



Australian Government
Productivity Commission

Identifying and Evaluating Regulation Reforms

Productivity Commission
Research Report

December 2011

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

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Foreword

Regulation is needed to meet a range of social, environmental and economic goals. However, in practice, much regulation does not do this cost-effectively, and some regulation does not even adequately achieve the ends for which it was designed.

There has been increasing recognition of these problems as regulation has continued to grow apace. Governments in Australia and overseas have sought to achieve 'better regulation' through institutions and processes to vet it more rigorously at the outset and to reform costly or ineffective regulation.

In this study, the Productivity Commission was asked to identify any lessons from past attempts to review and reform the regulatory 'stock', as well as to consider methods for evaluating reforms, in the context of identifying priority areas for future reform. The study contains findings about the efficacy of different approaches, some 'best practice' principles, and recommendations to enhance Australia's regulatory system.

In the course of the study, the Commission benefitted greatly from discussions with a range of government officials and business and other organisations, including in response to a draft report released in September. Valuable input and feedback were also received from officials at the OECD and in a number of foreign governments. The Commission is grateful to all those who assisted it.

The study was conducted in the Commission's Canberra office by a staff team led by Dr Jenny Gordon and overseen by me.

Gary Banks AO
Chairman

2 December 2011

Terms of reference

Identifying and Evaluating Regulation Reforms

I, Bill Shorten, pursuant to Parts 2 and 4 of the *Productivity Commission Act 1998* hereby request the Productivity Commission to undertake a research study on frameworks and approaches to identify areas of regulation reform and methods for evaluating reform outcomes.

Ongoing regulatory reform to improve the quality of regulation needs to be supported by frameworks and approaches to identify appropriate areas of reform and the priority of such reform. Equally important is the ability to effectively evaluate reform outcomes, in particular to provide an indication of how reform can reduce administrative and compliance costs for business. The Productivity Commission is asked to conduct a review to propose frameworks and approaches that will be effective in identifying poorly performing areas of regulation and regulatory reform priorities, and methods for evaluating reform outcomes.

This review is to replace the fifth year of the cycle of annual reviews of regulatory burdens on business, which was to have been a review of economy-wide generic regulation.

Background

In 2007, as part of the Government's response to the Report of the Taskforce on Reducing Regulatory Burdens on Business, the Productivity Commission was asked to conduct ongoing annual reviews of the burdens on business arising from the stock of government regulation. Four reviews have been conducted to date. At the direction of the Council of Australian Governments (under a separate review process) the Commission also undertakes reviews to benchmark compliance costs of regulations in targeted areas, such as food safety and occupational health and safety.

Scope of the annual review

In undertaking the review, the Commission should:

1. examine lessons gathered in Australia and overseas in reviewing regulation, identifying regulatory reform opportunities and priorities, and evaluating regulation reform outcomes.
2. build on such lessons to analyse possible frameworks and approaches for identifying poorly performing areas of regulation and regulatory reform

priorities, and both qualitative and quantitative methods for evaluating regulation reform outcomes

3. In proposing enhanced frameworks and approaches to identify poorly performing areas of regulation and regulatory reform priorities, and methods for evaluating reform outcomes, the Commission is to:
 - seek public submissions and consult with interested parties as necessary
 - have regard to any other relevant current or recent reviews commissioned by Australian governments’ and
 - have regard to the assessment of the OECD in its 2009 Review of Regulatory Reform in Australia — Towards a Seamless National Economy that there is likely to be limited scope for gains to regulatory quality through a further tightening of existing processes

The Commission’s report will be published within six months of receipt of the terms of reference and the Government’s response will be announced as soon as possible.

Bill Shorten
Assistant Treasurer
[received 24 May 2011]

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The following additional appendixes form an integral part the study and are available on the Commission’s website (www.pc.gov.au)

B Public stocktake reviews

C In-depth reviews

D Principles-based reviews

E Programmed reviews

F Benchmarking

G Stock management tools

H Regulator performance

I Ex post evaluation frameworks

J Quantifying the impacts of regulation and reform

K How do different countries manage regulation?

OVERVIEW

Key points

- The regulatory system should ensure that new regulation and the existing ‘stock’ are appropriate, effective and efficient. This requires the robust vetting of proposed regulation; ‘fine tuning’ of existing regulations and selecting key areas for reform.
 - It also requires that these be performed in a coordinated and cost-effective way, with political leadership a key factor in all this.
- There is a range of approaches to reviewing existing regulation and identifying necessary reforms. Some are more ‘routine’, making incremental improvements through ongoing management of the stock; some involve reviews that are programmed, and some are more ad-hoc.
- Designed for different purposes, the techniques within these three categories can complement each other, though their usefulness varies.
 - Among ‘management’ approaches, red tape targets can be a good way to commence a burden reduction program. But ‘one-in, one-out’ rules have more disadvantages than advantages. Regulator practices can play a key role in compliance burdens, with scope apparent for improvement.
 - Reviews embedded in legislation can usefully target areas of uncertainty. Sunsetting can help eliminate redundant regulation and ensure that re-made regulation is ‘fit for purpose’, but requires good preparation. Post implementation reviews, triggered by the avoidance of a regulation impact statement, are an important failsafe mechanism but need strengthening.
 - Public stocktakes cast a wide net and can identify cross-jurisdictional and cumulative burdens. Reviews based on a screening principle, particularly the competition test, have been highly effective and could be extended. In-depth reviews are best for identifying options for reform in more complex areas, while benchmarking can point to leading practices.
- Good design features vary for the individual techniques, but all require sound governance and effective consultation. For significant reviews, public exposure of preliminary findings is a key success factor.
- While Australia’s regulatory system now has the necessary institutions and processes broadly in place, there remains scope for improvement in:
 - prioritisation and sequencing of reviews and reforms — with greater attention paid to the costs of developing and undertaking reforms
 - monitoring of reviews and the implementation of reforms
 - advance information to achieve better focused consultations
 - incentives and mechanisms for good practice by regulators — with a further review needed to identify the best approaches
 - building public sector skills in evaluation and review.

Overview

Regulation has grown at an unprecedented pace in Australia over recent decades. As in other advanced countries, this has been a response to the new needs and demands of an increasingly affluent and risk averse society and an increasingly complex (global) economy. This regulatory accretion has brought economic, social and environmental benefits. But it has also brought substantial costs. Some costs have been the unavoidable by-product of pursuing legitimate policy objectives. But a significant proportion has not. And in some cases the costs have exceeded the benefits. Moreover, regulations have not always been effective in addressing the objectives for which they were designed, including regulations designed to reduce risk.

Growing recognition of these costs and other deficiencies of regulation has led governments to undertake major reforms over the years. An early focus of such efforts was the removal of many regulations that unduly impeded competition. This exposed many firms to heightened market disciplines and caused them to give more attention to impediments to their competitiveness, including the effect of other regulations. Further waves of reform followed, being focussed on the regulation of key input markets and regulatory compliance burdens generally.

The Commission and its predecessor organisations, through their public inquiry programs, have contributed to these various reform efforts. A recent strand of this work has involved annual ‘stocktakes’ of regulation in key sectors to identify unnecessary burdens on business and the not-for-profit sector. (Hereafter ‘business’ refers to both for-profit and not-for-profit organisations). These followed on from the economy-wide review by the ‘Regulation Taskforce’ in 2006. With the completion of the sectoral stocktakes early this year, the Australian Government asked the Commission to provide it with an assessment of these and other approaches to identifying priority reforms — and methods for evaluating their effects — together with advice on enhancing the ‘frameworks’ for reform efforts.

Why target the ‘stock’?

The requested focus for this report relates to the stock of existing regulation rather than the flow of new regulation. The magnitude of the stock is many multiples that of the flow, and it has commensurately larger impacts within the economy.

Ultimately, however, the stock of regulation is the outcome of the accumulated flows. In many cases, deficiencies of regulation can be traced to the inadequate vetting of it in the first place.

Processes to improve the scrutiny of new regulatory proposals — notably through impact assessment requirements — have accordingly been introduced or upgraded by all governments in Australia over recent years (box 1). How well these are working in practice, and the scope to make further improvements, remains unclear at this stage. (The Commission will undertake a comparative study of regulation impact assessments across jurisdictions for the Council of Australian Governments (COAG) in 2012.)

However, even if all new regulations were subjected to rigorous assessment, uncertainties about their effects in the longer term would remain in many cases. And even if a regulation were initially appropriate and cost effective, it may no longer be so some years hence. Changes can occur in markets and technologies, or in peoples' preferences and attitudes. Moreover, the accumulation of regulations leads to interactions that in themselves can give rise to increased costs and other unintended consequences.

Box 1 Managing the flow of regulation

The Australian Government established a system of regulation impact statements (RIS) in 1985 for all new Commonwealth regulation that imposes a significant burden on business. The guidelines and arrangements have been revised periodically, most recently in 2010.

All state and territory governments have also implemented RIS-type systems, now entrenched in COAG under the National Partnership Agreement to Deliver a Seamless National Economy.

A RIS is mandatory for all decisions made by the Australian Government and its agencies that are likely to have a significant impact on business or the not-for-profit sector. This requirement includes amendments to existing regulation and the rolling over of sunseting regulation.

The RIS process is overseen by the Office of Best Practice Regulation (OBPR) in the Department of Finance and Deregulation. OBPR vets and comments on compliance with the Government's RIS requirements and on the adequacy of the RIS in its coordination comments.

The Cabinet Secretariat provides a gate-keeping role to ensure that regulatory proposals coming to the Cabinet and sub-committees of the Cabinet meet the RIS requirements. Any regulatory proposal that has not complied, cannot proceed unless the Prime Minister has deemed that exceptional circumstances apply, necessitating a 'post implementation review' commencing within 2 years of implementation.

It is therefore essential that the stock of regulation be kept under review to verify that it remains ‘fit for purpose’, with any costly or otherwise poorly performing regulations removed or amended.

The costs of regulation are multi-dimensional and have multiple origins (box 2). This means that an effective policy framework for regulatory reform must embody a suite of approaches that can address and remedy these different forms of cost or burden. However such reviews are themselves not costless. They require skilled people and other resources, all of which have competing uses. They therefore need to be allocated so as to address the priorities, in a proportionate and coordinated way.

Assessing the ‘approaches’

A variety of approaches to identifying and implementing reforms to existing regulation have been used in Australia and overseas. These can be loosely divided into three broad categories: approaches that involve relatively routine or ongoing ‘management’ of the stock; those that are ‘programmed’ to occur at certain intervals or in particular circumstances; and those of a more ad hoc character, which may be triggered by various influences or emerging issues.

Stock management approaches

Regulator-based strategies

Regulators should be well placed to detect costs and problems in the regulations they administer and, where they are not the authors of the regulation, to advise policy departments about these issues. Equally, participants in this review have emphasised that the manner in which regulations are applied and enforced can be a significant driver of costs for businesses.

The Regulation Taskforce report argued that regulators needed to be more systematic in consulting and seeking feedback from regulated entities, and that any undue risk aversion of regulators needed to be addressed by government. A number of initiatives have been implemented since then, including more risk-based enforcement, and more use by regulators of consultative forums and processes. However, feedback from business groups suggests that problems remain.

Box 2 Sources of ‘unnecessary’ regulatory burdens

The Regulation Taskforce (2006) identified five features of regulations that contribute to compliance burdens on business that are not justified by the intent of the regulation.

- *Excessive coverage, including ‘regulatory creep’* — Regulations that appear to influence more activity than originally intended or warranted, overly prescriptive, or where the reach of regulation impacting on business, including smaller businesses, has become more extensive over time.
- *Regulation that is redundant* — Some regulations could have become ineffective or unnecessary as circumstances have changed over time.
- *Excessive reporting or recording requirements* — Companies face multiple demands from different arms of government for similar information, as well as information demands that are excessive or unnecessary. These are rarely coordinated and often duplicative.
- *Variation in definitions and reporting requirements* — Regulatory variation of this nature can generate confusion and extra work for businesses than would otherwise be the case.
- *Inconsistent and overlapping regulatory requirements* — Regulatory requirements that are inconsistently applied, or overlap with other requirements, either within governments, or across jurisdictions. These sources of burden particularly affect businesses that operate on a national basis, or across local government areas in some states.

There may also be economic costs arising from ‘distortions’ — the effects of regulation on competition and on incentives for investment and innovation. Such distortions (often unintended) can be due to:

- substitution effects resulting from changes in relative prices, including distorting investment decisions which have long term consequences
- overly prescriptive regulation which prevents innovative or lower cost approaches to meeting the intended outcomes of the regulation
- interactions of regulations that can compound costs, create inconsistencies, and otherwise pose dilemmas for business compliance.

In addition, there may be other non-economic costs arising from adverse environmental and social impacts. Finally, if regulation is not effective, there may be ‘opportunity costs’ in terms of the foregone benefits that regulation intended to deliver.

The adoption of leading practices by regulators can make regulation more effective, enabling greater realisation of its underlying objective, or can reduce the costs of attaining a particular level of compliance. By contrast, poor regulator practices can discourage compliance, waste government resources and add to business costs and delays. Even where new or reformed regulation is appropriate and well designed,

poor enforcement practices can risk rendering it ineffective, or unduly burdensome, or both.

While administration and enforcement practices will vary depending on such matters as the nature of the regulations being administered and the characteristics of the businesses, there is increasingly agreement on broad principles for good practice. These address matters such as: streamlining of reporting requirements on business; risk-based monitoring and enforcement strategies; mechanisms to address consistency in legislative interpretation; graduated responses to regulatory breaches; and clear and timely communication with business.

Stock-flow linkage rules

A second type of management strategy constrains the flow of new regulation through rules and procedures linking it to the existing stock. While ‘one-in one-out’ rules and ‘regulatory budgets’ are commonly discussed and advocated, they have rarely been adopted. The United Kingdom provides one example of adoption of a ‘one-in one-out rule’, although this is applied to the compliance costs associated with regulation rather than the number of instruments. It is too early to tell if this rule is effective in addressing unnecessary burdens in the stock of regulation. It does appear to have dampened the flow of new regulation.

The Australian Government has introduced a regulatory ‘offset’ arrangement in which agencies proposing new regulation can be asked to seek an offsetting reduction in compliance costs. The Department of Finance and Deregulation (Finance) reports that some offsets have been obtained, though agencies are not compelled to do so.

To provide effective discipline, stock-flow linkage rules would need to be obligatory. However, this could lead agencies to act in counterproductive ways, including ‘stockpiling’ redundant or poor regulation for future trading purposes, or favouring changes with low measured costs but lower benefits. Moreover, unless there is a market in offsets, forcing some agencies to find savings could result in them avoiding new regulatory changes that would be beneficial. But establishing such a market would be likely to introduce more problems than it would solve.

FINDING 4.1

Regulatory budgets and ‘one-in one-out’ rules have superficial appeal, but could have perverse effects. On balance, the disadvantages appear to outweigh the advantages. It would be important to assess the effectiveness of the current United Kingdom scheme before pursuing similar approaches.

The voluntary nature of Finance’s ‘offset’ arrangement imposes little discipline on agencies to examine the accumulation in compliance costs that they are imposing on business. However, the arrangement allows greater flexibility for agencies to retain or make new regulation that is beneficial, and accommodates agencies that may have already significantly reduced compliance burdens.

FINDING 4.2

The regulatory offset approach adopted by the Department of Finance and Deregulation appears to have brought some benefits without the downside risks of a more rigid requirement.

The Australian Government’s best practice regulation requirements require that agencies proposing new regulation, consider in a regulation impact statement (RIS), how this will affect the cumulative burden on business and the scope to streamline existing regulation.

FINDING 4.3

The existing RIS requirement to examine related regulation can provide a timely opportunity to find offsetting compliance cost savings that are more readily locatable. It would be hard to extend this provision to unrelated sources of regulatory burden, but the current provisions could be more rigorously enforced.

Red tape reduction targets

An increasing number of governments overseas and in Australia (box 3; appendix G) have implemented ‘red tape reduction targets’ — following the lead of the Netherlands in the early 2000s. The targets require departments and agencies to reduce existing compliance costs by a certain percentage or value within a specified period of time. These are typically limited to ‘paperwork’ costs estimated using a standard cost methodology. Some jurisdictions (for example Victoria) have expanded the targets to include more substantive compliance costs, including costs of delay. A scheme in British Columbia (Canada) targets the number of ‘must comply’ requirements, as a proxy for compliance costs.

In most cases, cost-reduction targets are reported to have been met, with estimates ranging up to several billion dollars in some cases (United Kingdom, Netherlands). Yet, despite the estimated savings, business surveys report little reduction in compliance costs. There are various reasons why this might be so — not least that some of the savings may be more apparent than real.

Box 3 Red tape reduction targets: Australian experience

Several Australian states have used red tape reduction targets to reduce regulatory burdens on business. The targets are usually in 'gross' terms — they do not take into account the costs imposed by new regulation.

Victoria — The Victorian Government has set a target of a \$500 million reduction in compliance costs to business by July 2012. The costs covered include administrative costs, substantive compliance costs, and delay costs. As at July 2010, Victoria had estimated a reduction in the compliance burden of \$401 million.

In order to help meet the target, Victoria used incentive payments — including a \$42 million tender fund. A model based on the Dutch standard cost model was used to estimate the regulatory savings of the reforms.

South Australia — In 2006, South Australia set a target of a \$150 million reduction in net administrative and compliance burdens to business by 2008. Agencies were requested to develop plans outlining potential reforms, and a series of reviews were undertaken. The Office of Best Practice Regulation's (OBPR) business cost calculator was used to estimate the burden reductions associated with the reforms.

An independent audit by Deloitte (South Australian Government 2008) suggested that the reduction target was exceeded. Following this, the South Australian Government announced another \$150 million reduction target by 2012.

New South Wales — New South Wales has a target of a \$500 million reduction in red tape (including both administrative and substantive compliance costs). As at June 2010, an estimated \$400 million of reductions had been achieved.

Queensland — The Queensland government set a target of a \$150 million reduction in the administrative and compliance burden to business between 2009 and 2013. Departments have submitted simplification plans, which outline a range of potential reforms.

FINDING 4.4

Estimates of the savings from red tape reduction targets are usually based on proposed changes in regulatory requirements, and reflect 'gross' rather than 'net' savings. The savings actually achieved may be overstated. Involvement by business can assist in identifying costs and verifying savings.

Baseline estimates of compliance costs can point to the areas imposing the highest costs, but such exercises are expensive to conduct. It is also doubtful that they are necessary. Some good design features for red tape targets are set out in box 4.

Box 4 **Good design features of red tape targets**

- Red tape targets should include the administration costs of the regulator, particularly where those costs are passed on to business in the form of fees and charges.
- Targets should take into account the previous work undertaken in reducing compliance costs, and to the extent feasible progressively expand the scope of compliance costs covered.
- Consideration should be given to setting agency level targets, where some have more, and some less, scope to reduce costs without affecting benefits.
- A consultative process should be adopted in identifying areas for savings in compliance costs, rather than a major (and costly) costing exercise.
- Savings should be quantified and the estimates made public in a timely way.
- The estimates should be reviewed by an independent body to reduce the scope for gaming by agencies and to build public confidence.
- Incentive payments to agencies may prove effective. These payments could be targeted to strengthening the agency's capabilities in evaluating the effects of regulation on business and the community.

FINDING 4.5

Red tape targets can be a useful first step for jurisdictions that have not previously undertaken programs to reduce compliance costs. The potential for savings is more doubtful for jurisdictions, including the Australian Government, that have already engaged in other exercises to reduce compliance costs.

Programmed review mechanisms

Sunsetting

'Sunsetting' requires a regulation to be re-made after a certain period (typically 5 to 10 years), if it is not to lapse. The logic supporting sunseting is that much regulation inevitably has a 'use-by date', when it is no longer needed or will require significant modification. But without a trigger to reassess its utility, at least some of this regulation will inevitably remain in place.

Sunsetting can apply to specific regulations or to all regulations that are not specifically exempted. The Australian Government has been a latecomer to sunseting relative to State jurisdictions. The *Legislative Instruments Act (2003)* (LIA) requires all non-exempt subordinate legislation to lapse after ten years, including the pre-existing stock of legislation.

Commonwealth instruments will start sunseting from early 2015. The number of regulations involved is large (6 300 principal instruments over a seven year period, with most due in the first three years). Moreover, because of the way the timing is defined for the pre-2005 stock, there will be two large ‘peaks’.

For sunseting to be effective, exemptions and deferrals need to be contained and any regulations being re-made appropriately assessed first. This takes preparation, yet despite warnings from a 2008 review, only a few Australian Government agencies have been doing this. This may, in part, be due to lack of clarity in the roles and responsibilities of agencies. Business and other stakeholders will also need sufficient warning of sunseting legislation and reviews to coordinate their efforts and participate effectively in consultation processes. The large volume of instruments scheduled to sunset increases the risks that regulation will be remade without adequate scrutiny.

Sunseting offers the opportunity to examine related legislative instruments, including primary legislation, in a thematic or systemic review. It is through such reviews that some of the greatest benefits are likely to be found. They also offer the scope to consolidate proposals for regulatory changes. While there are some provisions in the LIA enabling postponement for some instruments in exceptional circumstances, there is no general provision that either allows, or provides an incentive for, packaging of related instruments.

