development process. It clearly identifies the fundamental problems that need to be addressed and makes the case why (additional) government action is needed. It includes an assessment of the costs and benefits of each option, followed by a recommendation supporting the most effective and efficient option.

A RIS has seven elements, setting out:

- the problem or issues that give rise to the need for action;
- the desired objectives;
- the options (regulatory and non-regulatory) that may constitute viable means for achieving the desired objectives;
- an assessment of the impacts (costs, benefits, and where relevant, the levels of risks) on consumers, business, government and the community of each option;
- a consultation statement;
- a recommended option; and
- a strategy to implement and review the preferred option.

The elements of a RIS should contain a degree of detail and depth of analysis that is commensurate with the magnitude of the problem and the size of the potential impacts of the proposal. (For more information, see the *Best Practice Regulation Handbook*.)

*Source:* Australian Government 2007a.

#### 4. Green paper

For highly significant proposals, an initial policy ‘green paper’ must be prepared and made available to relevant parties.

A green paper canvasses most of the elements contained in a RIS. It should identify the problem, outline the objectives, discuss the options (regulatory and non-regulatory), identify the main groups affected by the options and include a preliminary analysis of the impacts. The green paper can be used to ask questions to fill information gaps and illicit specific feedback from stakeholders. The OBPR should be consulted on the preparation of the green paper.

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## *5. BCC report or RIS to OBPR*

The BCC report (or approved equivalent) documents the various categories of business compliance costs while the RIS documents the policy development process (box 1.1). The analysis in the BCC report or RIS should feed into decision-making papers such as Cabinet submissions. The OBPR is required to certify the BCC report or to assess the adequacy of the RIS before the decision-making stage. The assessment of the RIS usually involves an iterative process, with the OBPR providing comments to the policy officer.

The OBPR is required to advise decision makers (including Cabinet through its coordination comment) on whether the mandatory use of the BCC (or approved equivalent) has been met and on the adequacy of the RIS.

## *6. BCC report or RIS to decision maker*

The BCC report or RIS is presented to the decision maker, which may be Cabinet, the Prime Minister, Minister(s), board or agency head.

In the absence of exceptional circumstances, as agreed by the Prime Minister, a regulatory proposal with medium compliance costs or significant impacts on business and individuals or the economy cannot proceed to Cabinet or other decision makers unless it has complied with the Government's regulatory impact analysis requirements.

## *7. Exposure draft*

Prior to finalisation, the details of complex regulations should be tested with relevant business and community interests, including through exposure drafts. Consequently, it is appropriate to have a multiple decision-making stage process for complex regulations. The first decision may consider that regulation is the preferred option while a subsequent decision considers the details of implementing complex regulations. The OBPR should be consulted about the exposure draft.

The RIS for the first decision is amended to include the analysis associated with the implementation stage. The amended RIS is then assessed by the OBPR and, if adequate, presented to the decision maker.

## *8. BCC report or RIS tabled or made public*

After a decision is made, the certified BCC report or adequate RIS is tabled in Parliament or otherwise made public.

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## 9. RIA compliance information published

The OBPR is required to report annually on compliance with the Government's regulatory impact analysis and consultation requirements. The *Best Practice Regulation Report* is published around November each year.

### **Differences between previous and enhanced regulation-making frameworks**

In summary, the main differences include:

- six principles of good regulatory process have been formally endorsed
- all regulatory proposals must now undergo a preliminary assessment to determine if further regulatory analysis is required
- even proposals expected to have only 'medium' business compliance costs are required to complete a BCC report
- the requirement for the use of cost-benefit analysis in a RIS has been strengthened
- there is now a whole-of-government policy on consultation
- gate-keeping arrangements have been considerably strengthened.

Some of the detail about the differences follows.

#### *Principles of good regulatory process*

As recommended by the Regulation Taskforce (2006), the following six principles of good regulatory process have been endorsed at the Commonwealth level:

- Governments should not act to address 'problems' until a case for action has been clearly established.
- A range of feasible options needs to be identified and their benefits and costs assessed.
- Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted.
- Effective guidance should be provided to relevant regulators and regulated parties in order to ensure that the policy intent of the regulation is clear, as well as the expected compliance requirements.
- Mechanisms are needed to ensure that regulation remains relevant and effective over time.

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- There needs to be effective consultation with regulated parties at all stages of the regulatory cycle.

### *Preliminary assessments*

Under the new arrangements, all regulatory proposals must undergo a *preliminary assessment* to establish whether they are likely to involve an *impact on business and individuals or the economy*.