The success of sunseting depends on timely preparation. Smoothing out the workload peaks could be readily achieved through minor adjustments to the timing definitions in the Act (which would also remove subsequent ‘echo’ peaks a decade on).

Good design features for sunset programs are set out in box 5.

Box 5 Good design features of sunset programs

Effective sunseting processes need to:

- establish a clear and transparent process to manage the flow of sunseting legislation well in advance
- make the timetable for sunseting legislation publicly available at least 18 months prior to sunset
- enable the packaging of regulations that are overlapping or addressing similar issues even if it means bringing forward the review of some legislation due to sunset later (and vice versa).
- implement effective filtering or 'triage' processes which identify which regulations (or bundles) are likely to impose high costs or have unintended consequences that warrant a more in-depth review
- engage with business and the community in the 'triage' assessment, and more widely in checking the proposed treatment of the regulations for sunset
- for regulators with 'high' impacts, provide for a review that will:
 - demonstrate the case for remaking the regulation
 - examine whether alternatives could achieve the objectives at lower cost
 - become the basis for a RIS for re-made or amended regulation.

RECOMMENDATION 4.1

The Australian Government should amend the Legislative Instruments Act 2003 to:

- ***allow more effective 'smoothing' of the number of pre-2005 instruments due to sunset over the 2015 to 2018 period***
- ***provide flexibility and incentives to package related regulations for review, by enabling regulations to extend beyond their sunset date if they are scheduled to be reviewed as part of a package of related regulation within a reasonable period***

A single regulation impact statement should be able to cover related regulation where the regulations are to be remade.

RECOMMENDATION 4.2

The Australian Government should establish clear and transparent processes for the handling of sunseting legislation. These need to cover:

- ***prioritising sunseting instruments against agreed criteria, to identify the appropriate level of review effort and consultation***

-
- *development of effective data management processes that allow affected parties ready access to information on sunseting instruments, review and consultation processes*
 - *testing the proposed review action with relevant interests*
 - *indicating the nature of reviews to be undertaken, including the proposed level of consultation*
 - *development of subsequent proposals to remake the regulation, including preparation of a regulation impact statement for regulation that has a material impact.*

Timetables for these activities should be published.

Clarification of the roles and responsibilities of different Commonwealth departments and agencies needs to be undertaken as a matter of urgency.

'Process failure' post implementation reviews

The Australian Government's 'best practice requirements' for making regulation require a 'post implementation review' (PIR) for any regulation that would have required a RIS, including where exemptions have been granted by the Prime Minister in 'exceptional circumstances'. A PIR needs to commence within 1-2 years of implementation. The PIR was introduced with the intention of providing a 'fail-safe' mechanism to ensure that regulations made in haste or without sufficient assessment — and therefore having greater potential for adverse effects or unintended consequences — can be re-assessed before they have been in place too long.

It had originally been anticipated that there would be few 'exceptions'. However, the numbers have been rising — reaching over 60 since the regime was introduced in 2007, with one half occurring in the past 12 months. They include important areas of regulation with significant potential impacts (box 6). This suggests that the PIR route may be seen as a way to avoid or defer proper scrutiny of regulatory proposals.

Box 6 Some regulations requiring ‘post implementation reviews’

The OBPR has advised that a total of 61 PIRs have been required for regulatory initiatives. These are either due to non-compliance with the Government’s RIS requirements or “exceptional circumstances” exemptions being granted by the Prime Minister. They cover a range of areas including:

- changes to the arrangements for executive termination payments (2009)
- industrial relations legislation (including the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* and the *Fair Work Act 2009*) (2010)
- pharmacy location rules (2010)
- live cattle exports to Indonesia (2011)
- certain responses to the Australia’s Future Tax System Review, including the minerals resource rent tax and the targeting of not-for-profit tax concessions (2011).

FINDING 4.6

Contrary to their original ‘fail-safe’ rationale, there appears to have been some expectation that post implementation reviews would only address relatively limited implementation matters. If such an approach were to be used as a means of evading the regulation impact statement process, it would pose a considerable risk to the integrity of the Australian Government’s best practice regulation requirements.

The analysis of regulation assessed as having a material impact should in principle be comparable whether it is part of a RIS prepared before the regulatory decision is made, or is part of the PIR prepared afterwards. Implementation should provide new evidence on the efficiency and effectiveness of the approach taken, and business would be better able to comment on the assessments made by the department. A consultation PIR, similar to a COAG consultation RIS, may be effective in drawing out this information.

However, it may be difficult for an agency that has been implementing a particular solution to provide a ‘neutral’ assessment of the regulation 1-2 years later. This suggests that, particularly where the impacts on business are considerable, an ‘arms-length’ review is desirable. (Good design principles for PIRs are set out in box 7.)

Box 7 **Good design features for post implementation reviews**

Post implementation reviews (PIRs) should require the same rigour as the regulation impact statement (RIS) process. They should require:

- ‘arms-length’ reviews be undertaken for any regulation assessed as of major significance
- provision to be made for data generation to monitor the costs of implementation and the outputs and outcomes
- impact assessment be forward (as in the case of a RIS) as well as backward looking
- alternatives to achieving the objectives be evaluated
- consultation with stakeholders impacted or potentially impacted by the regulation.

Although only three completed PIRs have been posted on the Office of Best Practice Regulation (OBPR) website, it is notable that two were undertaken in conjunction with a RIS that proposed significant changes in the regulation. This lends support to the concerns that PIRs were designed to address — that regulations made without a RIS are more likely to need revision. Having to undertake a PIR may have brought issues to light more quickly than would otherwise have been the case. This suggests that allowing PIRs to be deferred can reduce their potential to act as a catalyst for revising poor regulation.

FINDING 4.7

There is a lack of clarity in the timing required for a post implementation review (PIR). While a PIR has to commence within two years of the regulation being implemented, there can be considerable discretion in the interpretation of implementation, and the timing for the completion of the review is not specified. This could lead to considerable delays.

RECOMMENDATION 4.3

The Australian Government should ensure that the Best Practice Regulation Handbook includes guidelines for post implementation reviews (PIRs) that:

- ***require PIRs of major significance to be undertaken at ‘arms-length’***
- ***require that all PIRs commence within two years of the regulation coming into effect (or in instances where regulation is retrospective, the date the regulation is made), and specify when PIRs are to be completed***
- ***require that all PIRs meet the requirements for a regulation impact statement (and that the analysis be commensurate with impacts)***

-
- *require that a draft PIR be released as part of the review consultation process for regulation with significant impacts*
 - *recommend the amendment or removal of the regulation, should it fail the net benefit test.*

Ex post review requirements in new regulation

The Commonwealth Government’s ‘best practice regulation requirements’ specify that a RIS should outline how the regulation in question will be subsequently reviewed. The *Best Practice Regulation Handbook* states that a RIS (should) set out when the review is to be carried out and provide information on how it will be conducted, including whether special data may need to be collected. These are important provisions.

The Handbook does not specify what type of review is required. Nor does it provide guidance on the appropriate scope, independence or transparency of reviews for regulations with a significant impact on business or the not-for-profit sector. Moreover, there is no systematic reporting of reviews that would enable an assessment of whether the reviews have been undertaken.

FINDING 4.8

The review requirement in regulation impact statements is not accompanied by subsequent monitoring to ensure that such reviews are undertaken.

In practice, review requirements appear able to be satisfied in a number of ways:

- for legislation that has a relatively minor impact on business or the not-for-profit sector, sunset provisions may be deemed adequate — although these will be ten years out
- a review can be embedded in the legislation (a statutory review) — though it may be limited in scope (see below)
- the agency responsible for the regulation may have a planned program of reviews that would cover the regulation — but whether the plan is followed is generally not monitored.

Statutory reviews may not provide a full review of the regulation, but are particularly effective where there are significant uncertainties about certain potential impacts. They are also used where elements of the regulation are transitional in nature, and can provide reassurance where regulatory changes have been controversial. The Commission identified a number of statutory reviews that appear

to have been well targeted, with the timing appropriately specified. (Good design features of statutory reviews are set out in box 8.)

Box 8 Good design features of an embedded statutory review

Review requirements should be embedded in legislation when there is significant uncertainty in regard to the effectiveness of the regulation, the efficiency of the chosen approach, or the impacts of the regulation. To be a cost-effective approach, the review clause ideally should:

- identify the areas of uncertainty that have motivated the review, including, if it is the case, the long term appropriateness of the regulation
- set the timing for the review at a point where sufficient new evidence would be available to make an assessment
- establish monitoring and data collection processes that are proportionate to the usefulness of such data in informing the review
- set out the governance arrangements for the review, including the degree of independence required, consultation processes and publication of review findings.

Source: Appendix E

FINDING 4.9

Embedding review requirements into legislation has proven an effective approach where there has been uncertainty surrounding the impact of regulation — particularly where it could have significant impacts. There would be benefits in more systematic use of such statutory reviews.

The Australian Government, following a recommendation of the Regulation Taskforce (2006), introduced a ‘catch-all’ requirement that any regulation not subject to sunseting or other evaluation be reviewed every five years. The Commission understands that, in practice, very few regulations would now fall into this residual category. However, what kind of review would satisfy the review requirement is not transparent. There is little information available on when reviews are scheduled, on the findings of past reviews, or on whether changes to regulation have occurred as a result. In particular, as noted, there is no way to track whether new regulation with major potential impacts on business is reviewed.

FINDING 4.10

There has been relatively little ex post evaluation of regulation (including reforms) reported. This has resulted in an information gap on the effectiveness of regulations in meeting their objectives.

The lack of good ex post evaluation of new regulation, apart from when it forms part of an in-depth review (see below), is not a uniquely Australian problem. Several other Organisation for Economic Cooperation and Development (OECD) countries have expressed concern about the lack of ex post assessment of the impacts of regulation, and are seeking to ‘rebalance’ their evaluation efforts. In Canada all regulations with a major impact on business require a formal monitoring and evaluation plan as part of the RIS process. This plan sets out the data gathering requirements as well as governance arrangements and the timing of the review.

Not all regulations would warrant this planning and review effort. For regulations with a smaller impact some simple performance measures, or feedback from business on performance, may suffice. There should be the potential to trigger a more substantial review should unexpected negative impacts be reported.

RECOMMENDATION 4.4

The Australian Government’s Best Practice Regulation guidelines should be modified to:

- *require a formal review and performance measurement plan in cases where the expected impact of a proposed regulation is rated as ‘major’ by the Office of Best Practice Regulation (OBPR)*
- *encourage the use of embedded statutory reviews where there are significant uncertainties regarding the effectiveness or impacts of the proposed regulation*
- *ensure that any proposed review is proportionate to the potential impact of the regulation*
- *ensure that all reviews foreshadowed in regulatory impact statements take place within five years.*

If this process were adopted, the current, more encompassing five yearly default review requirement could be dispensed with.

‘Ad hoc’ and special purpose reviews

Some of the most significant reforms to regulation over the past few decades have resulted from ad hoc initiatives in response to emerging problems or concerns. Some of these have focussed on a specific area of regulation, whereas others have been much broader in scope.

'Stocktakes' of burdens on business

Public 'stocktakes' of regulatory burdens on business provide a broad ranging 'discovery' mechanism. They invite business to make suggestions (or complaints) about regulation that imposes excessive compliance costs or other problems. These suggestions are filtered to ensure they are in-scope and then tested with responsible agencies. Draft findings and recommendations are typically provided for comment before being finalised and presented to government. This process can be highly effective in identifying improvements to regulations and identifying areas that warrant further examination.

In the Commonwealth jurisdiction, the Small Business Deregulation Taskforce (1996) and Regulation Taskforce (2006) were economy-wide in coverage. Reviews by the Commission over the past few years have looked at Australian Government regulation in particular sectors. Similar exercises have taken place within a number of states, and the New South Wales sectoral stocktakes using business panels is a notable relatively low key and low cost approach. While the Regulation Taskforce was commissioned by the Australian Government, it did identify cross-jurisdictional regulatory issues that COAG drew on to form the core of the Seamless National Economy (SNE) reform agenda.

Businesses can find it difficult to distinguish the jurisdictional source of regulatory problems. And often it is the accumulation of regulation that is the main problem. Broad stocktakes provide one of the few mechanisms with potential to identify where the interaction of regulations (across agencies, sectors and jurisdictions) imposes particular regulatory burdens.

Business input is accordingly crucial to the effectiveness of such stocktakes. This can be threatened by review fatigue, either from too many reviews or too little being seen to be achieved.

FINDING 4.11

For stocktakes to be effective mechanisms for identifying areas for reform, they need to engage widely and well with businesses. General public stocktakes are therefore best undertaken about every ten years. This also provides time for governments to respond fully to the recommendations. In sectors experiencing rapid regulatory or context change, a shorter period between stocktakes may be called for.

To be successful, major public stocktakes need visible political support, independent taskforces — with sufficient expertise to be trusted by business — and effective consultation strategies. Given their resource demands, and that businesses care more about the impacts of regulation than about who is doing the regulating,

cross-jurisdictional cooperation on major stocktakes is likely to provide the most cost-effective approach. (Good design principles for public stocktakes are set out in box 9.)

Box 9 Good design features for public regulation stocktakes

Broad stocktakes of regulation are likely to be most effective when:

- they have visible political support and commitment to enact the reforms
- there is an independent chair, and an advisory panel which includes business representatives
- there are effective consultation strategies to engage with business and sufficient time for meaningful engagement
- the supporting secretariat has evaluation skills and subject knowledge. Seconding staff from relevant agencies for the support team has advantages, though it is desirable to forge an independent 'culture'
- complaints and reform options are systematically tested with policy departments and regulators.
- there is a commitment by government to report on the progress of the recommendations, from response to implementation
- there is cross-jurisdictional cooperation.

RECOMMENDATION 4.5

Future regulatory stocktakes by the Australian Government should be able to identify individual jurisdictional, as well as federal and cross-jurisdictional, regulations that are imposing unnecessary burdens. This would require the cooperation of State and Territory governments to facilitate the vetting process and, ultimately, to respond to the review's recommendations, which should be progressed through COAG's Business Competition and Regulation Working Group. Where coordinated action is required, the recommendations should help inform the priority-setting processes for the Seamless National Economy agenda.

'Principles-based' review strategies

The Legislative Review Program under the National Competition Policy (NCP) was arguably the first application of a guiding principle being used to screen all regulation for reform (box 10). The NCP principle for the Legislative Review Program was that the regulations impeding competition should be removed unless such restrictions could be demonstrated to be beneficial to the community.

Box 10 National Competition Policy and the Legislative Review Program

In April 1995, the Australian Government and state and territory governments committed to the implementation of a wide-ranging NCP — which included a legislative review program (LRP) for all jurisdictions to review their regulation in regard to the impact it had on competition.

Australia's NCP initiative stemmed from a recognition that aspects of Australia's wider competition policy framework were impeding performance across the economy and constraining the scope to create national markets for infrastructure and other services.

Overall, the NCP LRP resulted in the identification of around 1800 laws regulating areas of economic activity for review under the NCP. In aggregate, governments reviewed and, where appropriate, reformed around 85 per cent of their nominated legislation. For priority legislation, the rate of compliance was around 78 per cent (NCC 2010).

A Productivity Commission review in 2005 found that the LRP had played an important role in winding back barriers to competition and efficiency across a wide range of economic activities. It also found that most of the NCP reforms were in place and that overall NCP had yielded substantial benefits to the Australian community. The success of Australia's NCP reforms saw them hailed internationally as a successful example of nationally coordinated reform.

NCP was completed in 2005. It was succeeded by Australia's National Reform Agenda, which included a stream of work on achieving a Seamless National Economy (SNE). The competition principle remains an important part of Australian regulatory policy, and is applied as part of the assessment of new regulation in all Australian jurisdictions.

A current example of a principle-based approach, although applied less comprehensively, is COAG's 'Seamless National Economy' reform stream. This screens areas of regulation to assess whether greater national 'coherence' — harmonisation or uniformity — would be beneficial. Based on the principle of subsidiarity, regulation should be undertaken at the lowest jurisdictional level unless a case can be made that a national approach would provide a net benefit to the community.

Principles-based approaches involve initial identification of candidates for reform, followed up by more detailed assessments where necessary. Approaches of this kind are accordingly more demanding and resource-intensive than general stocktakes. But if the filtering principle is robust and reviews are well conducted, they can be highly effective. (Good design principles for cross-jurisdictional principle-based reviews are set out in box 11.)

Box 11 Good design features for cross-jurisdictional principle-based reviews

Cross jurisdictional principle-based reform efforts should have:

- robust screening criteria to identify potential areas for reform and additional criteria to set priorities for review and reform
- transparent processes that utilise business representatives to test and refine priorities
- attention paid to the cost of achieving the reforms, especially for smaller jurisdictions
- attention paid to sequencing of both reviews and reforms
- mechanisms to engage all jurisdictions in reform and ensure political support (reward payments being one mechanism)
- a commitment to report on the progress of reforms, from government responses to recommendations, and implementation.

The NCP experience and the current review being undertaken by the Commission of the impacts and benefits of COAG’s SNE agenda, point to the need to prioritise review and reform efforts. While the NCP was successful overall, resources were stretched, and the quality of some reviews and the subsequent reforms were less than desired. As the SNE experience also attests, attempting to do too much at once can dilute available review resources, reduce scope for effective stakeholder participation, and ultimately compromise the potential for beneficial reforms.

FINDING 4.12

Based on experience with the NCP’s Legislative Review Program and the Seamless National Economy Agenda, principles-based reviews have considerable potential to identify and achieve significant reforms, provided there is effective screening and sequencing.

Several submissions to this study questioned the need for differences from international standards. A review principle to consider is why simply adopting relevant and widely accepted international standards in place of domestic variants would not benefit the Australian community. Also worthy of consideration is whether any regulations that restrict mobility of factors of production — labour and capital (including intellectual property) — should need to be justified. (The recent consultation paper on future SNE reform priorities includes this as one possible theme.)

The Australian Government should give consideration to extending principle-based reviews to the following areas:

- *reviewing regulations that avoided review during the National Competition Policy Legislative Review Program, or that were reviewed but retained*
- *applying the principle of accepting recognised international standards unless a case can be made that Australian standards delivers a net benefit to the community*
- *applying the principle of removing restraints on factor mobility unless they can be shown to involve a net benefit to the community.*

Benchmarking

With different jurisdictions following different approaches to common regulatory objectives, benchmarking can potentially provide useful information on comparative performance, leading practices and models for reform. The World Bank's *Doing Business* reports contain data that enable international comparisons to be made annually across a range of regulatory areas. In contrast, the benchmarking studies for COAG by the Commission have looked at the performance of regulations in target areas across jurisdictions within Australia (box 12). These benchmarking results have been found useful by governments and appear to have brought added reform momentum in the areas covered thus far.

FINDING 4.13

International benchmarking, such as the World Bank's Doing Business report can provide a useful initial guide to areas where more detailed review of regulation is needed.

The Commission's benchmarking exercises nationally (including New Zealand in the case of food regulation) have been more detailed than the World Bank one. They have generally also been more instructive domestically about relative performance and leading practices, given the similar institutional settings that apply. The exercises have faced difficulties in devising and obtaining the data for quantitative indicators, but they have shown that qualitative comparisons can also be revealing.

Governance arrangements for these studies have included an advisory panel of officials from all governments, which proved effective in guiding the development

of the approach, testing methodologies and obtaining data from jurisdictions. (Good design features of benchmarking are set out in box 13.)

Box 12 COAG's Regulatory Benchmarking Program

The Commission's 'feasibility' study

To help implement COAG's 2006 agreement on benchmarking and measuring regulatory burdens, the Commission was asked to examine the feasibility of developing quantitative and qualitative performance indicators and reporting framework options. This feasibility study concluded that benchmarking was technically feasible and could yield significant benefits (PC 2007a).

The 'quantity and quality of regulation' & 'cost of business registrations' reports

In December 2008, the Commission released two benchmarking reports. The 'quantity and quality' report (PC 2008a) provides indicators of the stock and flow of regulation and regulatory activities. It included a number of quality indicators for a range of regulatory processes, across all levels of government. The 'cost of business registrations' report (PC 2008b) provided estimates of administrative and substantive compliance costs for business in obtaining a range of registrations required by the Australian, state, territory and selected local governments. The study tested three methods for benchmarking — regulatory surveys, 'synthetic' or representative business estimates and business focus groups. The aim was to triangulate the estimate of compliance costs. Much was learned in the exercise, including the difficulty of estimating compliance costs in a consistent way across jurisdictions, even for relatively simple regulation.

The 'food safety regulation' & 'occupational health and safety' reports

The 'food safety' report (PC 2009b) compared the food regulatory systems across Australia and New Zealand. The Commission found considerable differences in regulatory approaches, interpretation and enforcement between jurisdictions, particularly in those areas (such as standards implementation and primary production requirements) not covered by the model food legislation.

The 'occupational health and safety' (OHS) report (PC 2010a) compared the occupational health and safety regulatory systems of the Commonwealth and state and territory governments. The report found a number of differences in regulation (such as record keeping and risk management, worker consultation, participation and representation and for workplace hazards such as psychosocial hazards and asbestos) and in the enforcement approach adopted by regulators.

Planning, zoning and development assessments

The Commission examined and reported on the operations of the states and territories' planning and zoning systems, particularly as they impact on business compliance costs, competition and the overall efficiency and effectiveness of the functioning of cities (PC 2011d).

Box 13 Good design features of benchmarking

Benchmarking across jurisdictions should:

- provide quantified indicators of relative performance where possible, including the distribution of business experiences
- where quantifiable indicators are likely to be misleading or expensive to construct, comparative descriptions should be framed to encourage governments to ask “why is it so?”
- use surveys where needed to collect information and impressions on a consistent basis
- seek to improve the consistency of data collection by regulators to enhance the potential use of these data sets for benchmarking purposes
- go beyond comparisons of regulatory provisions, to benchmark differences in the administration and enforcement of regulation (the behaviour of regulators) and to assess the sources of differences
- identify leading practice, where possible including assessing the transferability of the practice across jurisdictions
- not assume common outcomes from a regulation, but test to see if this is the case, and, where not, include outcomes in the benchmarking exercise
- be conducted at arms-length, but build cooperative relationships with the jurisdictions involved.

The resource demands have been significant (akin to a public inquiry), so it is crucial that topics for benchmarking are carefully selected. Timing is also important if the results are to be influential in supporting reform. Benchmarking studies do not usually make recommendations for reform, but in providing information on leading practices they can assist in identifying reform options.

FINDING 4.14

Benchmarking across jurisdictions has proven a useful tool in Australia’s federal system, by identifying and helping to promote a better understanding of leading regulatory practices.

'In-depth' reviews

When it comes to major areas of regulation with wide-ranging effects, for which significant reforms may be required, there is generally no substitute for in-depth reviews. Such reviews need to be able to assess the appropriateness, effectiveness and efficiency of regulation — and to do so within a wider policy context, in which other forms of intervention may also be in the mix. Apart from stand-alone ad hoc reviews, where agencies take the opportunity to package related legislation for review in order to address the sunseting requirement, the resulting systemic review should, in effect, be an in-depth review. Similarly, reviews that occur in the more complex cases under a principles-based approach may need to be 'in-depth' to fully address the requirements.

Many of Australia's important regulatory reforms have emerged from such reviews (box 14). Those that have worked best in helping to achieve beneficial and enduring reforms have generally been characterised by independent leadership and skilled support teams, with adequate time to complete their task. Extensive consultation has been a crucial part of this, including through public submissions and, importantly, the release of a draft report for public scrutiny. When done well, in-depth reviews have not only identified beneficial regulatory changes, but have also built community support, facilitating their implementation by government. (Good design principles for in-depth reviews are given in box 15.)

FINDING 4.15

The more influential and credible reviews of key regulatory areas have involved extensive consultation, including through draft reports, and have been conducted independently. Political commitment and periodic monitoring of implementation are needed to progress the recommended reforms.

In-depth reviews can consume significant resources. Given this, they need to be directed at areas where the potential gains from reform are likely to be high. While there will always be unanticipated circumstances that demand such reviews — including to avoid reflexive regulatory responses to emerging 'issues' — forward planning and prioritisation have important roles to play (see below).

Box 14 **Examples of ‘in-depth’ reviews**

In-depth reviews have been conducted in Australia by a range of taskforces, panels, government departments and agencies. In considering regulations, or issues with a strong regulatory dimension, these have generally (though to varying degrees) shared a common approach involving: consultation; research and the search for evidence in assessing the impact of current regulations; and identification of alternatives.

Such reviews are typically directed at achieving ‘appropriate’ regulation to meet some broadly agreed objective. This may lead them to recommend new regulation in some cases, as well as amendments to or removal of existing regulation. Also such reviews may look at non-regulatory instruments in combination with, or as an alternative to, regulation.

Some examples of in-depth reviews conducted by taskforces include the Victorian Tax Industry Inquiry headed by Professor Alan Fels; the 2011 transparency review of the Therapeutic Goods Administration; the 2008-10 Australia’s Future Tax System (Henry) Review; the 2009-10 (Cooper) Review of Australia’s Superannuation System; the 1998 (West) and the 2008 (Bradley) reviews of higher education; the 2009 National Health and Hospitals Reform Commission; and the 2008-09 (Hawke) Review of the *Environment Protection and Biodiversity Conservation Act 1999*. Other reviews using aspects of this approach include the 2004 (Hogan) Aged Care Review; and the Wallis (1996-97) and Campbell (1979) inquiries into the Australian financial system.

Regulatory reviews and inquiries undertaken by the Productivity Commission and the Victorian Competition and Efficiency Commission (VCEC) also use an in-depth approach. These reviews have tended to involve long time frames and extensive opportunities for public input, including through draft reports. They have been able to examine alternatives to regulation and use a community wide approach in considering costs and benefits.

Parliamentary Committee inquiries into current or prospective regulations also share some (if not all) of the characteristics of in-depth reviews. These inquiries tend to share a strong focus on public consultation via submissions and hearings. However, Committee reviews tend to be more lightly resourced, with less capacity for detailed analysis, than those conducted by standing bodies, panels and taskforces.

Box 15 Good design features of in-depth reviews

- Governments commissioning in-depth reviews should place a premium on independence and transparency:
 - those heading the review should be at arm’s length from the relevant policy area and regulator, with no conflicting interests
 - ideally, secretariats should also be separate from the commissioning agency
 - an appropriate mix of skills is required for those involved in the review
 - the review should be announced with a clear timetable, allow adequate time for consultation, and require reports to be made public in a timely way.
- Major stakeholders should have adequate opportunity for involvement. Ideally consultation processes should include:
 - release of terms of reference and information about the review
 - an issues paper and submissions, which are publicly available
 - a draft report, inviting feedback on initial review conclusions.
- Terms of reference should provide adequate direction while not constraining the review in considering relevant issues.
 - The review should be required to give consideration to the regulatory burden in making recommendations.
- The final report should be publicly released and timely responses made. These should be monitored and publicly reported as should implementation of the subsequent reforms.

Evaluation methods

The Commission was asked to examine, and provide advice about, methods for evaluating *reform outcomes*. Process audits and performance audits are important to verify that reforms have been implemented, and in the case of performance audits that the objective has been achieved. But it is also important to be able to demonstrate to the community that the efforts that went into the reform were worthwhile — that the community is better off. This is important for accountability and helps to achieve support for further reform.

Demonstrating the impacts of reform requires evaluation methods that test the logic of the reform by seeking evidence of the outcomes and tracing them back to the reforms. Such methods identify whether the logic behind the reform was sound, or a different approach is needed. They can also pick up unintended consequences that require regulatory adjustments.

Relatively few explicit ex post evaluations of regulatory reforms have been undertaken in Australia (or in other OECD countries). There have been some ‘embedded’ reviews of specific reform initiatives (like the regulatory regime for third party access to essential infrastructure). There have also been broader reviews, such as to assess the net gains from the NCP reforms and, currently, the Commission’s review of the impacts of the ‘Seamless National Economy’ reforms.

The methods relevant to evaluating *reforms* are essentially the same methods that can be used to evaluate regulations generally, or indeed to evaluate regulatory *proposals*. In practice, most of the review approaches just discussed rely more on qualitative than quantitative evaluation techniques. This reflects lack of attention to establishing data collection as part of implementing a regulation. The main exception is statutory reviews, where the data needed for evaluation can be well defined and required to be collected. Such data has proven valuable to robust evaluation. Where data permits, quantitative techniques can bring additional rigour and support greater insights about relative impacts.

The individual methods vary greatly in technical complexity and in the nature and extent of the impacts encompassed by the analysis (box 16). Different methods are accordingly suited to different evaluation tasks. For example, the ‘business cost calculator’ has been designed to estimate various regulatory compliance costs at the firm level, whereas general equilibrium modelling can project the magnitudes of these and other costs (and benefits) across industries and for the economy as a whole.

Evaluation methods also vary in their resourcing and skill requirements. Their allocation to review tasks, whether ex post or ex ante, is therefore a matter of ‘horses for courses’.

FINDING 5.1

Regardless of the method used, a good evaluation will seek to assess change against a counterfactual, look for confirming evidence from multiple sources (triangulation) particularly when relying on subjective evidence, and report on the confidence in the findings made by the evaluation.

FINDING 5.2

Evaluations of regulations and regulatory reforms generally need to draw on both qualitative and quantitative methods. The selection of these should be determined by their ‘fitness for purpose’, relating to the nature of the task and access to data. Quantitative methods are desirable where practicable and could be more widely used. Partial quantification can often be better than none, but should be supported with qualitative evidence

Box 16 Some quantitative evaluation methods**Compliance cost ‘calculators’**

The Standard Cost Model (developed by the Netherlands Government) seeks to estimate the reduction in administrative compliance costs. These costs include paperwork costs, and the cost of time involved in completing the paperwork. More sophisticated versions of the cost accounting approach (such as the Commonwealth’s Business Cost Calculator) broaden the scope to include substantive costs such as investment in training and equipment required for compliance, and the costs of delay.

Econometric analysis

Econometrics is a set of statistical tools that can be used to determine whether there is a mathematical relationship between two (or more) variables, what effect the variables have on each other, and the robustness of the relationship. Econometrics provides a way to test whether relationships set out in economic theory hold in practice, by applying real world data to theoretical models. In the context of evaluating regulations and reforms, econometrics can be used to determine whether regulations and reforms affect individual variables of interest.

Economic modelling

Partial equilibrium models describe the relationships between the variables that change directly in response to the reform and the target variables. Economic partial equilibrium models might look at a specific industry to estimate the effect on investment and/or innovation that result from reforms. The models may then be used to estimate the effect of these changes on industry inputs, output and profitability over time.

General equilibrium (GE) models capture the main relationships between inputs and outputs in the economy, and are used to estimate the flow-on effects to other sectors in the economy from changes at an industry level or to the availability and quality of the resources (labour, capital and land). Partial equilibrium models are generally used to estimate the ‘shocks’ that are fed into a GE model.

One area where evaluation of regulation needs to be strengthened is in the assessment of the impact of regulation on risk. With the reduction of risk being a primary motivation for much regulation, it is important to assess whether such regulation does actually reduce risk, or mitigate the impact should the risky event occur. There is evidence to suggest that people tend to overestimate the probability of ‘accessible’ but comparatively rare events (such as airplane accidents), which stimulates the demand for regulation to address these risks. They also tend to underestimate the probability of events that fall outside of their comprehension (such as climate change), and those that are very familiar (such as driving a car).

At a minimum, the cost of regulation should be assessed and the question of what reduction in risk would warrant this cost posed. Good evaluation is needed to assess the underlying risk, the real level of community concern, and most importantly the effectiveness of the regulation in reducing both the target risk and any unintended consequences.

FINDING 5.3

The assessment of risk and the impacts of regulation on risk is essential to good policy. Lack of evaluation of the impacts of regulation on risk means there has been little evidence on which to base sound regulatory design.

Strengthening the ‘framework’

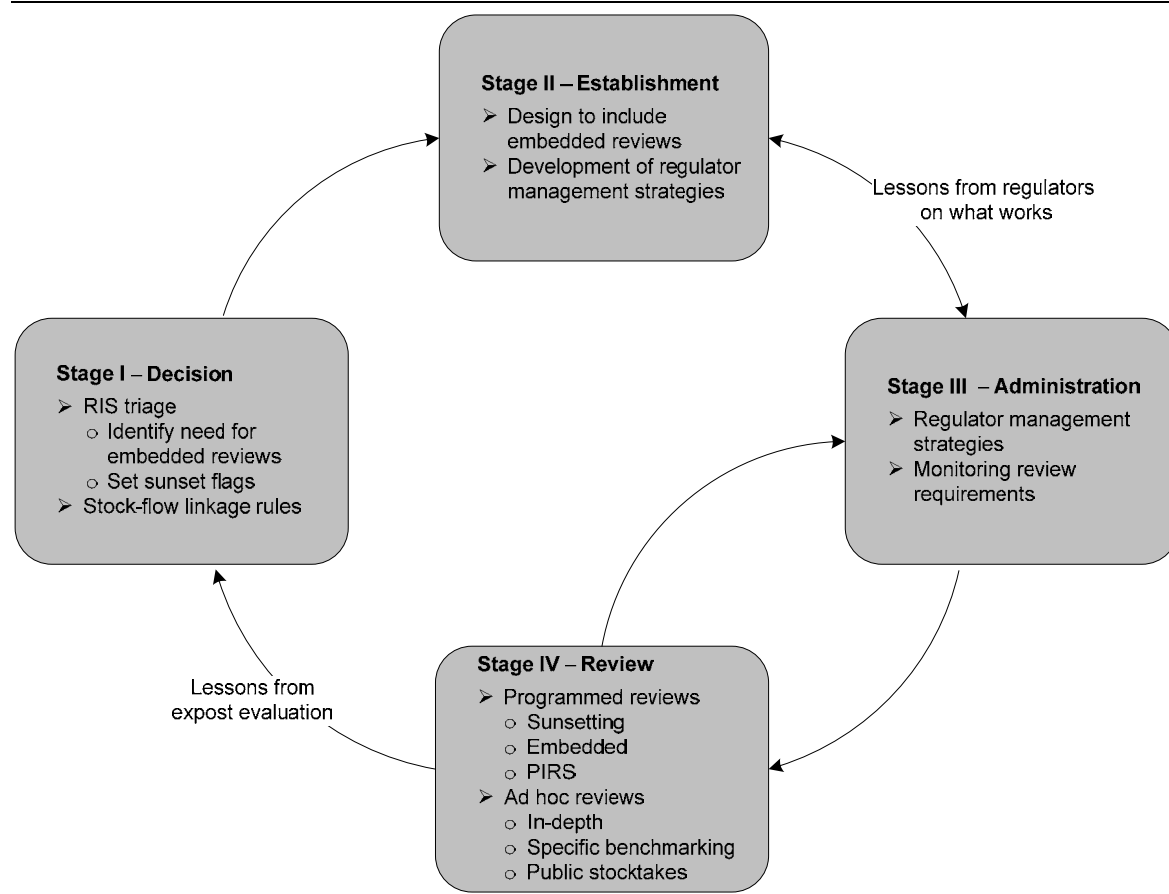
Most of the approaches for reviewing and evaluating regulations discussed above have made — and should continue to make — a useful contribution to identifying areas for reform or otherwise enhancing the regulatory stock. However no approach can be relied on to ‘do it all’. Each has its own niche, either in relation to the type of reforms targeted or the point in the regulatory cycle at which the approach comes into play. Such approaches are most effective, therefore, when they complement each other such that there are no gaps in coverage (and, equally, no doubling up), with all regulations reviewed in the most timely and appropriate way.

Given the limited resources available for such activities — particularly skilled analysts — it is also important that these resources are allocated such that the overall ‘returns’ from the various approaches can be maximised. This depends in turn on the effectiveness of the wider system or ‘framework’ in which the individual approaches are designed and managed.

The Organisation for Economic Cooperation and Development (OECD) has emphasised the importance of regulatory governance to regulatory performance. It stresses the need for ‘joined up’ systems, comprising appropriate institutions, processes and ‘tools’ across the whole regulatory cycle.

The ‘regulatory cycle’ can be segmented into four stages or phases, from initial decision-making, to implementation, administration and finally review (figure 1). How well each of these is managed has an important bearing on the overall performance of the existing body of regulation.

Figure 1 **Review approaches through the regulatory cycle**



A number of changes have been made to Australia’s regulatory system over time, with the aim of strengthening its capacities at each stage of the cycle, as well as enabling better coordination. Among the more important of these at the Commonwealth level are:

- assignment of responsibility for good regulatory practice to a Cabinet-level Minister (the Minister for Finance and Deregulation)
- the strengthening of procedures and analytical requirements for making regulation, and the upgrading of the OBPR to provide advice to agencies as well as to vet and report on compliance
- the institution of automatic review mechanisms for subordinate regulation (notably through sunseting)
- the initiation of a range of in-depth reviews in key areas of regulation.

Within COAG, the establishment of the Business Regulation and Competition Working Group (BRCWG) has for the first time provided an ongoing national forum for the consideration of regulation reforms encompassing all jurisdictions — including to improve processes (for example, regulatory assessment) and to improve particular areas of regulation (for example the 27 SNE items). The BRCWG has recently issued a stakeholder consultation paper as part of the development of the next stage of the SNE reform agenda.

The OECD, in its recent review of regulation in Australia, endorsed these arrangements, a number of which had responded to earlier recommendations of the Regulation Taskforce. The various elements required for a good regulatory system can now be said to be largely in place. However, in observing how the system is operating in practice, the Commission has found scope for improvements in a number of areas.

Prioritisation and sequencing of reviews and reforms

As the resources for both reviews and reforms are limited, prioritisation of effort is essential. Developing, designing and drafting legislation is a resource intensive process, as is putting in place the new requirements. Good regulatory processes require consultation with businesses and other stakeholders, and their resources too are limited. And while reviews provide the analysis to underpin reform, to be effective they need to feed into either reform processes underway or into the future reform agenda.

Prioritisation criteria seek to identify the areas of regulation where reform is likely to provide the biggest return to the reform effort. The payoff will generally be greater the:

- deeper the impacts of changes that are likely to come from reform. The magnitude of the impacts (benefits less costs) for those affected by the reform depends on the size of the problem and the extent to which regulation can address the problem
- broader these impacts are across the community. The impacts are greater the higher the share of the community affected by the changes. The distribution of the benefits also affects the return, and, all else equal, would favour reforms where the benefits were more likely to accrue to the most disadvantaged in the community
- lower the costs of planning and implementing the reform.

FINDING 6.1

The net pay-off from a reform will depend on the depth and breadth of the reform's impacts. It will also depend on the cost of undertaking the reform. Making sure that this effort is cost-effective is central to good regulatory policy.

Past reform programs, such as in the NCP and SNE streams, have suffered from overload. While the 'selection criteria' adopted by these exercise have been appropriate in the broad (box 17), there appears to have been insufficient consideration given to the sequencing of reviews, or to the number and combination of reforms attempted at any one time. A clear understanding of the resources and timeframes needed to advance priority reviews and reforms is essential.

Sequencing of reforms can be important to ensure adequate resourcing and that related regulations are considered in a complementary way. Reforms may also need to be sequenced where one lays the foundations for others. Less fundamental, but possibly as important, is the demonstration effect of successful reforms.

Sequencing will be particularly important for the looming mass of sunseting regulations. Past review programs, such as in the NCP and Seamless National Economy streams, have suffered from overload.

FINDING 6.2

There are many sources of information that can be drawn on to inform priorities for more in-depth reviews and benchmarking studies. The current processes for identifying priorities for review and their sequencing could be more transparent. Business and community input and feedback are important 'reality checks'.

Box 17 Selecting candidates for COAG’s ‘Seamless National Economy’ reform agenda

The Business Regulation and Competition Working Group (BRCWG) was tasked with identifying the first tranche of regulatory reform initiatives for the COAG regulatory reform agenda and the Seamless National Economy.

The BRCWG considered the potential benefits to growth, productivity and workforce mobility from over 35 possible reform areas. These were drawn from a number of sources. They included issues with multi-jurisdictional implications that were suitable for reform, but had nonetheless proved resistant to reform in the past and were evaluated according to the following considerations:

- How *wide* is the reach of the regulation?
- How *deep* is the reach of the regulation? Does it have a significant effect on industries generating a large amount of GDP?
- How *large* are the costs to business and taxpayers of complying with the regulation?
- How *damaging* is the regulation to incentives for effort, risk-taking, entrepreneurship and innovation?
- How *large* are the impediments created by the regulation to workforce mobility and participation?

Each area was then categorised according to the desired level of regulatory change: mutual recognition, harmonisation or a national system.

RECOMMENDATION 6.1

In considering current and future regulatory reform activities, the Australian Government should apply the following principles:

- *incremental improvements to regulatory arrangements (so called ‘good housekeeping’ measures) should be undertaken as a matter of course*
- *reforms identified or underway should be completed before embarking on new reform agendas*
- *in prioritising and sequencing reforms, in addition to the depth and breadth of the potential benefits, the human resource and other costs of achieving the reforms need to be explicitly taken into account*
- *precedence in in-depth reviews and benchmarking, should be given to developing the most cost-effective options for achieving current reform commitments. In planning future reforms, such reviews should be prioritised based on an assessment of potential gains, including by drawing on information provided by public stocktakes and other stock management approaches.*

Monitoring and reporting

As discussed above, the current best practice guidelines for a RIS specify the need for a review to be undertaken for any regulation that has a significant impact on business. To be compliant, a review must be planned. But this commitment is currently not being monitored unless the review is embedded in legislation. Recommendation 4.5 strengthens this requirement for those regulatory proposals that are assessed as having a ‘major’ impact, requiring a formal evaluation plan. The scheduling and implementation of proposed reviews need to be monitored to ensure that they occur.

These reviews, like most of the approaches discussed above, make specific recommendations for reforms. Yet, with the exception of sunseting and red tape target commitments, there is no obligation to respond to the recommendations. Given the resources involved in undertaking reviews, the government should ensure that the recommendations are considered in a timely way, and that those it accepts are implemented.