- As mentioned earlier, if there are likely to be *no or low impacts*, the department can self-assess and no further regulatory analysis is required. However, where policy officers are in any doubt, they need to consult the OBPR.
  - The self-assessment process remains an option as under the previous arrangements. However, it should be noted that the threshold for further regulatory analysis has been lowered to cover ‘medium’ business compliance costs.
  - In line with the previous arrangements, at compliance reporting time (when the proposal is tabled or made public) if the department’s self-assessment was found to be incorrect, the OBPR is required to report non-compliance.

### *Business Cost Calculator reports*

Under the new arrangements, if a regulation potentially involves *medium business compliance costs* (and no other impacts) a BCC report (or equivalent) *must* be prepared, although a full RIS is not required.

- The requirement only applies to increases in compliance costs.
- The policy officer prepares a BCC report (certified by the OBPR) for the decision-making stage, which is tabled or made public.

### *Regulation Impact Statements*

Essentially the test for when a RIS is required remains unchanged. A RIS is required for regulations that potentially have a *significant impact on business and individuals or the economy* (whether in the form of compliance costs or other impacts, including a restriction or promotion of competition).

That said, the RIS requirements have been strengthened in the following ways.

- The requirement to assess business compliance costs has been strengthened. If the impacts include medium or significant business compliance costs, the BCC report forms part of the RIS.

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- The requirement to use cost-benefit analysis and, where appropriate, risk analysis in the RIS has been strengthened.
  - The need to assess *existing* regulation and identify scope for rationalisation.

In line with the previous arrangements, once the analysis has been undertaken, a RIS is prepared for the decision-making stage (assessed as adequate by the OBPR) and is tabled or made public.

### *Consultation policy*

The Government adopted a whole-of-government policy on consultation which specifies principles that need to be followed by all agencies when developing regulation. The seven principles for best practice consultation cover continuity, targeting, appropriate timeliness, accessibility, transparency, consistency and flexibility and evaluation and review. Details can be found in the *Best Practice Regulation Handbook*.

As discussed earlier, a requirement for a consultation strategy has also been embedded in Annual Regulatory Plans. Under the new arrangements, if the impacts of the regulation are likely to be highly significant and/or the regulations are complex, a green paper and/or an exposure draft of the legislation (respectively) is required for consultation.

### *Strengthened gate-keeping*

Under the new arrangements gate-keeping has been substantially strengthened.

In the absence of exceptional circumstances as agreed by the Prime Minister, a regulatory proposal with potentially *medium business compliance costs* or *significant impacts on business and individuals or the economy*, cannot proceed to the Cabinet or other decision maker unless it has complied with the regulatory impact analysis requirements.

If a proposal does proceed (either to Cabinet or to another decision maker) without an adequate RIS or BCC report, the resulting regulation must be the subject of a post-implementation review within one to two years. (This applies also even if exceptional circumstances status is granted.)

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### *Enhanced role of OBPR*

In line with the enhanced regulation-making framework, the OBPR provides a central role in assisting regulators (departments and agencies) to meet the Government's best practice regulation requirements, and in monitoring and reporting on their performance.

The OBPR offers training and assistance to departments and agencies in preparing RISs and using the BCC to assess compliance costs. The OBPR provides technical assistance and training to officials on cost-benefit analysis and risk analysis. The OBPR also provides advice on preparing Annual Regulatory Plans.

### **COAG RIS process strengthened**

The Council of Australian Governments (COAG) has recently strengthened its regulatory impact analysis requirements for national regulation-making and for similar arrangements in the states and territories. Following its April 2007 meeting, COAG agreed as follows:

... all Governments will 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 by:

- (a) establishing and maintaining "gate-keeping mechanisms" as part of the decision-making process to ensure that the regulatory impact of proposed regulatory instruments are made fully transparent to decision makers in advance of decisions being made and to the public as soon as possible;
- (b) improving the quality of regulation impact analysis through the use, where appropriate, of cost-benefit analysis;
- (c) better measurement of compliance costs flowing from new and amended regulation, such as through the use of the Commonwealth Office of Small Business' costing model;
- (d) broadening the scope of regulation impact analysis, where appropriate, to recognise the effect of regulation on individuals and the cumulative burden on business and, as part of the consideration of alternatives to new regulation, have regard to whether the existing regulatory regimes of other jurisdictions might offer a viable alternative; and,
- (e) applying these arrangements to Ministerial Councils. (COAG 2007, p. 8)

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## 1.2 Improving the stock of existing regulation

One of the key elements of best practice regulation making is to review regulation once it has been in place for some time. Such reviews ensure that consideration can be given to whether the desired objectives for introducing regulation are being met, whether the impacts are as expected, or whether there have been unanticipated problems.

Reviews of the stock of regulation oblige regulators to consider whether there is still a problem which requires government action. They require consideration of whether the existing regulations are still the appropriate means of dealing with the problem or whether there are more appropriate measures.

The report *Rethinking Regulation* (Regulation Taskforce 2006, p. 173), examined existing regulatory burdens and noted that: ‘*all regulations should be subject to review processes to ensure their continuing appropriateness and effectiveness*’.