A recent review by KPMG (2011) found that there was no evidence of implementation for nearly half of the recommendations of reviews in Victoria affecting the minerals sector. The authors also commented on the difficulty in actually finding this information. Similarly, in undertaking this study, the Commission found that while it could track the government response to Commission inquiries, there was no easy way to monitor progress with the intended reforms.

Lack of transparency can breed cynicism in the community about whether real progress has occurred, and a sense that contributing to such reviews is wasted effort.

Australia is one of the few jurisdictions to have a complete database of all major government regulation, in the form of the ComLaw website, which incorporates the Federal Register of Legislative Instruments (FRLI). RIS documents are also published on the OBPR website, along with details of what if any post-implementation reviews may be required. ComLaw has potential to act as an organising platform to monitor such actions as: proposed reviews of regulation, the draft then final recommendations made by reviews, government response to the recommendations, and legislative changes that result.

The Australian Government should establish a system that:

- *tracks reviews proposed to meet the RIS requirements to ensure they are undertaken*
- *monitors the progress of reform recommendations from these and other commissioned reviews*
- *makes this information available on a public website, with links to planned reviews, completed reviews, government responses, and a record of subsequent actions.*

The public provision of such information would represent a significant advance in transparency. It would also promote greater accountability of government for its management of the regulatory system. However, as a passive database, its influence would be limited. There is a strong case for the information contained in it being made more ‘active’ through annual reporting by the Finance Department (or in the OBPR’s annual Best Practice Regulation Report). This would enable data to be contextualised and be more useful to both government and stakeholders. While such annual reporting may reveal some gaps and delays, it will also be able to document government’s achievements (which are often not recognised).

The Department of Finance and Deregulation or the Office of Best Practice Regulation should report annually on reviews of regulation that have been undertaken, government responses to any recommendations and their implementation status.

Ultimately an effective regulatory system requires strong leadership within government. In the context of strengthening regulatory governance, the OECD (2011) has stated:

Political commitment to regulatory reform has been unanimously highlighted by country reviews as one of the main factors supporting regulatory quality. Effective regulatory policy should be adopted at the highest political level, and its importance should be adequately communicated to lower levels of the administration. Political commitment can be demonstrated in different ways. ... However, the creation of a central oversight body in charge of promoting regulatory quality may be the most important element. (p. 77)

As noted, these conditions have been broadly met at the Commonwealth level in Australia, with responsibility assigned to the Minister for Finance and Deregulation. Because budgetary and regulatory activities are often complementary or interactive,

having oversight of both combined in the one portfolio is logical. The Finance Minister can serve as a champion for good regulation and has been instrumental in forging ‘Partnerships’ with other Ministers, providing top-down reform impetus in targeted areas. A question arises as to whether these responsibilities could benefit from greater institutional support within the Parliament. The Senate Standing Committee on Regulations and Ordinances plays an important role in providing technical scrutiny of all delegated legislation to ensure their compliance with principles of parliamentary propriety. Whether there may be a role for a Committee with a wider focus on ‘good regulation’ is worthy of further consideration. Such a forum could strengthen political leadership in this area and help promote a better understanding of regulatory effectiveness.

FINDING 6.3

Political leadership is essential to an effective regulatory system, including compliance with good regulatory processes. Assigning responsibility to the Minister for Finance and Deregulation has been a significant advance at the Commonwealth level. There may be scope for further institutional initiatives to strengthen political involvement in achieving good regulation.

Better consultation

Consultation with business and other stakeholders is fundamental when developing regulations, both in relation to the options being considered and at the detailed design and implementation stage. Once regulations are in place, good two-way communication can be crucial to the effective administration of regulations and to identifying ongoing refinements. At the review stage, such communication is essential to enhance the performance of the regulators, particularly with respect to minimising compliance costs.

Agencies consult widely on a range of issues, not least new regulation. Indeed, concerns were raised during consultations for this study that the requirements for consultation may at times exceed the capacity of agencies to undertake them effectively. Businesses, too, report review fatigue. Agencies have reported duplication of consultation effort, and difficulties in engaging business when they have recently participated in consultations for other agencies, or even different areas in the same agency.

One important element that appears to be missing is the information to support efforts by agencies to coordinate consultations. Agencies have reported duplication of consultation effort, and difficulties in engaging business when they have recently participated in other consultations. In part this is an information problem, as

agencies do not have easy access to timetables for reviews and consultations in other agencies, or possibly even in the same agency.

Australian Government agencies publish annual regulatory plans that can be accessed through the OBPR website. Examination of the site revealed that not all agencies have provided a plan; the plans are sometimes incomplete, as they do not include reviews which are required to be undertaken over the next financial year, and they are not user-friendly. The plans need to be linked so that key word searches, tags for email alerts, and tag clouds could be applied. The ComLaw site, discussed above, may have the capability to provide a platform for this kind of service as well.

FINDING 6.4

The reporting requirements set out above could be used to more effectively provide advance notice of reviews, alerting stakeholders to matters of importance and enabling them to contribute more proactively.

‘Whole-of-government’ principles for consultation have been developed (box 18), but arguably could be better utilised. Business continues to complain about token consultation efforts and lack of consultation at critical stages, such as when different regulatory reform options are initially being considered and when the ‘details’ of the approach to be adopted are being finalised. While ongoing forums for communications have been instituted in some cases (see below), more in-depth and focussed consultations are needed when developing or reviewing specific regulations.

In particular, this study has reaffirmed the crucial role of draft reports or other vehicles for exposing preliminary findings and recommendations to public scrutiny. Draft reports enable options to be tested in a way that can lead to improved design and avoid unintended consequences. They can also provide an opportunity for learning by governments about stakeholders’ views on specific options, which can facilitate subsequent implementation. The experience of regulatory policy with and without such opportunities for feedback underlines the need to entrench them as integral to good regulatory process.

Box 18 Whole of government principles for consultation

Following a recommendation of the Regulation Taskforce (2006), the Government's *Best Practice Regulation Handbook* (Australian Government 2010b) contains the following best practice consultation principles, which are to be met by all agencies when developing regulation.

Continuity — Consultation should be continuous, and start early in the policy development process.

Targeting — Consultation should be widely based to ensure it captures the diversity of stakeholders affected by the proposed changes. This includes state, territory and local governments, as appropriate, and relevant Australian Government agencies.

Timeliness — Consultation should start when policy objectives and options are being identified. Throughout the consultation process, stakeholders should be given sufficient time to provide considered responses.

Accessibility — Stakeholder groups should be informed of proposed consultation and be provided with information about proposals through a range of means appropriate to these groups. Agencies should be aware of the opportunities to consult jointly with other agencies to minimise the burden on stakeholders.

Transparency — Policy agencies need to explain clearly the objectives of the consultation process and the regulation policy framework within which consultations will take place, and provide feedback on how they have taken consultation responses into consideration.

Consistency and flexibility — Consistent consultation procedures can make it easier for stakeholders to participate. However, this must be balanced with the need for consultation arrangements to be designed to suit the circumstances of the particular proposal under consideration.

Evaluation and review — Policy agencies should evaluate consultation processes and continue to examine ways of making them more effective. (p. 44)

RECOMMENDATION 6.4

Any review of a significant area of regulation should make provision for the public to see and provide feedback on its preliminary findings and recommendations, with further consultation at the more detailed implementation stage.

Improving regulator practices

How regulations are administered is an important determinant of the overall regulatory burden. Excessive costs can arise from overly stringent requirements or prescriptive supervision. These can emanate from attempts to minimise risk without adequate regard to cost, or simply from lack of attention to compliance burdens relative to the principal objectives of a regulation. Poor administration and

enforcement practices can also discourage compliance and dissipate government resources, hindering achievement of the underlying objectives of the regulation.

Such problematic practices partly reflect the incentives facing regulators, which can really only be remedied by governments modifying those incentives. Regulation Taskforce proposals for the Australian Government to pursue this through clearer guidance in legislation and ‘Statements of Expectation and Intent’, together with the development of cost-related key performance indicators and requirements for better consultation and appeal mechanisms, were all accepted. But the extent of their implementation and how well they are operating in practice is unclear and could usefully be reviewed.

At the same time, in contrast to the case for the *development* of regulation, governments have not agreed to formal guidelines and requirements for the administration and enforcement of regulation. Several studies have addressed what tools, processes and strategies may work well in particular contexts, augmenting the know-how of regulators themselves, and there is increasing agreement on ‘best practice’. Further research could examine the Australian evidence and inform the scope to achieve governmental agreement on these matters.

RECOMMENDATION 6.5

The Australian Government should commission a study into regulator practices and means of managing regulator performance, to enhance the administration and enforcement of regulation. Acknowledging that approaches adopted by regulators may be constrained and that the best approach may vary from field to field, such a study should:

- *identify the range of tools, processes and strategies currently employed by regulators, and examine their impacts on regulatory outcomes and associated costs and benefits*
- *identify existing oversight and other means of managing regulator performance and examine their effectiveness*
- *inform the merits of developing a common set of best practice guidelines and common requirements for ensuring compliance with them.*

Building capacities in evaluation

The reviews necessary to identify and implement reforms to regulation require people who are at least as skilled as those responsible for developing the regulations in the first place. The limited availability of the right people (and their opportunity costs) are important reasons for prioritising and sequencing their efforts. However, given the relatively large gains to be had from well-targeted reforms, there may be a

case for devoting additional resources to the reform task, and to regulatory reviews in particular. This applies both to the institutions overseeing and vetting new regulation, and to those monitoring and evaluating existing regulations.

The specification of review needs when regulation is being developed, should make provision for their resourcing where this is likely to be necessary to ensure adequate evaluation. Agencies should also ensure that they have the skills in evaluation required to conduct in-house reviews and to manage consultancies if reviews are contracted out. Concerns have been raised at senior levels in the public service recently about the decline in analytical skills. The potential returns from more cost-effective regulatory policy alone would justify investing more in these capabilities.

FINDING 6.5

A lack of skills limits the potential for good ex post evaluations. Unless there is a demand for quality evaluation there is little incentive to build the necessary skills. Countries that have recently implemented programs to improve ex post evaluation of regulation are also investing in the development of evaluation skills.

RECOMMENDATION 6.6

The Australian Government should commit to building skills in evaluating and reviewing regulation, and examine options to achieve this.

Summary of Recommendations

<i>Issue</i>	<i>Proposed response</i>	<i>Main benefits</i>
Managing the stock of regulation		
<i>Improving the effectiveness of sunseting</i>		
<p>The sunset requirements under the <i>Legislative Instruments Act 2003</i> mean the number of legislative instruments falling due for review is considerable, with two large peaks in 2016 and 2018. This could place an overwhelming burden on departments and agencies and the Office of Best Practice Regulation (OBPR). Even with good preparation the risks associated with the workload could undermine this useful mechanism's potential contribution.</p>	<p>Amend the <i>Legislative Instruments Act 2003</i> to enable:</p> <ul style="list-style-type: none">• smoothing of the pre-2005 instruments sunseting over 2015 to 2018• the packaging of related regulations for review. <p>(Rec 4.1)</p> <p>Establish clear and transparent processes for implementation. These include publishing a timetable, clarifying roles and responsibilities of different agencies and developing:</p> <ul style="list-style-type: none">• a 'triage' system to prioritise review and consultation• data management to support consultation• arrangements to test the proposed review action with all stakeholders• reviews and subsequent legislative proposals (including a regulation impact statement (RIS) where required). <p>(Rec 4.2)</p>	<p>This would promote use of systemic reviews and improve the effectiveness of sunseting arrangements.</p> <p>Review (and subsequent RIS) resources would be directed at those regulations that currently impose a significant burden on business, achieving a greater payoff.</p>
<i>Tightening the arrangements for post implementation reviews (PIRs)</i>		
<p>While PIRs were intended as a 'failsafe' in exceptional circumstances where an adequate RIS could not be prepared, their use has escalated, including for major areas of legislation. If this mechanism were to be used as a means of evading the RIS process, it would pose a considerable risk to the integrity of the Government's best practice requirements.</p>	<p>Amend the <i>Best Practice Regulation Handbook</i> to include guidelines requiring:</p> <ul style="list-style-type: none">• all PIRs to meet the same requirements as a RIS, but with a draft for consultation• amendment or removal of regulation to be recommended as appropriate. <p>(Rec 4.3)</p>	<p>Maintains the integrity of the system and reduces the incentive to avoid ex ante assessment of regulatory proposals.</p>

<i>Issue</i>	<i>Proposed response</i>	<i>Main benefits</i>
PIRs are currently required to commence within two years of implementation of the regulation. Uncertainty regarding what constitutes 'implementation' could create considerable delay.	Clarify in the <i>Handbook</i> that PIRs commence within two years of the regulation coming into effect and specify when they are to be completed. (Rec 4.3)	Enables more timely rectification of regulatory problems.
Undertaking a PIR — which becomes a public document — may place officials in a conflicted position, given their twin roles of working to implement government policy and providing 'in-confidence' policy advice to the government of the day.	Amend the <i>Handbook</i> to encourage PIRs of major significance to be undertaken at 'arm's length'. (Rec 4.3)	Strengthen the robustness of PIR analysis.
<i>Strengthening the ex post review of regulations with significant impacts</i>		
The level of ex post review needed to satisfy the RIS requirement is unclear. Further guidance on scope and governance is needed.	Enhance the guidelines for the review requirement in the RIS to encourage reviews proportionate to the potential impact. All reviews to occur within 5 years of the regulation coming into effect. Legislation or regulation assessed as having a major impact would require a formal 'review and performance measurement plan' that includes proposed performance measures, data collection, governance arrangements and evaluation methodology. (Rec 4.4)	Encourage more proportionate, timely, and useful reviews. Would improve the design of the regulation, and ensure data is available for review, particularly for regulations with major impacts.
Where there are significant uncertainties about impacts reviews may occur too late.	The <i>Handbook</i> should encourage the use of embedded statutory reviews where there are uncertainties regarding the effectiveness or impacts of the proposed regulation. (Rec 4.4)	Timely rectification of any adverse impacts arising.
No assurance that reviews proposed in a RIS are actually undertaken.	Develop a mechanism for tracking proposed reviews and review findings. (Recs. 4.4)	Would help maintain 'fit for purpose' regulation.

<i>Issue</i>	<i>Proposed response</i>	<i>Main benefits</i>
<i>Improving the cost-effectiveness of major regulation review and reform</i>		
A RIS is only required to assess the additional burden of regulation, yet it is often the accumulation of regulation that is the problem. Public stocktakes can help. But they are less effective if they occur too often or if there is poor implementation of previous recommendations.	Public stocktakes should be undertaken about every 10 years and after previous recommendations are dealt with. Stocktakes should encompass regulations in all jurisdictions. COAG should encourage jurisdictions to develop and progress recommendations relating to their own jurisdiction. Where appropriate, these should help inform the priority setting process for the Seamless National Economy (SNE) agenda. (Rec 4.5)	More effective business engagement and coordinated reforms. Provides information for setting priorities for major reviews.
Divergence from international standards can impose undue burdens. Some anti-competitive regulations remain. Regulatory impediments to factor mobility can impose high costs, especially given current structural pressures.	Consideration should be given to undertaking principles-based reviews for: <ul style="list-style-type: none"> • areas which avoided reform under the NCP's competition principle • regulations diverging from relevant and widely accepted international standards • regulatory restrictions that directly or indirectly reduce factor mobility. (Rec 4.6)	Cost-effective, targeted reform of regulations with prima facie costs across the economy as a whole.
Strengthening the regulatory framework		
<i>Where to focus the reform effort?</i>		
Determining where resources are best allocated to the regulatory reform task depends on where the best returns are likely to arise. While COAG's SNE process applied appropriate criteria in assessing the priorities for reform, the costs of undertaking reform may have been under-weighted.	When deciding on where to allocate resources to regulatory reforms, the following principles should be considered. <ul style="list-style-type: none"> • 'Routine' improvements should occur as a matter of course • Reforms identified or underway should be completed before embarking on a major new reform agenda. 	More cost-effective reforms and better support from stakeholders.

<i>Issue</i>	<i>Proposed response</i>	<i>Main benefits</i>
	<ul style="list-style-type: none"> • When prioritising future reforms, the costs of achieving the reform and resources available need explicit consideration, alongside any sequencing issues that arise. • When prioritising review efforts, focus on the need to inform the current agenda, and then on building an evidence base to help develop future reform priorities. <p>(Rec 6.1)</p>	
<i>Better monitoring and reporting of progress in implementing reforms</i>		
<p>There is no systematic reporting on responses to and implementation of the recommendations made by reviews.</p> <p>Lack of information on what has been achieved reduces stakeholder interest.</p>	<p>A system for monitoring the progress of reform recommendations, including recommendations for more in-depths reviews, should be developed.</p> <p>The information should be available on a public website with links to both planned and completed reviews.</p> <p>(Rec 6.2)</p>	<p>Better information may assist in improving accountability of government (and hence encouraging implementation) and sustaining support for reform.</p>
	<p>The Department of Finance and Deregulation or OBPR should report annually on review activity and implementation.</p> <p>(Rec 6.3)</p>	
<i>Better consultation</i>		
<p>Whole of government principles for consultation could be better utilised. Many reviews do not test draft recommendations with stakeholders prior to finalisation, risking unintended consequences and reducing stakeholder support.</p>	<p>Reviews of significant areas of regulation should include public consultation and feedback on preliminary findings. Further consultation should occur during the implementation stage.</p> <p>(Rec 6.4)</p>	<p>Effective stakeholder engagement will help to develop 'good' regulation and avoid unintended consequences, as well as building support for outcomes.</p>

<i>Issue</i>	<i>Proposed response</i>	<i>Main benefits</i>
<i>Improving regulator practices</i>		
Regulators may lack the flexibility to manage in the most cost-effective way. They often lack incentives to balance risk with costs imposed.	Initiate a study to: <ul style="list-style-type: none"> • identify and examine the range of tools, processes and strategies used by regulators and their impacts • identify and examine the effectiveness of various ways of managing performance • inform best practice guidelines. (Rec 6.5)	Would assist in developing appropriate incentives for regulatory administration and to understanding what constitutes 'best practice' for regulators.
<i>Building capacities in regulatory oversight and evaluation</i>		
Reviews are constrained by the limited availability of skills in ex post evaluation, including the evaluation of the impact of risk. But there is also little incentive to build such skills if the demand for good quality ex post reviews is not apparent, or the outcomes are not implemented.	The Australian Government should commit to building skills in evaluating and reviewing regulation, and examine options to achieve this. (Rec 6.6)	Building evaluation skills will assist in improving the quality of regulation and better targeted reforms.

1 What this study is about

The Productivity Commission has been asked by the Australian Government to provide its assessment of ‘frameworks and approaches’ for identifying areas for further regulation reform and methods for evaluating reform outcomes. This follows four rounds of the Annual Review of Regulatory Burdens on Business, covering all sectors of the economy, previously undertaken by the Commission.

In brief, the Commission has been asked to:

- examine the lessons from past reviews of regulation, both in Australia and overseas
- build on these lessons to suggest frameworks and approaches for identifying poorly performing areas of regulation and regulatory reform priorities, and methods for evaluating regulation reform outcomes (see the terms of reference on page IV for details).

The terms of reference note the need to prioritise future regulatory reform efforts of governments. It is also important to evaluate reform outcomes effectively, including the impacts on administrative and compliance costs faced by business.

1.1 The scope of this study

This study accordingly outlines frameworks, approaches and methods for identifying priorities for regulation reform and for evaluating their impacts. It does not propose specific areas of regulation for reform, although the application of the approaches would have implications for priority areas. Indeed, one of the lessons is that follow-up to reviews and completion of reforms are themselves priorities for the future. Another lesson is that the quality of interaction between businesses and regulators continues to be the issue most commonly raised by business as imposing unnecessary costs.

This study focuses on approaches for ‘managing’ the *stock* of regulation in order to reduce the regulatory burdens imposed on business and achieve better outcomes for the community. However, some of the strategies for managing the stock need to be considered at the time a regulation is being framed and introduced. So while the study does not examine the regulatory impact assessment system as such, it does consider actions at this point in the ‘regulatory cycle’ that can enhance the

management of the regulation once it has been implemented. The Council of Australian Governments (COAG) has agreed to undertake a benchmarking study in 2012 of the regulation impact statement (RIS) processes in place across all Australian jurisdictions.

This study considers strategies applicable to reforming all forms of regulation (box 1.1) that affect businesses — including those in the not-for-profit sector. (Some of these strategies are also applicable to regulations that do not have business impacts.) It draws on examples of approaches that have been taken to managing the stock of regulation in Australian jurisdictions and other relevant countries, to identify useful ways in which the Australian Government and COAG could identify priority reforms.

Box 1.1 What is ‘regulation’?

A regulation is most simply defined as a principle, rule, or law designed to control, govern or influence conduct. Regulatory instruments shape incentives and influence how people behave and interact, helping societies to function well and deal with a variety of problems.

Regulation can be broadly divided into economic regulation (which can directly influence market behaviour such as pricing, competition, market entry or exit) and social regulation (which protects public interests such as health, safety, the environment and social cohesion). Some economic and social regulations apply widely to the community, while others apply only to certain industries.

Regulatory instruments in Australia can also be classified according to their legal basis:

- *Primary legislation* consists of Acts of Parliament. (A legislative proposal for enactment of a law is called a Bill until it is passed and receives a Royal Assent, at which time it is a law (statute) and is no longer referred to as a Bill.)
- *Statutory rules* are any regulations made under enabling legislation, with a requirement to be tabled in Parliament and/or be assented to by the Governor or Governor General-in-Council.
- *Other legislative instruments* include guidelines, declarations, orders or other instruments that have legal enforceability, but that are not subject to Parliamentary scrutiny.

Apart from these regulatory instruments, there are also codes and standards that governments use to influence behaviour, but which do not involve ‘black letter’ law — these are known as *quasi-regulation*. Forms of co-regulation, such as legislative support for rules developed and administered by industry, and other instruments such as international treaties, are also used to directly or indirectly influence conduct.

Source: PC (2008a).

1.2 Regulation reform in Australia

Australian governments have made considerable efforts to reform regulation over recent decades. There have been three main waves of regulatory reform.

- First, the liberalisation of trade and financial regulation in the 1980s opened the Australian economy to international markets. The increased competition faced by many enterprises, in turn, highlighted various impediments and costs within the domestic regulatory regime.
- This provided impetus for a second wave of reforms to the regulation of labour markets and public monopolies in key infrastructure service areas, culminating in the National Competition Policy (NCP). The NCP's Legislative Review Program required the Australian, state and territory governments to examine all legislation that restricted competition.
- In a third wave of reforms, COAG has sought to reduce the costs to business and the community that arise from compliance burdens, particularly those attributable to differences in regulation across jurisdictions in Australia. The Seamless National Economy (SNE) initiative seeks to improve the national coherence of regulation and reduce its costs, while maintaining or enhancing its effectiveness. This work has drawn on earlier stocktake assessments of regulation (notably the *Rethinking Regulation* report (Regulation Taskforce 2006)), and is being informed in part by the series of benchmarking studies undertaken by the Productivity Commission.

Progress in the SNE initiative and other streams of the COAG reform agenda is being monitored by the COAG Reform Council, with annual public reports on agreed performance indicators. In a related study, the Commission has been tasked by COAG with assessing the impacts and benefits of the COAG reform agenda (box 1.2). The impacts of the first round of SNE reforms will be one of the first areas to be assessed.

Box 1.2 Assessing the impacts and benefits of the COAG reform agenda

The Commission has been asked to undertake a stream of work assessing the impacts and benefits of the COAG reform agenda. The first study in this series is looking specifically at:

- 17 nominated regulation reforms from the Seamless National Economy (SNE) agenda
- vocational, education and training, and initiatives to support transitions from school to further education, training and employment.

Further reports will be provided every two to three years under a standing terms of reference (received June 2010) and according to reporting priorities provided by the Assistant Treasurer. The Commission released a framework report outlining its proposed approach in December 2010.

Source: PC (2010b).

In addition to national reforms pursued through COAG, governments have looked for ways to improve their own regulatory systems and reduce the associated burden for business. Some state and territory governments have conducted stocktakes of their regulation, and some have pursued explicit targets for the reduction of red tape burdens.

These efforts, aimed at improving the stock of regulation, have been complemented by more comprehensive and analytical screening of new regulation, with all jurisdictions adopting RIS processes in line with principles agreed by COAG. As noted, these processes are to be the subject of a benchmarking study in 2012 and are not the principal focus of this study.

It is important to recognise, therefore, that over the last three decades, many of the more pressing and achievable reforms have been accomplished (box 1.3). This makes finding the priorities for future reform a more challenging task.

Box 1.3 Major Australian achievements in regulation reform

Trade liberalisation — reductions in tariff assistance (that began in 1973) and the abolition of quantitative import controls — mainly in the automotive, whitegoods and textile, clothing and footwear industries — gathered pace from the mid 1980s. The effective rate of assistance to manufacturing fell from around 35 per cent in the early 1970s to 5 per cent by 2000.

Capital markets — the Australian dollar was floated in March 1983, foreign exchange controls and capital rationing (through interest rate controls) were removed progressively from the early 1980s and foreign-owned banks were allowed to compete initially for corporate customers and then, in the 1990s, to act as deposit taking institutions.

Infrastructure — partial deregulation and restructuring of airlines, coastal shipping, telecommunications and the waterfront occurred from the late 1980s. Across-the-board commercialisation, corporatisation and privatisation initiatives for government business enterprises were progressively implemented from around the same time.

Labour markets — the Prices and Incomes Accord operated from 1983 to 1996. Award restructuring and simplification, and the shift from centralised wage fixing to enterprise bargaining, began in the late 1980s. Reform accelerated in the mid 1990s with the introduction of the *Workplace Relations Act 1996*, further award simplification (limiting prescribed employment conditions in enterprise bargaining agreements) and the introduction of individual employment contracts (Australian Workplace Agreements).

Human services — competitive tendering and contracting out, performance-based funding, and user charges were introduced in the late 1980s and extended in scope during the 1990s. Administrative reforms (for example, financial management and program budgeting) were introduced in health, education and community services in the early 1990s.

National Competition Policy reforms — a coordinated national program of broad-ranging reforms was commenced by all Australian governments in 1995, including reforms to essential service industries (including energy and road transport), government businesses and a wide range of anti-competitive regulations.

Taxation reform — capital gains tax and the dividend imputation system were introduced in 1985 and 1987, respectively. The company tax rate was lowered progressively from the late 1980s. A broad-based consumption tax (GST) was implemented in 2000, replacing the narrow wholesale sales tax system and a range of inefficient state-based duties. Income tax rates were lowered at the same time.

Seamless National Economy — this current COAG program aims to improve the national 'coherence' of regulation and reduce its costs, while maintaining or enhancing effectiveness. It covers 36 areas of reform, including 27 deregulation priorities, 8 competition reform areas, and ongoing reforms to improve processes for regulation making and review.

Sources: Banks (2005); COAG (2008c).

1.3 How the Commission has approached this study

Regulation reform is important to ensure that the stock of regulation is achieving its purpose (it is effective), that it is not imposing unnecessary distortions or burdens (it is efficient) and, by addressing real problems, will deliver net benefits to the community (it is appropriate) (box 1.4). While much attention has been given to compliance costs in excess of those required to achieve the objectives of regulation, it is important that the regulation reform agenda goes beyond improving the efficiency of regulation to ensuring that it is also effective and appropriate.

Box 1.4 The goals of regulation reform

There are three broad goals against which regulation and regulation reform efforts should be assessed.

- *Effective regulation* achieves the objective of the regulation.
- *Efficient regulation* does not impose any unnecessary distortions or burdens on the economy in achieving its objective. In other words, given a policy objective, the regulation is achieved at the least cost to society.
- *Appropriate regulation* addresses a real economic, environmental or social concern and actually delivers a net benefit to the community. A regulation may be effective and efficient but may not have an appropriate objective. ‘Zero-waste’ or ‘zero-risk’ are examples of inappropriately specified regulatory objectives. They are inappropriate because the costs of achieving the objective outweigh the benefits, (and the objective may not be achievable at any cost).

Reform frameworks and approaches

The terms of reference direct the Commission to evaluate ‘frameworks and approaches’ to identifying areas for regulation reform. The Commission has interpreted this to include any actions that governments can take to better manage the stock of regulation. This goes beyond approaches to identifying the regulations imposing compliance burdens on business or the community to include approaches that can promote continuous improvement in the efficiency, effectiveness and appropriateness of the stock of regulation and its administration. Such activities cannot be undertaken in isolation and need to be coordinated, and supported by systems and processes that also promote cooperation and consultation.

The study draws on examples of approaches to better management of the stock of regulation that have been adopted or promoted in Australia and other relevant countries. The approaches are examined against four criteria:

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1. the extent to which they identify regulations (in part, whole, or in combination) that are inefficient, ineffective and/or inappropriate
 2. the extent to which they identify alternatives that are efficient, effective and appropriate
 3. their influence on reform — in other words, achieving change for the better
 4. their overall cost-effectiveness.

This last criterion is important, as efforts to manage and reform the stock of regulation are obviously not costless — either for governments or for businesses and other stakeholders who are asked to contribute to the effort. A key theme of this study is the need to adopt approaches that are ‘proportionate’ — matching effort to the benefits expected.

Assessing evaluation methods

The second task set out in the terms of reference is to look at methods for the ex post evaluation of regulation reforms. While such evaluations can be undertaken as a stand-alone exercise, most of the approaches to reviewing the stock of regulation involve evaluation, or rely on information from evaluations of other changes in regulation. Hence, the two parts of the study are strongly linked.

Approaches to evaluating and identifying regulatory reforms need to be considered as forming part of the regulatory system governments have in place to develop, establish, administer, and review regulation. The Organisation for Economic Cooperation and Development (OECD 2010f), in its review of regulatory policy across member countries, has emphasised the importance of regulatory governance in achieving good regulatory outcomes:

The relative failure of regulatory policy to deliver consistently effective regulation so far can be linked to inadequate and underdeveloped regulatory governance. (p. 49)

For these reasons this study, consistent with the inclusion of ‘frameworks’ in the terms of reference, looks beyond the discussion of individual approaches to consider how these form part of a regulatory system. The study draws, in particular, on the Commission’s experience in undertaking stocktakes, benchmarking and in-depth reviews. It also draws on OECD and other sources concerning relevant regulatory systems around the world to identify best practices, recognising that the governance arrangements must take account of the legal and political environment.

Processes

This report builds on the discussion draft released in September. It is informed by submissions and consultations with peak industry bodies, government agencies, as well as discussions with officials at the OECD and other countries involved in developing and implementing systems for regulation reform. Two roundtables were also conducted, one with government and the other with business representatives.

1.4 The structure of this report

The following chapters of this report describe key aspects of and lessons from different approaches, frameworks and methods that have been used to identify priority areas for evaluating and reforming regulation. The appendixes, which are available on the Productivity Commission's website (www.pc.gov.au) provide a range of examples of the various tools and approaches used, with a more detailed analysis of what does and doesn't work and why.

Chapter 2 sets up the broad context and rationale for analysing the stock of regulation. Chapter 3 describes the approaches that have been used to identify areas for, and promote, regulation reform in Australia and other relevant countries. Chapter 4 sets out the main lessons from the Commission's review of these frameworks, approaches and methods for identifying and prioritising regulations for reform. The methods and approaches for evaluating regulation reform are discussed in chapter 5. Chapter 6 discusses how Australia's regulatory system could be refined to enhance its performance.

2 Why reform the ‘stock’ of regulation?

Key points

- Regulation provides key foundations for a well-functioning economy. But regulation generally comes with costs as well as benefits for society.
- Some of the costs imposed by regulation may be unnecessary, with the objectives of the regulation able to be achieved at lower cost.
 - Excessive coverage, extensive and variable reporting requirements, inconsistent and overlapping regulations, and redundant and ineffective regulation can all impose undue compliance burdens on business.
 - Unintended consequences, such as distorted incentives for investment or innovation, can impose longer term and potentially higher costs and result in poorer social and environmental outcomes.
- Even regulation that is initially well made and cost-effective can require subsequent amendment as costs and benefits change over time due to changes in technology, demographics, preferences, relative prices and resource ownership — and the accumulation and interaction of regulations.
- Regulation reform itself is not costless, requiring skilled people and resources that have competing uses.
- Regulation policy should be aimed at ensuring the quality of regulation at entry, and throughout its implementation and administration. It should also include mechanisms for reviewing regulations that are proportionate to the potential gains from the reform.
- In assessing the net return to reform effort, the broad criteria to consider are the:
 - *depth of the reform* — the magnitude of the impact on compliance costs and distortions for those affected
 - *breadth of the reform* — the share of the community affected, both directly and indirectly
 - *cost of making the reform* — including the effort to build support for reform.
- A regulation reform agenda which aims to improve the efficiency, effectiveness and appropriateness of the regulatory stock must:
 - ensure ‘continuous improvement’ in the stock of regulation and its administration through ‘routine management’ and programmed reviews
 - prioritise those individual areas of regulation where reform is likely to have high payoffs — ‘big reforms’ that require and warrant considerable effort
 - strengthen the regulatory system to support these objectives.

Reform means change for the better. As noted in chapter 1, regulatory changes for the better need to enhance the appropriateness, effectiveness or efficiency of existing regulation. While reform announcements often focus on specific changes in key areas, ensuring continuous improvement across-the-board should also be seen as an important part of a reform agenda.

Section 2.1 commences by outlining why ‘good’ regulation matters and its characteristics. The importance of stock management processes in developing good regulation is discussed in section 2.2. The final section (section 2.3) turns to priority setting and its importance for developing a regulatory reform agenda. A regulatory reform agenda covers three main areas: ‘big effort’ reforms; continuous improvement of the stock regulation; and strengthening the institutional architecture. Priorities need to be developed to allocate effort and resources across the three areas as well as within each of these areas.

2.1 The importance of ‘good’ regulation

Regulations are requirements imposed by governments that influence the decisions and conduct of businesses, other organisations and consumers. They may also restrict the range of activities that are undertaken. Expressed most succinctly, best practice regulation achieves worthy objectives at least cost. Over the years, analysts have identified the more important characteristics which regulation must satisfy to pass this test (box 2.1).

Box 2.1 What is ‘good’ regulation?

According to the Organisation for Economic Cooperation and Development (OECD), ‘good’ regulation should:

- serve clearly identified policy goals, and be effective in achieving those goals
- have a sound legal and empirical basis
- produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental and social effects into account
- minimise costs and market distortions
- promote innovation through market incentives and goal-based approaches
- be clear, simple, and practical for users
- be consistent with other regulations and policies
- be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels.

Source: OECD (2005).

There are sound reasons for much regulation. It can reflect and enforce the community's values and the rights of the individual. It can reduce risks to people's health and safety (such as through consumer policy), address discrimination (such as with equal opportunity laws), and protect the environment from overuse or degradation. Regulation is also part of the institutional architecture for markets to work efficiently, including by establishing property rights and enforcing contracts.

Much regulation is aimed at addressing sources of market failure — asymmetric information; monopoly power; externalities, and public goods. Market failures can reduce productivity, result in over- or under-production relative to community preferences, and distort consumption and production decisions. Regulation can also aim to reduce social and environment risks through 'collective' solutions. However, regulation to correct market failures or to address risks, still needs to be efficient and effective, with the benefits of such corrections outweighing the costs of implementing and complying with the regulation.

Regulation can be used to protect some producers at a cost to others, favour the use of some resources relative to others, and benefit some consumers over others. In some cases such changes are intentional and desirable — for example, to look after vulnerable consumers and natural resources, or to reduce volatility and encourage longer-term sustainability. However, in other cases, there may be no merit in this; the costs imposed can be considerable and not justified by the benefits.

The benefits and costs of regulation

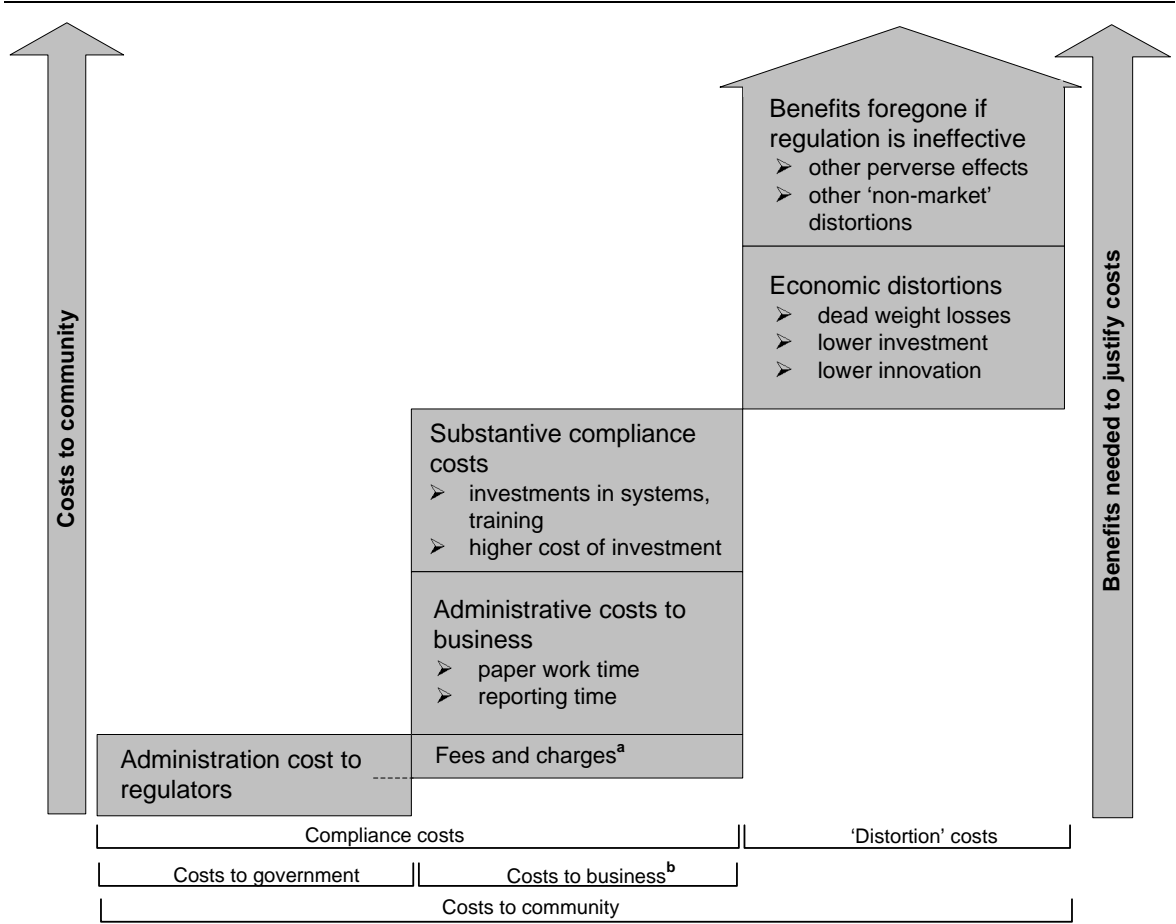
The benefits of a regulation may comprise economic, social or environmental outcomes that are valued by the community. Economic outcomes include increases in employment and income, and reductions in the cost of production that flow through to lower prices and higher consumption, improving the standard of living. Social and environmental outcomes, such as increases in leisure time and reductions in pollution, can also directly benefit the standard of living. Economic, social and environmental outcomes can also affect quality of life, such as personal freedoms and safety, physical and mental wellbeing and feeling connected to family, friends and the community. Many benefits will not be 'financial', that is, affecting prices and incomes. Similarly, not all costs will be financial. For example, the reduction of one risk can increase another (see below). And, there may be losers as well as winners from the changes resulting from a regulation.

As discussed in the following chapter, regulation policy has nevertheless often focused on reducing unnecessary financial costs, in part because these are generally the easiest to identify. Financial costs include administration costs to governments and compliance costs to businesses and households. Business compliance costs include the administrative costs of undertaking paperwork, compiling the information, and reporting to regulators. There can also be more substantive compliance costs, such as the investment in staff training and systems and other capital upgrades required to comply with regulation. From a business perspective, the fees and charges paid to regulators impose a compliance cost, but from the community perspective it is the total cost of the regulator, rather than just the costs they pass onto business through cost recovery, that matter.

The range of potential costs of regulation are depicted in figure 2.1.

Figure 2.1 **Multiple potential burdens of regulation**

Costs to business and the community



^a Cost to business depends on fees and charges passed onto business through cost recovery. ^b Some costs are passed through in prices, lower wages or lower returns on capital.

There may be economic costs arising from regulatory ‘distortions’ — for example, where regulation reduces competition and affects incentives for investment and innovation. Such distortions (often unintended), can be due to:

- substitution effects resulting from changes in relative prices, including distorting investment decisions which have long-term consequences
- overly prescriptive regulation which prevents innovative or lower cost approaches to meeting the intended outcomes of the regulation
- interactions of regulations that can compound costs, create inconsistencies, or otherwise pose dilemmas for business compliance.

In addition, there may be other non-market costs arising from environmental and social changes. For example, regulation to reduce one risk may result in an increase in other risks (Graham and Wiener 1995). There are also economic risk-risk trade-offs as the debate over the contribution of prudential regulations to the global financial crisis highlights (Brunnermeier et al. 2009). If regulation is not effective there can also be opportunity costs in the form of the foregone benefits the regulation was intended to deliver.

The costs of administering regulation can be large. For example, *Regulation and its Review* (PC 2005a), reported that the administration expenses of 15 dedicated Australian Government regulatory agencies approached \$2 billion in 2003-04, with the Australian Tax Office accounting for a further \$2.3 billion in the same year.