A number of review mechanisms have been introduced by governments at different levels over the years. In addition, the Australian Government agreed to additional review mechanisms recommended by the Regulation Taskforce. This section provides a brief overview of these regulation review mechanisms.

### Australian Government mechanisms

#### *Annual reviews of regulatory burdens on business*

On 12 October 2005, the Australian Government announced the introduction of a new annual review process to examine the cumulative stock of Commonwealth regulation and identify an annual red tape reduction agenda (Howard and Costello 2005).

The reviews, by the Productivity Commission, are being conducted with advance notice over a five year cycle to ensure that all industry sectors are examined and provide greater certainty for business. Like the Regulation Taskforce’s more sweeping review, the sectorally targeted annual regulation reviews will identify Government regulation that is ‘unnecessarily burdensome, complex or redundant, or duplicates regulations in other jurisdictions’. The Commission will develop a list of priority areas and options to alleviate regulatory burdens and identify reforms to enhance regulatory consistency across jurisdictions (Costello 2007).

The five year cycle involves reviewing, in sequence, regulation which mainly impacts on the following areas:

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- Primary sector - 2007
  - Manufacturing sector and distributive trades - 2008
  - Social and economic infrastructure services - 2009
  - Business and consumer services – 2010
  - Economy-wide generic regulation and regulation missed in earlier reviews – 2011.

The first review commenced on 1 April 2007 and was completed at the end of October 2007.

### *Reviews of regulations with sunset clauses*

The *Legislative Instruments Act 2003* (LIA) introduced a comprehensive regime for the making, registration, publication, parliamentary scrutiny and sunseting (or automatic ceasing) of Commonwealth delegated legislation. (Attorney-General's Department 2006, p. 2)

The Legislative Instruments Handbook states that:

The default position is that a non-exempt legislative instrument will sunset after 10 years on either a 1 April or 1 October. The instrument will be treated as though it is repealed from then.

It also states that:

Amendments to a principal instrument will sunset on the same day as the principal instrument. The sunseting date for a legislative instrument will depend on whether the instrument is made before or after 1 January 2005. (Attorney-General's Department 2004, p. 64)

There are some exemptions from the sunseting provisions. The Act also contains provisions for short-term deferral of sunseting of an instrument in limited circumstances and for the continuation of an instrument for a further 10 years subject to Parliamentary resolution.

A list of instruments and provisions of instruments due to sunset will be tabled in Parliament 18 months before the sunseting date. The list is also to be copied to responsible rule-making agencies.

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## *Five-yearly reviews of regulation*

*Rethinking Regulation* (Regulation Taskforce 2006, p. 174) recommended that:

‘... at least every 5 years, all regulations (not subject to sunset provisions) should, following a screening process, be reviewed, with the scope of the review tailored to the nature of the regulation and its perceived performance’.

It further considered that:

‘... a full review would be undertaken, entailing consideration not only of the design and effectiveness of the regulation but also whether alternatives to it would generate greater net benefits’.

The Government accepted this recommendation and as a result, all regulations that are not subject to statutory review or to the sunset provisions of the *Legislative Instruments Act 2003* will be subject to review five years after their introduction. The first tranche of five-yearly reviews are set to commence in 2012.

The first task in implementing this requirement is to identify the stock of regulation that will be affected. The second task is to undertake a preliminary assessment of the impacts of the regulation. This can be done using the Government’s preliminary assessment process for new and amending regulation. If the preliminary assessment suggests that there are compliance cost impacts or significant other impacts associated with the regulation that were not originally identified, or stakeholders have raised concerns about the regulation, it should be subject to further review.

The OBPR, with assistance from the Office of Legislative Drafting, will play a key role in this process, helping departments and agencies to identify the regulations introduced five years earlier and to determine when a preliminary assessment by the department or agency responsible for its introduction should be undertaken. A trial of the approach will be conducted with selected departments and agencies in 2009-10 to identify the scale and scope of the task.

## **COAG mechanisms**

### *Competition Principles Agreement – reviews of legislation*

On 25 February 1994, the Council of Australian Governments (COAG) agreed to the principles of competition policy articulated in the report of the National Competition Policy Review. The Competition Principles Agreement required each party to develop a timetable, by June 1996, for the review and, where appropriate, reform of all existing legislation that restricted competition by the year 2000.

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The states and territories placed some 1500 pieces of legislation on the review schedule, whilst the Commonwealth listed about 100 pieces of legislation. The Commonwealth's legislation review schedule not only included legislation which potentially restricted competition, but was expanded to include legislation which may impose costs or confer benefits on business.

The Commonwealth, state and territory governments agreed that significant legislation would be systematically reviewed at least every 10 years.

In 2005-06, the National Competition Council (NCC) reported that:

In aggregate terms, governments reviewed and, where appropriate, reformed around 85 percent of their nominated legislation. (NCC 2006, p. 60)

Following this, COAG agreed that all jurisdictions will recommit to the principles contained in the Agreement (COAG 2006). The Agreement provides for ongoing reviews of legislation placed in the Legislation Review Schedule. Clause 5 (6) of the Agreement requires that:

'Once a Party has reviewed legislation that restricts competition under the principles ... the Party will systematically review the legislation at least once every ten years'. (COAG 1995, p. 5)

In April 2007, COAG agreed that each jurisdiction will complete outstanding priority legislation reviews in accordance with the Agreement public benefit test. Governments will report annually to COAG on their progress in meeting this commitment (COAG 2007a).

### *'Hot Spots' and Annual Reviews*

At the national level, concerns about inconsistent and unnecessarily burdensome regulatory regimes across jurisdictions, led to COAG agreeing, at its February and July 2006 meetings, to take action to address a number of specific 'hot spots' and areas for cross-jurisdictional regulation reform. These areas are as follows:

- Rail safety regulation
- Occupational health and safety
- National trade measurement
- Chemicals and plastics
- Development assessment arrangements
- Building regulation
- Environmental assessment and approvals processes

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- Business name, Australian Business Number and related business registration processes
  - Personal property securities
  - Product safety.

In addition to the ‘hot spots’ reviews, COAG has also established a system of annual reviews. This has been in response to the report of the Regulation Taskforce (2006) and in line with the COAG National Reform Agenda, which focuses on reducing the regulatory burden imposed by the three levels of government. The Regulation Taskforce (2006, p. 171) recommended that:

COAG should consider establishing a series of reviews targeted at areas where there is significant overlap and/or inconsistency between Australian Government and state and territory government regulation.

In February 2006, COAG agreed that each jurisdiction will review existing regulations with a view to encouraging competition and efficiency and streamlining and reducing the regulatory burden on business by:

- initiating at least annual targeted reviews to reduce the burden of existing regulation in its own jurisdiction through a public inquiry and reporting process that provides opportunities for input from a range of stakeholders, including business groups, with each review to identify priority areas where regulatory reform could provide significant gains to business and the community; and
- acting on the recommendations of the reviews referred to above, and co-ordinating reform measures with other jurisdictions if appropriate. (COAG 2006, p. 5)

COAG has also established the COAG Reform Council to report to COAG annually on progress in implementing the National Reform Agenda.

### *Regulatory benchmarking*

The first stage of this study was concluded with the release of the Productivity Commission’s report, *Performance Benchmarking of Australian Business Regulation* on 6 March 2007 (PC 2007). At the request of COAG, the report outlines a common framework for benchmarking, measuring and reporting on the regulatory burden on business, including a range of feasible quantitative and qualitative performance indicators. It also proposes, as a second stage, a program for the first three years of benchmarking.

On 13 April 2007, COAG considered the Commission’s report and agreed to proceed to the second stage of the project. COAG noted that the Commonwealth will fund the benchmarking exercise.

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On 5 September 2007, the second stage of the study commenced and is to extend over the next three years. The terms of reference require that stage two examine the regulatory compliance costs associated with becoming and being a business, the delays and uncertainties of gaining approvals in doing business, and the regulatory duplication and inconsistencies in doing business interstate.

To assist with stage two of the project, the Commission has convened a Government Advisory Panel comprising senior officials from all jurisdictions. The panel is to assist in providing advice on the scope of the benchmarking exercise and to facilitate and coordinate data provision. It will also be given the opportunity to scrutinise and comment on preliminary results.

The Commission is to report within 12 months on measures of the quantity and quality of regulation and of the compliance costs associated with business registration requirements. At the conclusion of year three, the Commission is to review the exercise and report on options for the forward program.

#### *Other reviews*

The Regulation Taskforce (2006, p. 172-73) noted that:

An important mechanism for improving regulation in Australia has been the many ad hoc reviews of specific policy areas that have taken place over the years, often as a response to perceived problems or changes in circumstances. Recent examples include Productivity Commission reviews of health workforce issues, consumer product safety and regulatory issues in the areas of building regulation, occupational health and safety, workers' compensation, and native vegetation and biodiversity.

These reviews have demonstrated that often there is scope to considerably improve the design and application of regulations to promote better outcomes.

In addition to the formal review mechanisms noted above, there remains capacity for all three levels of government to initiate ad hoc reviews of regulation, including by independent taskforces and standing bodies such as the Victorian Competition and Efficiency Commission and the Productivity Commission. For example, among the reviews proposed in *Rethinking Regulation*, the Productivity Commission has been asked to conduct inquiries into the regulatory framework for the Chemicals and Plastics Industries and Consumer Policy.