The administrative costs to business of regulation are also considerable. For example, an early study by the Productivity Commission researchers (Lattimore et al. 1998) estimated the administrative compliance costs on business from regulation at around \$11 billion in 1994-95, of which around 85 per cent was borne by small and medium-sized enterprises. Based on a survey undertaken by the OECD in 2001, the Commission estimated that the compliance costs of regulations could be as high as 4 per cent of gross domestic product (GDP) (up to \$35 billion in 2005-06) (PC 2006c). The Regulation Taskforce (2006) reported the estimates provided by the New South Wales (NSW) Chamber of Commerce that the average business in NSW spends 400 hours a year (or nearly \$10 000) complying with regulations or meeting its legal obligations. The administrative costs of regulation in Victoria were estimated at \$1.03 billion in 2006, based on the methodology applied in the United Kingdom (UK) (VDTF 2007). Most recently, an AIG (2011) survey of Chief Executive Officers estimated that, on average, the costs of meeting regulation was almost 4 per cent of their total annual expenditure.

In 2005, the UK Government estimated total administrative burdens associated with their regulation to be £20-40 billion (1.6 to 3.2 per cent of GDP), while that in the Netherlands was estimated at €16 billion (3.6 per cent of GDP) in 2002. Denmark and Belgium have estimated total administrative burdens to be around 2 per cent of GDP (PC 2006c).

While some of these costs will be necessary to achieve the objectives of the regulation, excess costs or unnecessary burdens can be substantial, and have a number of origins (box 2.2).

The costs arising from the effects of regulation on incentives and other distortions are harder to estimate. However, limited evidence suggests that these costs can be larger than compliance costs. Based on a regression analysis of a World Bank indicator of regulatory quality, the United States Small Business Administration estimated the total cost of US regulations at US\$1.2 trillion in 2008 (around 8.5 per cent of GDP) (Crain and Crain 2010). In addition, estimates of efficiency benefits from previous reforms of regulation have been large — for example, the Commission has estimated that real GDP was about 2.5 per cent higher as a result of National Competition Policy (NCP) reforms to utilities and infrastructure (PC 2005b).

Box 2.2 Sources of ‘unnecessary’ regulatory burdens

Rethinking Regulation identified five features of regulations that contribute to burdens on business not justified by the intent of the regulation.

- *Excessive coverage, including ‘regulatory creep’* — regulations that appear to influence more activity than originally intended or warranted, or where the reach of regulation impacting on business, including smaller businesses, has become more extensive over time.
- *Regulation that is redundant* — some regulations could have become ineffective or unnecessary as circumstances have changed over time. Other poorly designed regulations might give rise to unintended or perverse outcomes.
- *Excessive reporting or recording requirements* — companies face excessive or unnecessary demands for information from different arms of government. These are rarely coordinated and often duplicative.
- *Variation in definitions and reporting requirements* — this can generate confusion and extra work for businesses than would otherwise be the case.
- *Inconsistent and overlapping regulatory requirements* — regulatory requirements that are inconsistently applied, or overlap with other requirements, either within governments, or across jurisdictions. These sources of burden particularly affect businesses that operate across jurisdictional boundaries.

Source: Regulation Taskforce (2006).

The administration of a regulation can also have an important bearing on both the effectiveness of the regulation and the compliance costs imposed. Heavy handed administration of regulation can reduce innovation and act as a disincentive to investment, including through entry of new firms.

For example, the Department of Innovation, Industry, Science and Research (sub. 6) noted in the context of health regulation:

Some aspects of regulation governing access to medicines are controlled by formal Agreements between specific stakeholder groups and the government. These Agreements, while designed to deliver the specific outcomes for patients and consumers of medicines, may, in some cases, do so at the cost of restricting businesses as well as service delivery innovation. Review of such regulation may lead to measures that provide such services in better and more efficient ways. (p. 20)

Uneven administration of regulation may confer advantage to some, while failure to enforce can impose costs on the compliant firms and on consumers. Inconsistent decision making by regulators can also result in businesses over-investing in compliance, while slow decision making leads to delays that can be costly to business.

Good regulation is that in which such costs are minimised (efficiency), with the objectives being achieved (effectiveness) and the overall benefits exceeding the costs (appropriateness).

2.2 Managing the stock of regulation

There has been considerable focus over the last decade or two on improving the quality of regulation through screening processes for new regulation (box 2.3). But governments are increasingly looking at ways to better manage the (much larger) existing stock of regulation. For example, the OECD (2011) outlined different stock management techniques and their growth over time (figure 2.2). The OECD (2011) also indicated that it is developing a new *Recommendation on Regulatory Policy and Governance* to build an existing best practice, including the need to:

Assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment. (p. 34)

Box 2.3 **Managing the flow of Australian Government regulation**

The Australian Government, in 1985, established a system of regulation impact statements (RIS) for all new regulation that imposes a burden on business. The RIS guidelines have been revised periodically, most recently in 2010. All state and territory governments have also implemented a RIS-type system, which was entrenched by the Council of Australian Governments (COAG) under the National Partnership Agreement to Deliver a Seamless National Economy.

A RIS is mandatory for all decisions made by the Australian Government and its agencies that are likely to have a regulatory impact on business or the not-for-profit sector, unless that impact is of a minor or machinery nature and does not substantially alter existing arrangements. This requirement includes amendments to existing regulation and the remaking of sunseting regulation.

The RIS process is overseen by the Office of Best Practice Regulation (OBPR), previously located within the Productivity Commission, now in the Department of Finance and Deregulation. OBPR comments on compliance with the Government's RIS requirements and the adequacy of the RIS in its Cabinet coordination comments. The Cabinet Secretariat provides a gate-keeping role to ensure that regulatory proposals coming to the Cabinet and sub-committees of the Cabinet meet the RIS requirements. The Cabinet Secretariat will not circulate final Cabinet submissions memoranda, or other Cabinet papers, without adequate RISs unless the Prime Minister has deemed that exceptional circumstances apply.

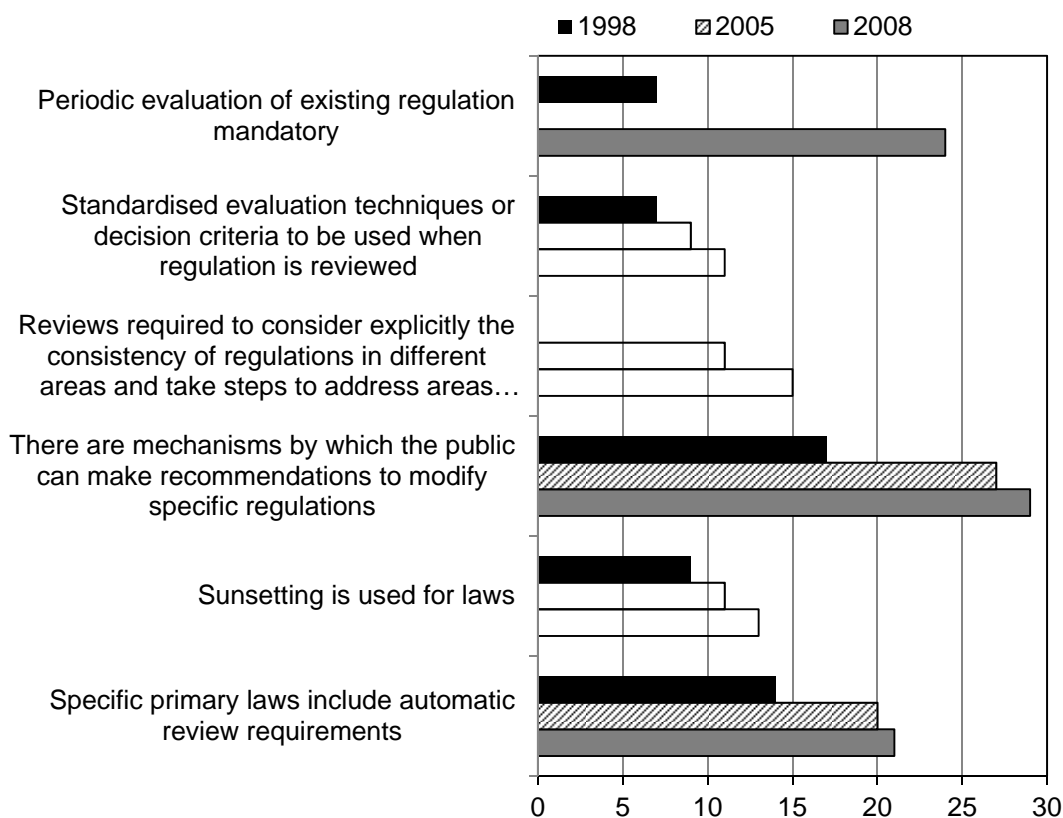
Since July 2010, the OBPR has maintained a central online public register of all new RISs including those assessed as inadequate. In consultation with the agency, RISs and the OBPR's assessments of RISs are published on the register as soon as practicable from the date of the regulatory announcement.

Section 7 of the RIS guidelines (Implementation and review) requires that a RIS provides information on how the preferred option would be implemented, monitored and reviewed. A RIS is also required to consider existing regulation, and whether there is duplication or overlap and existing effectiveness.

Source: Australian Government (2010b).

The volume and scope of regulation continues to grow rapidly. *Rethinking Regulation* (Regulation Taskforce 2006) noted that in the sixteen year period from 1990 to 2006, the Australian Parliament passed more pages of legislation than in the previous ninety years. This trend shows no sign of abating. A survey of Australian and state and territory governments in 2008 identified 439 different business regulators (PC 2008a). The same study noted that, at the Australian Government level, there were 1279 Acts generating 98 486 pages of legislation and 18 000 statutory rules generating another 90 000 pages of subordinate legislation. Across all the jurisdictions, there was well over half a million pages of legislation by June 2007, with over 48 000 added in the previous year.

Figure 2.2 **Regulatory review and evaluation, 1998, 2005 and 2008**
Number of jurisdictions



Source: OECD (2011, p. 31).

This growth in regulation is occurring partly in response to the increased complexity of markets and technologies, and greater recognition of the importance of managing non-market resources. It is also in response to demands by parts of the community for formal institutions to take on social insurance roles previously left to the informal sector or social institutions. For different reasons, these two forces are reflected in the growing use of regulation to address perceived risks to the community or to satisfy new objectives. Government resistance to such pressures may be low, in part because of the low budgetary cost of regulation, but also because governments need to be seen to be responsive to community demands. Regulatory action is often preferred as a tangible response. For example, the Property Council of Australia (sub. 7) stated:

Regulation is often seen by Government as the quick fix solution to any perceived problem. (p. 5)

The need to actively manage the stock of regulation is increasingly recognised internationally. In the United States, for example, the importance of managing the

stock of regulation is currently being promoted. The former chief economist at the Council of Economic Advisers, Michael Greenstone (2011a), stated:

Limiting evaluation to the period before implementation lacks common sense. ... We should expect – in fact, demand – a similar form of performance evaluation for our nation’s vast regulatory structure, based on hard evidence about what works. We need a culture of regulatory experimentation and evaluation that can measure a regulation’s success. ... This requires modest resources, but costs are small compared to the costs of regulations that stifle job growth or otherwise fail the American people. (p. 1)

Even if all new regulation were subject to rigorous ex ante assessment processes, some of the stock of regulation will inevitably impose an undue burden. This is because of changes in the context including in: technologies; in the objectives of the government reflecting changing preferences in the community; and because of the cumulative effect of regulation, that can interact in complex ways. Identifying regulation that imposes excessive costs, does not meet its purpose, or is no longer desirable, and rectifying such deficiencies can lift productivity and bring other benefits, such as improving choice and opportunity.

Stock management is part of a sound regulatory system

Active management of the stock of regulation is part of a sound regulatory system. Managing the stock effectively means retaining ‘good’ regulation, while removing or amending regulation that is no longer fit for purpose.

While regulation reform may suggest ‘headline’ changes, stock management encompasses a range of possible actions from routine to major. At the simpler end, regulators must fine tune the administration of regulations to reduce compliance costs imposed on the businesses they regulate. In the middle, uncertainty about the impact of some regulations can justify a review during implementation or early in its administration. At the more complex end, where a costly ‘cocktail’ of regulation may have emerged, substantial legislative changes may be needed. In such cases, the full range of regulations impacting on an industry may need to be examined, with a benefit-cost test applied to different options to select the most cost-effective approach, as well as to ensure that the costs are justified by the benefits of the regulation.

2.3 Marshalling reform efforts

Reforming regulation is rarely costless. It takes time and effort to examine a regulation and to develop alternatives, and then to implement any changes. Even repealing a regulation can involve adjustment costs. Therefore, for a reform to

proceed, the benefits that reform brings — in terms of lower administration and compliance costs, better allocation of resources, increased competition, greater incentives for innovation, as well as enhanced effectiveness of regulation — must be greater than the costs of undertaking the reform.

Prioritising areas for reform

Prioritising reforms is important not only to reap the biggest gains, but also because the skilled people and other resources available for this endeavour are limited. Reviews can place significant demands on the community and business — comments about review fatigue are increasingly common. Moreover, review activity can create uncertainty, especially where there are long periods between the announcement of a review and the adoption of recommendations.

Many reforms worth doing can be hard to sell, either because of the complexity of the issues or because of political sensitivities, particularly where the losers are more vocal than the potential winners. Concentrating resources and public attention allows a more rigorous analysis of the net benefits of identified reforms and a more focussed consultative process, increasing the likelihood that reform will be successful.

Substantial reforms need to be prioritised, recognising that different reforms have different profiles of costs and benefits over time. Attention must be paid to the sequencing and ‘packaging’ of reform — to ensure the groundwork is laid before other reforms (that may be dependent on these foundations for their effectiveness) are implemented.

Reform efforts also need to be coordinated. Uncoordinated reform efforts can result in overlap or duplication of reviews, reform fatigue for business, implementation overload, and poor sequencing of important reforms that can undermine their success.

To be useful, prioritisation processes should:

- assign the scarce resources for review and reform to areas with a high rate of return to effort
- coordinate reform efforts, including consultations with business and community
- shorten the time required to make decisions, and improve accountability by greater clarity of responsibility
- raise the probability of successful reform by bringing sound evidence to bear and building an appetite for the reform.

Governments have applied a number of criteria to assist in identifying where the rate of return from reform effort is likely to be higher. The assessment criteria need to vary for different types of regulation, but there are some general criteria that affect the rate of return on reform effort.

- *Depth of reform* — the extent to which the existing situation differs from the achievable ideal and the impact this has on the community. Large costs imposed on businesses and significant distortions in the allocation of resources usually offer greater returns to correcting these problems, especially if the gains are widespread.
- *Breadth of reform* — the share of the economy or community affected by the changes. Some reforms may affect a relatively small share of the economy or community (such as local pollution levels). Others can affect almost everyone (such as food standards for milk) where there is a trade-off between reducing risk and cost.
- *Cost of reform* — the cost of making the change is distinct from any change in the compliance cost or other burdens as a result of the change in the regulation. This cost of reform includes the time and financial costs for government, business and others to make the case for, then implement, the reform. It also includes the cost to: investigate the changes needed and propose and assess the options for change; consult and test the proposed changes; and build support for the reform. Reforms that are more expensive to undertake would require a larger pay-off.

Prioritisation requires more than a set of criteria that allow governments to identify high return reforms. It also requires a process that can gather the information, conduct and test the analysis, and deliberate to choose priorities. The regulatory system needs to support this process as well as more routine activities.

Reform of regulation for good stock management

In developing an agenda for regulation reform, governments need to consider the return on their efforts, which should be proportionate to the expected benefits. For example, relatively routine activities, such as fine tuning by regulators, may be warranted because they can achieve savings in compliance costs with relatively little effort.

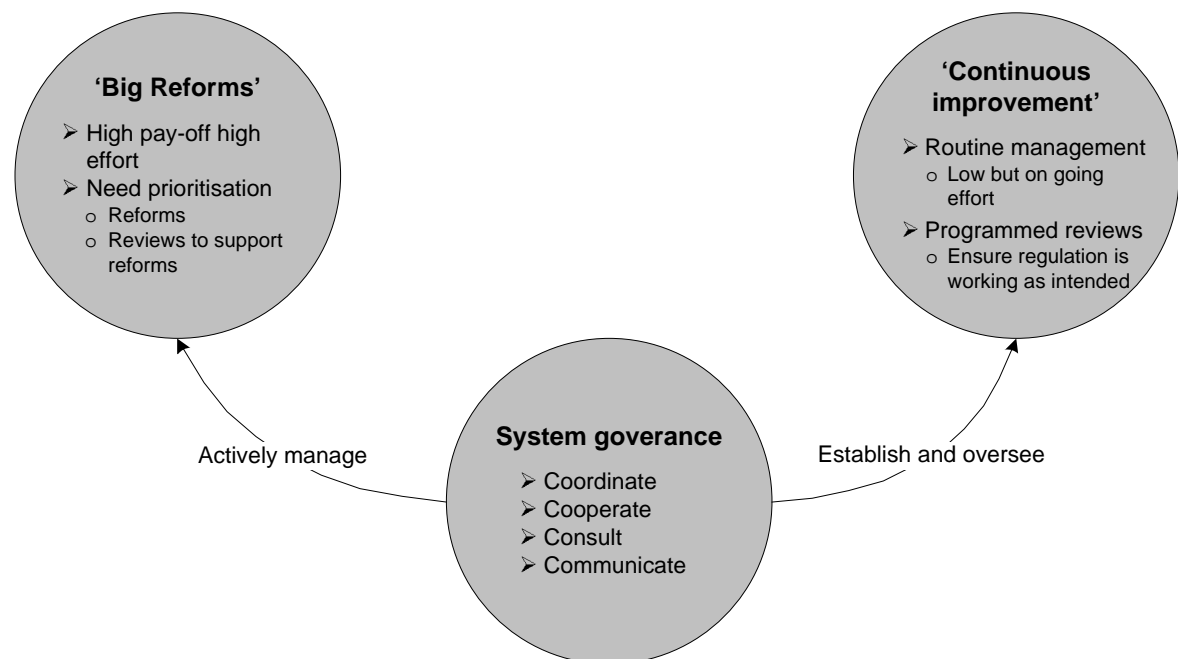
Processes to monitor the performance of new regulation, and to ensure review of regulation — for example where the impacts were uncertain or good process was not followed at the time of the introduction of the regulation — are also part of ensuring the stock of regulation is efficient, effective and appropriate.

In short, a reform agenda (figure 2.3) should:

- prioritise ‘big effort’ reforms — by setting out a process for establishing priority reviews and then draw on this and other information to progress important regulation reform in a sequenced way
- oversee an ongoing strategy of continuous improvement — putting in place the processes to fine tune regulation to enhance its efficiency and effectiveness, ensure regulation is working as intended, remove redundant regulation, and flag opportunities for more substantial reform effort
- strengthen the institutional architecture and governance arrangements to support prioritisation and continuous improvement. This should include processes to monitor and ensure the completion of agreed reforms in a timely way.

The rest of this study focuses on the frameworks, approaches and systems that governments can draw on to prioritise reforms and ensure continuous improvement in the stock of regulation. Chapters 3 and 4 look at different approaches to reviewing regulation and identifying reform needs, their relative merits and lessons from their use. Chapter 5 discusses the evaluation techniques that such reviews can employ. Finally, chapter 6 considers the framework or system for regulation reform and makes some recommendations to strengthen the Australian Government system.

Figure 2.3 The elements of regulation reform



3 Approaches to reviewing and reforming the stock of regulation

Key points

- Various approaches have been used to reform the stock of regulation. They vary both in their depth (the nature of the burdens and benefits they consider) and breadth (the number of regulations and industries covered).
- *Management* approaches — such as regulator strategies ‘one-in one-out’ rules and red tape reduction targets — address unnecessary administrative costs in a routine or incremental way.
- *Programmed* reviews are undertaken on a planned basis to ensure that regulation is needed and is working as intended. They include:
 - sunseting, where regulation lapses after a specified period if not remade
 - reviews embedded in legislation
 - post implementation reviews, which in the Commonwealth jurisdiction are required where initial regulation impact statement (RIS) requirements have not been met.
- More significant reviews are often undertaken on an *ad hoc* basis. They include:
 - public stocktake reviews, which identify regulation that is imposing unnecessary burdens. Stocktakes tend to be broad, but the issues covered can be limited by their ‘complaints-based’ nature
 - principles-based reviews, which apply a common principle as a screening mechanism to identify the need to review a regulation. The most generally applied principle has related to restrictions on competition
 - benchmarking, which compares regulation, regulatory processes, and/or regulatory outcomes across countries or jurisdictions
 - in-depth reviews, to achieve a full understanding of the regulatory issues and developing options for reform, typically focusing on a particular industry, category of regulation, or problem area.

A variety of frameworks and approaches to identifying regulatory areas requiring reform have been used in Australia and other countries. Some of the approaches are complementary, others duplicate effort. Some are well suited to identifying high return priority areas and options for reform. Others are well suited for identifying small but common burdens that can easily be removed and should be included in

any program of regulation reform. Some approaches can yield options for reform, while others may only indicate that reform is needed. An efficient and effective system for managing the stock of regulation would assign each approach to where it is best suited to the task required, so as to maximise the overall payoff to review and reform effort.

This chapter briefly summarises the approaches that have been used to help government reform the stock of regulation. Section 3.1 outlines three broad categories of approach — management approaches, programmed reviews and ad hoc reviews. The following three sections describe the different approaches within each category and provide some examples of their application.

An analysis of each approach and lessons on its application is provided in chapter 4. More detailed examples of each approach are in appendixes B to H.

3.1 Three broad approaches

Over the last few decades, governments have put considerable effort into establishing systems to improve the quality of new regulation. There has been some concern, however, that this has diverted attention from the task of managing the stock of existing regulation. Effort is required on all fronts, as the Organisation for Economic Cooperation and Development (OECD 2010h) has observed:

The assessment of ex ante regulatory impacts improves policy design but it only constitutes one part of regulatory management. Institutionalising accountability and results in regulation may need to be adjusted to practical outcomes after policy implementation. Closing the loop is essential if regulatory policy is to be performance-driven and politically accountable. This requires ensuring that ex ante impact assessment foresees the need of future ex post consideration of regulatory impacts. A fully integrated approach to regulatory policy therefore needs to include considerations for ex post evaluation at an early stage, with a full approach of regulations “from cradle to grave”. (p. 6)

There are three broad types of approaches that governments, overseas and in Australia, have used to pursue reforms to the stock of regulation.

- *Management approaches* have an ongoing role that can be regarded as ‘good housekeeping’. This category includes regulators’ ‘finetuning’ of administration, and requirements to take account of existing regulation in proposing new legislation (stock-flow linkage rules), red tape targets and internal stocktakes.
- *Programmed reviews* examine the performance of specific regulations at a specified time, or when a well-defined situation arises, to ensure regulation is working as intended. The scope of these reviews varies, but they may consider

the efficiency, effectiveness and/or the appropriateness of a regulation. This category includes sunseting legislation, embedded statutory reviews and post implementation reviews (PIRs).

- *Ad hoc reviews* take place as a need arises. They include public stocktakes and principles-based reviews, that look at a wide range of regulation, and targeted ‘in-depth’ reviews and benchmarking exercises that look at specific regulations or sets of regulation that might affect a particular industry or outcome area.

How the various methods have been assigned to these categories is not definitive, with some others potentially crossing boundaries. This includes sunseting, which has some characteristics of a routine management tool.

Table 3.1 summarises the main instruments in the three categories.

Table 3.1 Approaches to managing the stock of regulation

	<i>Main features</i>	<i>Use (examples)</i>
<i>Management approaches</i>		
Regulator mechanisms (appendix H)	Includes complaints portals, regular reviews to examine complaints and other problems identified by the regulator Consultation and feedback mechanisms Internal review/evaluation	Office of the Registrar of Indigenous Corporations Australian Securities and Investments Commission Australian Tax Office
Regulatory budgets (appendix G)	Departments are assigned a ‘budget’ of compliance costs that regulation can impose on businesses. New regulations that impose an additional cost must be offset by reductions in the costs imposed by existing regulations	No examples — though much discussed
‘One-in one-out’ rules (appendix G)	Introduction of a new legislative instrument is to be offset by the removal of an existing instrument	United Kingdom (2010) — onwards (partial application which is described as a one-in one-out but more like a compulsory cost offset)
Other stock-flow linkage rules	Requirement to consider scope to remove or reduce other regulation when introducing new regulation	Australian Government ‘off-set’ requirement
Red tape reduction targets (appendix G)	Targets for savings in compliance costs through agency actions to reduce paperwork and reporting requirements for compliance with business regulation	Netherlands (2003–2010) South Australia (2006–2012) Victoria (2006-2012) United Kingdom (2005-2010)
Internal ‘stocktakes’ (appendix G)	Departments or a central agency review of the existing stock of regulation usually to identify redundant regulation, but may also apply other filters	Australian Government pre-2008 stocktake

(continued next page)

Table 3.1 (continued)

	<i>Main features</i>	<i>Use (examples)</i>
<i>Programmed reviews</i>		
Sunset clauses (appendix E)	Requirement for all (usually subordinate) legislation to lapse after a specified period if not re-made. Remade legislation with significant impacts on business is required to go through the regulation impact statement (RIS) process	Australian Government Victoria, Queensland, South Australia, Tasmania — every 10 years New South Wales — every five years
Embedded statutory reviews (appendix E)	Identified during the development of the legislation. A requirement for a review (often 2 to 5 years after implementation) usually where there are significant uncertainties about the impact of the regulation. The scope of the review varies	Part IIIA of the <i>Competition and Consumer Act 2010</i> <i>Wheat Export Marketing Act 2008</i>
Post implementation reviews (appendix E)	Required for all Commonwealth legislation that was exempted from the RIS process or was non-compliant	Office of Best Practice Regulation (OBPR) — three completed, around 60 required
<i>Ad hoc reviews</i>		
Public stocktakes (appendix B)	Broad reviews calling for businesses to identify areas of regulation imposing excess burdens. Follow up analysis screens the 'complaints' to assess validity and options for reform	Small Business Deregulation Taskforce (1996) Regulation Taskforce (2006) Western Australia (2009)
Principles-based reviews (appendix D)	Use a principle to screen a wide range of legislation for further review. May require that the legislation be repealed or amended unless it can be shown to be in the public interest ('reverse onus')	National Competition Policy Legislative Review Program (1995–2006) Council of Australian Governments (COAG) Seamless National Economy (2008-09 — 2012-13)
Benchmarking (appendix F)	Comparisons of specific aspects of regulation across countries or jurisdictions, such as administrative costs of compliance, numbers of legal restrictions, delay time and other indicators of the performance of regulation	World Bank — <i>Doing Business</i> 2004 — onwards OECD benchmarking such as the index of product market regulation Productivity Commission series for COAG
'In-depth' reviews (appendix C)	One-off, usually ad hoc, comprehensive reviews, focusing on specific industries or sectors. Commissioned by government and often conducted 'at arms length'	Wallis (1996-97) and Campbell (1979) inquiries into the Australian financial system Review of Quarantine and Biosecurity (Beale et al.) (2008) Chemicals and Plastics Regulation (PC 2008c)

Sources: Appendixes B to H.

3.2 Management approaches

Management approaches involve mainly incremental changes that occur through the on-going development and administration of regulation. These are discussed in detail in appendixes G and H.

Regulator based reforms

Through their interactions with business and their experience with regulation ‘at the coal face’, regulators — the bodies charged with administering and enforcing regulation — are in principle well situated to help identify problems with the existing stock of regulation that warrant reform. With the right mechanisms and incentives in place, regulators can adjust requirements themselves or, if necessary, feed this information back to policy makers and thereby assist in reforming the regulation.

The way in which regulators interpret and administer the regulations for which they are responsible can also have a major bearing on the compliance costs for business. As discussed in chapter 2, a sound regulatory system would ensure that regulators apply regulations in ways that are effective and efficient. To this end, not only do regulators need appropriate powers, resources and discretion, there is also a role for oversight arrangements to provide guidance and incentives for regulators to adopt best practice in administering and enforcing regulation.

The scope regulators have for ‘fine tuning’ regulation depends on the extent to which the regulation prescribes the way it is administered. Where regulation sets out objectives and principles, rather than explicit requirements, regulators are likely to have greater scope to apply the regulation in a way that can minimise the regulatory burden. There is, however, a balance between discretion to administer cost-effectively and potential for regulatory ‘capture’ or regulatory ‘creep’.

Regulators can use various mechanisms to identify the need for fine tuning or more comprehensive reform for the regulations they administer. They include the:

- monitoring of complaints and issues, with periodic reviews and consultation to test validity and develop strategies to address any problems
- use of stakeholder ‘consultative’ groups such as business panels to provide feedback and identify problems and solutions that are within the authority of the regulator to implement
- monitoring of indicators such as time spent completing forms and turn-around time for applications.

The use of such mechanisms may be part of a formal continuous improvement program conducted by the regulator. For example, the Office of the Registrar of Indigenous Corporations (ORIC) maintains a list of complaints and problems that it reviews using consultative processes (ORIC, pers. comm., 27 July 2011). Regulators may also take action to review practice in response to one-off events or a build-up in external pressure.

More broadly, regulators can also draw on the range of studies and guides that has been developed (for example, United Kingdom (UK) Government (Hampton Review) 2005 and ANAO 2007) setting out good practices for the administration and enforcement of regulation. While ‘best practice’ depends on matters including the nature of the regulations being administered and the characteristics of the business being regulated, there are some broad principles that generally apply. As elaborated in appendix H, matters covered include:

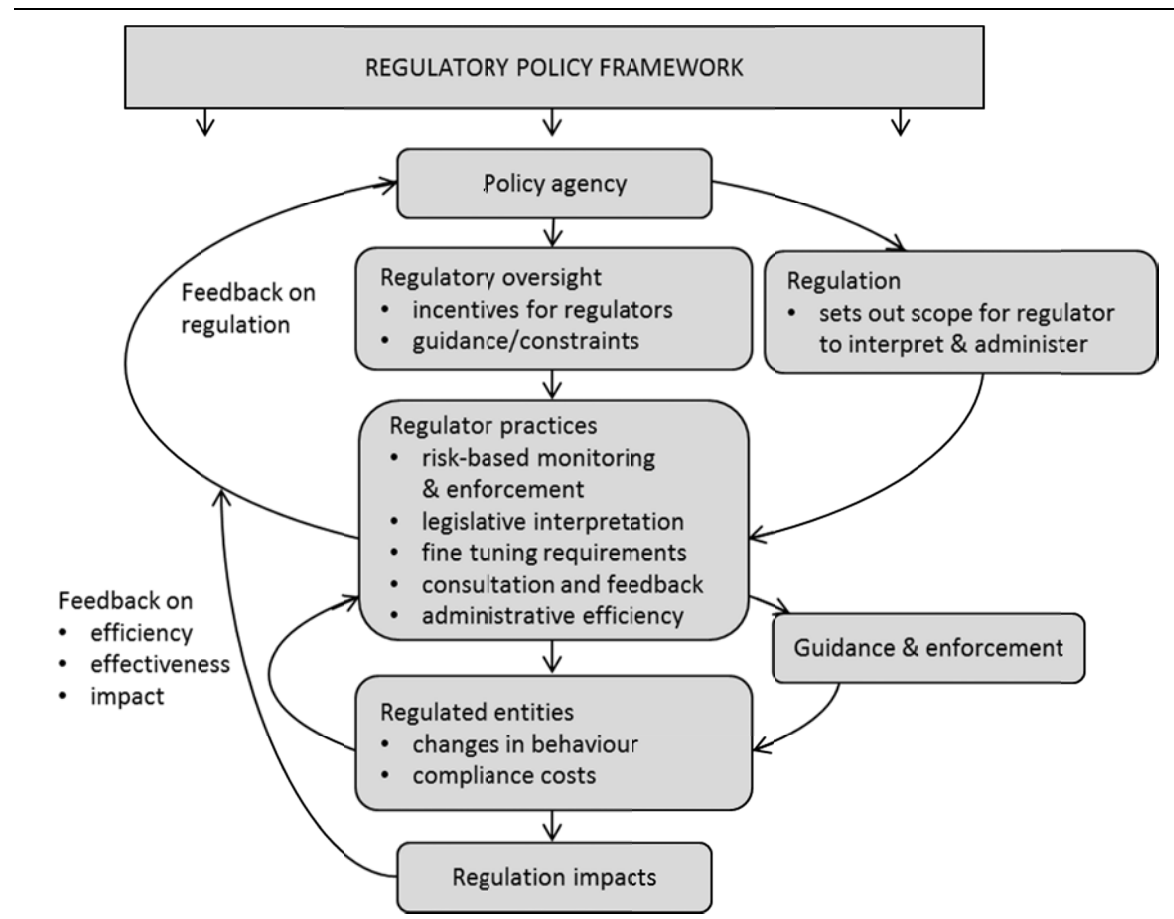
- risk-based monitoring and enforcement approaches, which can allow the objectives of regulation to be addressed while minimising enforcement and compliance costs
- ‘escalation’ enforcement models, wherein regulators deal with infractions by any business initially through ‘soft’ mechanisms such as advice, warnings or minor penalties and escalate to ‘harder’ penalties only in relation to those entities that continue to remain non-compliant
- standardising, streamlining and reducing information and reporting requirements on business and reducing waiting times for decisions
- processes to improve consistency in the interpretation of legislation and regulations, and to convey information and advice about regulatory requirements to regulated entities.

To encourage adoption of best practice in these areas, governments have provided general guidance for adoption by regulators and, in some cases, introduced more formal oversight mechanisms (appendix H). These mechanisms aim to better align the regulator’s approach with good practice principles by enabling or constraining the types of approaches regulators are able to use. In particular, such policies aim to achieve an appropriate balance between the costs of achieving compliance and the risks of non-compliance. A good regulatory oversight system will also address the incentives for regulators to select the most cost-effective strategies to achieve this balance.

Figure 3.1 brings this together and illustrates the links between regulator practice — which is key to cost-effective administration of regulation — and regulatory oversight. Oversight can address incentives and constraints, and provide guidance for regulators on their administrative practices. It can also influence the nature of

the feedback mechanisms that may inform policy and the need for regulatory reform. (It is worth noting that while in the figure regulatory oversight is the responsibility of the policy agency, this might not always be the case, especially where the administration and policy-making functions reside within a single entity.)

Figure 3.1 **Regulator practice and oversight within the regulatory policy framework**



Stock-flow linkage rules

‘Stock-flow linkage’ rules require action to reform or maintain the stock of regulation in order to introduce new regulation.

Regulatory budgets are a much-discussed, but rarely (if ever) implemented, example. This approach requires agencies to ensure that the total compliance costs imposed by the regulation remain within a designated ‘budget’ constraint. Additional compliance costs imposed by new regulation must be offset by reductions in costs imposed by existing regulation. In some proposals, a trading of budget across agencies could ensure that the total compliance costs imposed on

business are not increased, while allowing more valued legislation to be introduced. (Under this scenario, those agencies would have to ‘buy’ some budget from other agencies.) However, the implementation of regulatory budgets poses considerable challenges, including allocation of budgets and the costs of measurement. The United Kingdom (UK) appears to be the only jurisdiction to have actually implemented this approach, albeit in a modified version that focuses on flows and has been labelled as ‘one-in one-out’ (HM Government 2011; appendix K).

The standard ‘one-in one-out’ rule requires a regulation to be removed for each new piece of regulation that is introduced. This rule could be applied at a government or agency level. Again, while often raised, examples of its application in practice are hard to find. Variants suggested include a ‘one-in two-out’ rule (proposed by the Opposition in Tasmania), or the targeting of pages of legislation rather than the number of instruments.

RIS requirements (including those of the Australian Government) can include a provision that consideration be given to existing regulation when new regulation is being introduced. Agencies are typically required to document why existing regulation is not adequate, and can be further required to assess how it could better address the problem such as through improved enforcement or encouraging better compliance as part of the new regulatory proposal. The Australian Government best practice regulation requirements also require that agencies consider the cumulative burden of their proposed regulation on business (box 3.1). But there is no explicit requirement in the RIS that new regulatory proposals should identify offsetting reductions in related regulation or trigger reductions in regulatory burdens more broadly.

In its submission, the Department of Finance and Deregulation (Finance) (sub. DR11) outlined the current use of regulatory offsets by the Australian Government. It stated that:

Examples (of regulatory offsets) might include the removal of redundant regulation, streamlining reporting requirements or simplifying administrative procedures. The requirement to provide offsets is not mandatory, however, agencies must provide evidence that opportunities for offsets have been considered. (p. 3)

The Department cited several examples of regulation that had been removed or ‘proposed for reform’ as a result of these arrangements, including in the areas of fisheries licensing, film classification, superannuation reporting and Medicare billing (sub. DR11, pp. 3-4).

Box 3.1 **Consideration of existing regulations in the RIS process**

In providing guidance on the regulation impact statement (RIS) process, the Office of Best Practice Regulation (OBPR) suggests that consideration should be given to existing regulation when forming new regulations. For example, section 3.2 of the most recent OBPR handbook (Australian Government 2010b) states:

Governments may previously have taken action to address the underlying problem. Where this is the case, you should document the characteristics of existing regulation at all levels of government (federal, state/territory and local), and identify the responsible regulatory organisations and relevant government policy. You should demonstrate whether or not existing regulation has been effective in addressing the problem.

If it is clear that existing regulation is failing to deal with the problem in an acceptable way, is this because the regulation is flawed, or because there are problems with compliance? Could the situation be dealt with by improving enforcement or encouraging better compliance with the existing regulation? (p. 32)

An additional adequacy criterion for a RIS is that the impact analysis section should ‘... recognise the effect of the options on individuals and the cumulative burden on business’ (p. 17) in analysing the costs and benefits of the different options.

Source: Australian Government (2010b).

Red tape reduction targets

Perhaps the best known efforts to reduce the burden of regulation on business are the red tape reduction programs. These have been adopted in several Australian jurisdictions, with considerable compliance cost savings being reported (box 3.2).

Both percentage reductions and dollar targets for compliance cost savings have been used in Australia and abroad. A 25 per cent reduction has been the most common target, although this is generally converted to a monetary value. This target was first introduced by the Netherlands in 2002. It was adopted on the presumption that savings in business administration costs of this order could be achieved without reducing the effectiveness of the regulation. The Netherlands, having apparently achieved this target, then instituted another 25 per cent cut on the remaining stock (OECD 2007a). However, diminishing potential has meant that subsequent targets have been reduced (appendixes G and K).

Box 3.2 Red tape reduction targets in Australia

Several Australian states, including Victoria, South Australia, New South Wales and Queensland have used red tape reduction targets to reduce regulatory burdens on business.

Victoria — Victoria has a target of a \$500 million reduction in compliance costs to business by July 2012. The costs covered include administrative costs, substantive compliance costs, and delay costs. As at July 2010, Victoria had estimated a reduction in the compliance burden of \$401 million.

In order to help meet the target, Victoria used incentive payments — including a \$42 million tender fund. A model based on the Dutch standard cost model was used to estimate the regulatory savings of the reforms.

South Australia — In 2006, South Australia set a target of a \$150 million reduction in net administrative and compliance burdens to business, by 2008. Agencies were requested to develop plans outlining potential reforms, and a series of reviews were undertaken. The Australian Government OBPR business cost calculator was used to estimate the burden reductions associated with the reforms.

An independent audit by Deloitte (South Australian Government 2008) suggested that the reduction target was exceeded. Following this, the South Australian Government announced another \$150 million reduction target by 2012.

New South Wales — New South Wales has a target of a \$500 million reduction in red tape (including both administrative and substantive compliance costs). As at June 2010, an estimated \$400 million of reductions had been achieved.

Queensland — The Queensland Government set a target of a \$150 million reduction in the administrative and compliance burden to business between 2009 and 2013. Departments have submitted simplification plans, which outline a range of potential reforms.

Source: Appendix G.

The percentage reduction approach requires some baseline measurement of the costs of compliance imposed across the economy. This can be expensive — the UK Government spent £18 million to estimate the administrative cost of regulation at £20-40 billion (NAO 2008). The Victorian Department of Finance and Treasury (2007) reasoned that the burden of regulation in Victoria was likely to be a similar share of economic activity as was found in the UK (1 per cent of GDP, with 44 per cent of this estimated to be imposed by state regulation), imputing \$1.03 billion as the administration costs of regulation in 2006.

The monetary target approach still requires agencies to assess the savings resulting from their efforts to reduce administrative or compliance costs. A range of ‘cost calculators’ have been applied to make these estimates of savings (chapter 5;

appendix J). (Such calculators are also used in estimating the cost of new regulation.)

An alternative approach focuses on the number of ‘must comply’ provisions within the legislation and regulation. The Canadian province of British Columbia appears to have been successful in reducing compliance costs through targeting reductions in such requirements (box 3.3).

Box 3.3 Cutting compliance requirements — the British Columbia example

The Canadian province of British Columbia’s approach to reducing red tape has focused on the number of regulatory requirements. In 2001, when the scheme was announced, there was an estimated 360 000 regulatory requirements associated with regulation. The objective of the scheme was to reduce the number of requirements by 33 per cent by 2004.

This target was exceeded, with the number of regulatory requirements dropping by 36 per cent by 2004. Following this, a further target of ‘no increase’ in the number of regulatory requirements between 2004 and 2012 was announced. As of March 2011 this target is also on track to be exceeded, with the number of regulatory instruments actually dropping by 10 per cent since 2004.

Some examples of requirements removed include:

- reducing the number of reporting requirements for schools by 10-15 per cent, and reducing the timing load of the remaining reports
- removing a requirement for travel agents to have commercial premises
- allowing a greater range of vehicles to be used without a policy-issued permit.

Source: Appendix G.

3.3 Programmed reviews

Programmed reviews refer to reviews that are set out in legislative requirements or are required to meet best practice regulation requirements. These tend to focus on a single regulation or, for sunset reviews, potentially a package of regulations. Most have a specific time period in which a review must be undertaken. Further details on these approaches are in appendix E.

RIS requirements for review

It is a requirement of the Australian Government’s ‘best practice regulation requirements’ that a RIS outline how a regulation will be reviewed. The *Best*

Practice Regulation Handbook (Australian Government 2010b) states that a RIS (should) set out when the review is to be carried out and how the review will be conducted, including if special data are required to be collected. The responsibility for ensuring that reviews foreshadowed in RISs are conducted rests with departments and agencies. The Australian Government, following a recommendation of the Regulation Taskforce in 2006, introduced a further requirement that all regulation not subject to sunseting or other evaluation be reviewed every five years. In practice, so long as the reviews foreshadowed in RISs take place, very few regulations would now fall into this category.

Sunseting

Sunset requirements, initially introduced as clauses in specific pieces of legislation, now generally provide for all legislation of a specified type to lapse unless remade. The motivation for sunseting is the presumption that most regulation in its original form has a ‘use by’ date. Sunseting provides a useful housekeeping mechanism for dispensing with redundant or increasingly inappropriate regulation. Given that automatic lapsing would be problematic for much primary legislation, most sunset arrangements are confined to subordinate legislation.

Where governments do not want the regulation to lapse, it must be remade. In general it must meet the same procedural requirements as new legislation (including regulatory impact assessment where there are significant impacts on business, not for profit organisations, or the community).

Most jurisdictions in Australia have a 10 year sunset period (including the Australian Government, Victoria, Queensland, South Australia and Tasmania). New South Wales has a five year term. Sunseting provisions also apply at the local government level for by-laws and local laws in a number of jurisdictions. For some jurisdictions, sunset requirements are applied only to new instruments from the date the sunset legislation was introduced. However, the sunset requirements introduced in other jurisdictions, including the Commonwealth, New South Wales, and Queensland also apply to the pre-existing stock of regulation. The annual volume of new legislation means that even if old legislation does not sunset, a large number of instruments could sunset in any given year. Where the existing stock is included, the sunseting of existing legislation may be staggered (box 3.4).

‘Embedded’ statutory reviews

Some legislation includes a requirement for a review to be conducted and in some instances it also sets out the specifics of the review, such as timing, the scope of the review and the governance arrangements. Such ‘embedded’ reviews have generally

been used for significant areas of regulation where there are uncertainties about the efficacy or impacts of the legislation (including potential for collateral effects or other unintended consequences), or where the regulatory regime is transitional. Embedded statutory reviews have sometimes also been used to give comfort to stakeholders concerned that they might be adversely affected by new legislation (box 3.5).

Box 3.4 The work load from sunseting regulation

The sunseting provisions for Commonwealth subordinate regulations, as set out in the *Legislative Instruments Act 2003* (LIA), require that a list of instruments due to sunset be tabled in Parliament 18 months before their sunseting date. The Parliament then has six months in which to pass a resolution to allow a legislative instrument or provisions of a legislative instrument on that list to continue in force as if remade. The Attorney-General may grant a certificate extending the life of a legislative instrument for up to 12 months (Australian Government 2009).

The LIA does not specify what review processes, including regulatory impact assessment, will be required to remake sunseting instruments. The Handbook to the LIA (Australian Government 2004) notes that:

Some instruments are subject to the regulatory impact statement process and this will not change under the LIA ... Enquiries about whether a RIS should be prepared for a regulatory proposal, and certainly before the making of a particular legislative instrument, should continue to be directed to the [Office of Best Practice Regulation] (pp. 19-27).

Australian Government legislation will begin sunseting from early 2015. Estimates provided by the Attorney-General's Department indicate that around 6 300 principal instruments are scheduled to sunset between 2015 and 2022. The bulk of these will sunset on or before 1 April 2018, including all regulations made prior to the commencement of the LIA in 2005. The bulk of these are legislative instruments made prior to the introduction of the LIA.

Instruments scheduled to sunset range from a large number of relatively minor regulations to more complex regulations with more significant impacts on business. It is not clear how many of these instruments will need to be remade, and if so, how many of the remade instruments will have an impact on business and trigger the Government's best practice regulation requirements for the preparation of a RIS. Currently, around 2-3 per cent of new instruments require a RIS.

The default position is that non-exempt legislative instruments will sunset after 10 years. However for pre-existing legislation, the sunseting date for instruments:

- made in the five years before the LIA commenced (2000–2005) is 1 October 2016.
- made prior to that five-year period (1995–2000) is 1 April 2018.

Source: Appendix E.

Box 3.5 Examples of 'embedded' reviews

Price regulation of airport services

In the Commission's first review of price regulation of airport services (PC 2002), the Commission recommended a shift to 'light handed' regulation. As this represented a substantial shift from existing arrangements, the Commission recommended that 'price regulation of airports should be reviewed towards the end of the five-year regulatory period. The review should be independent and public. Its objective should be to ascertain the need for any future price regulation of airports (including price monitoring or more stringent price regulation)' (recommendation 6, p. XLVII).

Wheat Export Marketing

Section 89 of the *Wheat Export Marketing Act 2008* required that the Productivity Commission commence a review of the new arrangements by 1 January 2010. The review commenced in September 2009 and a final report was provided to the Government in July 2010.

Fuel standards

Under the legislation for national fuel quality standards a statutory independent review was required two years after the first set of standards came into effect and thereafter every five years. The *Fuel Quality Standards Act 2000* provides, in section 72, for a review of the operation of the Act, to be undertaken as soon as possible after the second anniversary of the commencement of Part 2 of the Act. The review was completed in 2005.

National Access Regime

The Commission completed a review of the National Access Regime in 2001. In April 1995 the Australian, state and territory governments signed three Intergovernmental Agreements, including the Competition Principles Agreement (CPA), which established the framework for competition policy reforms. The CPA required that its own terms and operation be reviewed after five years of operation. Terms of reference for that review specified that the review of Clause 6 of the CPA be incorporated into the competition policy review of Part IIIA of the (then) *Trade Practices Act 1974*.

Telecommunications Competition Regulation

The Commission's inquiry into Telecommunications Competition Regulation released in 2001, stemmed from a requirement in section 151CN of the (then) *Trade Practices Act 1974* for a review of Part XIB of that Act which deals with anti-competitive conduct in the telecommunications sector.

Fisheries Management (New South Wales)

In its Better Regulation Statement for proposed amendments to the *NSW Fisheries Management Act 1994* (NSW), the NSW Department of Primary Industries stated that a statutory review of the Act would be undertaken in 2009-10, in accordance with section 290 of the Act.

Source: Appendix E.

The scope of embedded statutory reviews can vary considerably. For some, such as the Commission's review of the 'Part IIIA' regulations governing third party access to essential facilities, major changes or repeal of the legislation were within the scope of the review (PC 2001). The scope of the wheat marketing arrangements review undertaken by the Commission (PC 2010f) included regulatory arrangements to protect growers while encouraging competition, but did not allow the option of a return to a single desk. More limited embedded reviews may only consider implementation design features.

Embedded statutory reviews are also employed at the state level. For example, the NSW *Guide to Better Regulation* (BRO 2009) states that review clauses should be included in all Bills, unless a Bill has a minimal impact. In most cases reviews are to be conducted every five years and statutory reviews must be tabled in parliament to allow for public scrutiny. Overall, agencies in NSW completed 11 comprehensive statutory reviews of Acts in 2009-10. The NSW Better Regulation office is canvassing views on a proposal that RIA requirements be strengthened to mandate the inclusion of a review clause in all Bills, including amending legislation (BRO 2011).

Embedded statutory reviews are typically designed to commence around two to five years after implementation (to allow time to assess how the regulations are working). Alternatively, legislation could specify an event which, if observed, will trigger a review. There do not appear to be any rules or guidelines about when an embedded review should be included in Australian Government legislation, nor about the scope of any such review.

Post implementation reviews

In the Australian context, a PIR refers to a review which is required for any regulatory proposal that has avoided or is non-compliant with the RIS process and has been exempted but permitted to proceed. The *Best Practice Regulation Handbook* (Australian Government 2010b) notes that while the terms of reference can vary depending on individual circumstances, PIRs should generally be similar in scale and scope to what would have been prepared for the decision-making stage through a RIS. This would include assessing impacts of the regulation and whether the Government's objectives could be achieved in a more efficient or effective way. However, there is no mandatory requirement that a PIR follow all seven steps required in a RIS (box 3.6).

PIRs are also required in Queensland in similar circumstances. A PIR must be commenced within two years of the implementation date of any regulation with significant impacts where a Regulatory Assessment Statement was not conducted.

The PIR should assess the impact, effectiveness and continued relevance of the regulation to date and analysis should be proportionate to the issue being addressed (Queensland Government 2010).

Box 3.6 Australian Government PIR requirements

The Australian Government's post implementation review (PIR) requirements, as outlined in the *Best Practice Regulation Handbook* (Australian Government 2010b), state that:

Where a proposal proceeds (either through the Cabinet or another decision maker) without an adequate RIS, the resulting regulation must be the subject of a post-implementation review (PIR). The review must commence within one to two years of the regulation being implemented, and will be required regardless of whether or not an exemption from the RIS requirements for exceptional circumstances was granted by the Prime Minister.

While the terms of reference for each review will depend on individual circumstances, the review should generally be similar in scale and scope to what would have been prepared for the decision making stage. Issues that **could** be examined include:

- the problem that the regulation was intended to address
- the objective of government action
- the impacts of the regulation (whether the regulation is meeting its objectives), and
- whether the government's objectives could be achieved in a more efficient and effective way.

The key difference between a PIR and an analysis prepared prior to implementation is that, in the case of a review, the agency can report accurately on the implementation of the regulation and its actual impacts. Agencies should gather data from business and other stakeholders on the actual impacts of the measure, including compliance costs.

PIRs should incorporate consultation in line with the Australian Government's consultation principles ...The level of consultation should be commensurate with the significance of the measure under review. Ideally, where appropriate and required, agencies should establish consultative arrangements well before the review is due in order to gather relevant data in preparation for the review.

Agencies are required to list upcoming PIRs (including proposed timelines) in their Annual Regulatory Plans. Where agencies share joint responsibility for a PIR, the review should be listed on each responsible agency's Annual Regulatory Plan. (p. 21, emphasis added)

The PIR must be certified by the relevant departmental or agency head/deputy head prior to being submitted to the Office for Best Practice Regulation (OBPR) for final assessment. The PIR must also be sent to the relevant portfolio minister and the Prime Minister.

The OBPR reports on scheduled PIRs — when they are required to commence and whether they are underway — as well as completed PIRs in its annual best practice regulation reports and provides regular updates on the OBPR website.

Source: Australian Government (2010b).

A PIR would be limited in its ability to assess the appropriateness of a regulation where a full RIS was not required in the first place. At the Commonwealth level, only an ‘implementation’ RIS is required for regulation that is regarded as meeting an election commitment:

... where a regulatory proposal implements a specific election commitment, the RIS should focus on the commitment and the manner in which the commitment should be implemented, not on the initial regulatory decision. (Australian Government 2010b, p. 15)

3.4 Ad hoc reviews

A variety of other types of reviews are commissioned by governments on a more or less ad hoc basis. There are two main types:

- general reviews covering a wide range of regulation — these include public stocktakes (appendix B) and principles-based reviews (appendix D)
- reviews that focus on a particular area of regulation — these include benchmarking (appendix F) and in-depth reviews (appendix C).

It should be noted that some kinds of benchmarking are of a more routine nature so do not fit well into this category. But as they can be a useful identification tool they are included here.

Public stocktakes and ‘perceptions’ surveys

Public stocktakes are defined here as consultative reviews that invite businesses to provide information on the burdens imposed by regulation. This is different to regulation stocktakes undertaken internally by departments and agencies without widespread consultation. Public stocktakes are typically ‘complaints-based’ exercises, with submissions, roundtables and other approaches used to gather information from industry and other interested parties. The problems raised by business are then subject to scrutiny to see if they are significant, and to assess whether there are alternative approaches that can reduce the burden without detracting from the policy objective.

The stocktake of Australia’s regulation by the Regulation Taskforce (2006) was the most recent economy-wide exercise. This followed the Small Business Deregulation Task Force (1996) a decade earlier, which was focused on small business. Several states have also undertaken stocktakes, most recently Victoria (VCEC 2011a). Stocktakes can also be undertaken at a sectoral level. The Commission has completed a series of such stocktakes of Australian Government regulation (box 3.7).

Box 3.7 Examples of public stocktakes in Australia

- The *Small Business Deregulation Task Force* (1996) was led by Charlie Bell, CEO of McDonalds, and supported by a secretariat from the Australian Government Department of Industry, Trade and Commerce. It reviewed the compliance and paperwork burden imposed on small business across the economy. The report made 62 recommendations in the areas of taxation, employment, reporting burden, streamlining government processes and regulation, changing the regulatory culture, and making it easier to deal with government. In its response in March 1997, the Australian Government accepted all recommendations.
- *Rethinking Regulation* was the report of a specially commissioned Regulation Taskforce (2006). It was led by Gary Banks (Chairman of the Productivity Commission), and supported by a secretariat drawn from across government, including secondees from the Productivity Commission. The review was required to identify reforms to reduce burdens on business from across the spectrum of Commonwealth regulation, including areas of overlap with state and territory government regulation. The Australian Government accepted 160 of the 178 recommendations.
- The Productivity Commission has conducted a series of sector-level stocktakes to identify specific areas of regulation that are unnecessarily burdensome, complex or redundant; or that duplicate regulations or the role of regulatory bodies. These included: Primary Sector (PC 2007c); Manufacturing and Distributive Trades (PC 2008f); Social and Economic Infrastructure Services (PC 2009c); and Business and Consumer Services (PC 2010h).
- The Victorian Competition and Efficiency Commission examined Victoria's regulatory framework (VCEC 2011a). The final report, submitted to the Victorian Government in April 2011, included proposals to improve the operation of Victoria's regulatory management system and identified specific areas of Victoria's regulation that are unnecessarily burdensome, complex, redundant or duplicative. Five areas of regulation that should be reformed as a matter of priority were identified.
- In Western Australia, the final report of the Red Tape Reduction Group was released in February 2010. The report contains 107 recommendations including reforms which aim to: improve the regulatory culture, performance and accountability of government agencies; maintain an impetus and mechanisms for on-going red tape reduction by government; and address specific areas of concern raised during the consultation process. The report contains 16 specific reform chapters across a broad spectrum of government activity.

Source: Appendix B.

Perceptions' surveys are sometimes used as part of a stocktake review, or as input into estimates of the compliance burden of red tape. They seek the views of business on the magnitude of and/or trends in the burden of regulation. VCEC commissioned a perceptions survey in Victoria as part of its stocktake exercise (Wallis Consulting 2011). This elicited views from a wide range of businesses on

trends in the overall burden and on areas of regulation that imposed the greatest burdens. The NSW Business Chamber undertook a similar exercise in that jurisdiction. The Business Council of Australia (BCA) conducts a regular survey of their member's views on trends in the regulatory burden for each jurisdiction. Survey responses are compiled in their *Scorecard of Redtape Reform* (BCA 2010). The Australian Industry Group recently released the findings of its survey of CEOs on regulatory burdens (AIG 2011). An overview of the findings from these various perceptions surveys is in box 3.8.

Principles-based reviews

Principles-based reviews are a way of identifying the need for reform for a specific (often broad), set of legislation with certain features in common that potentially give rise to excessive regulatory burdens. The principle(s) provides an initial filter or screen to identify which regulations may warrant reform.

The most extensive example of a principles-based review is the National Competition Policy (NCP) Legislative Review Program (LRP) (box 3.9). This required all Australian, state and territory government legislation to be screened for anti-competitive effects. Some 1800 regulations found to be anti-competitive were then subject to review, with the onus on those organisations benefiting from the regulations to demonstrate that retaining the restrictions on competition was in the public interest, and that the objectives could not be met another way. Jurisdictions were given flexibility in how the LRP reviews were to be conducted, with a range of in-house and consultancy options used. Financial incentive payments from the Commonwealth to the states and territories were also provided, to encourage the completion of the reviews and implementation of reforms. The impacts of regulation on competition has since become a key principle in screening for the potential burden of new regulation.

The approach taken to developing the Council of Australian Government's Seamless National Economy (SNE) reform stream also has features in common with a principles-based approach. This process has evolved over several years, with the first screening principle being areas of regulation where a more coordinated national approach is likely to yield benefits. In July 2006 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. (p. 1)

Box 3.8 'Perceptions' surveys

The Victorian Competition and Efficiency Commission perceptions survey

VCEC commissioned a perceptions survey in 2011 as part of its review into Victoria's regulatory framework. The survey yielded some insights into business perceptions of Victoria's program of cutting red tape, including that:

- 56 per cent of businesses stated that they had noticed a net increase in the cost of Victorian regulations over the previous three years (3 per cent noted a net decrease)
- businesses reported that the most burdensome aspects of regulation were complying with requirements (31 per cent) and completing paper work (27 per cent).
- 58 per cent of businesses stated that they dealt with legislation that was unnecessarily burdensome.

The New South Wales Business Chamber survey

A survey of 373 businesses was conducted in 2010. Key findings included that:

- 70 per cent of businesses had noted an increase in the cost of regulation over the previous two years
- 46 per cent of businesses reported that preparing information was the most costly phase of compliance.

Business Council of Australia's Scorecard of Red Tape Reform

Similar to a perceptions survey, the BCA's Scorecard ranks jurisdictions' regulation making systems against four benchmarks: principles, accountability, transparency and process of review. The 2010 results suggested that:

- the Commonwealth jurisdiction was the only jurisdiction with a negative performance trend since 2007 — mainly arising from the perceived reduction in independence of the OBPR.

Australian Industry Group's survey of CEOs on regulatory burdens

Around 320 CEOs were surveyed regarding their experience with business regulatory regimes across Australia. The results included:

- for the average business, direct compliance costs represented close to 4 per cent of total annual expenses
- waiting for regulatory decisions was the most costly stage of the regulatory compliance process
- close to 70 per cent of respondents had experienced a rise in compliance costs in the three years prior to the survey.

Sources: AIG (2011); BCA (2010); NSW Business Chamber (2010); Wallis Consulting (2011).

Box 3.9 National Competition Policy and the Legislative Review Program

In April 1995, the Australian Government and state and territory governments committed to the implementation of a wide-ranging National Competition Policy (NCP) — which included a legislative review program (LRP) for all jurisdictions to review their regulation in regard to the impact it had on competition.

Australia's NCP initiative stemmed from a recognition that aspects of Australia's wider competition policy framework were impeding performance across the economy and constraining the scope to create national markets for infrastructure and other services.

Overall, the LRP resulted in the identification of around 1800 laws regulating areas of economic activity for review under the NCP. In aggregate, governments reviewed, and where appropriate, reformed, around 85 per cent of their nominated legislation. For priority legislation, the rate of compliance was around 78 per cent (NCC 2010).

A Productivity Commission review in 2005 found that the LRP had played an important role in winding back barriers to competition and efficiency across a wide range of economic activities. It also found that most of the NCP reforms were in place and that overall NCP had yielded substantial benefits to the Australian community. The success of Australia's NCP reforms saw them hailed internationally, including by the OECD, as a successful example of nationally coordinated reform.

NCP was completed in 2005. It was succeeded by Australia's National Reform Agenda, which included a stream of work on achieving a Seamless National Economy (SNE). The competition principle remains an important part of Australian regulatory policy, and is applied as part of the assessment of new regulation in all Australian jurisdictions.

Source: Appendix D.

COAG also agreed to pursue further regulatory reform across several other areas at the same time (including business registration, personal property securities and product safety regulation). The Commission, in 2006, identified a number of further areas of regulation where national 'coherence' — through mutual recognition, harmonisation, or uniform national regulation — had the potential to reduce the costs imposed on businesses that operated across jurisdictions (PC 2006c). COAG subsequently invited jurisdictions to identify additional areas where national coherence could be improved to the benefit of business (COAG 2008b). COAG then assessed the proposals against a set of criteria, eventually determining 27 'deregulation priorities' for reform under the SNE (see chapter 6 for a discussion of these criteria).

Commonwealth commitments to international regulatory agreements can lead to changes in regulation in Australia at federal, state and territory levels of government. For many international obligations, removal of unnecessary regulatory

burdens on business is not a focus and they can involve an increase rather than a decrease in regulation. International obligations can, however, assist in removing distortions from ‘behind the border’ barriers, or lower transaction costs for firms engaged in international trade. For example, adoption of international standards and commitments to remove barriers to trade and investment, both at and behind the border, may be an impetus for regulation reform as well as helping prevent backsliding on reforms already achieved.

Benchmarking

Regulatory benchmarking is a process for comparing aspects of regulation across jurisdictions in order to highlight which jurisdictions are leading or lagging, or to identify leading regulatory practice. The aspects of regulation which can be benchmarked include: requirements and their cost to business; outcomes; and features of the administration and enforcement of regulations.

Some types of benchmarking are regular and broadly based, whereas others are selective or targeted exercises.

Regular international benchmarking

The World Bank *Doing Business* Report is perhaps the best known of the international benchmarking exercises (World Bank 2010). It benchmarks five aspects of regulation that can impose compliance costs on business across nine areas of business activity, using a standard cost methodology (box 3.10).

The OECD also has several series that benchmark the restrictiveness of regulation in the labour market, trade and investment areas (OECD 2010g). For example, the OECD product market regulation index converts qualitative data on laws and regulations, collected in a survey of national governments, into a quantitative indicator that is consistent across time and countries. The index shows a broad decline in product market regulation over the past ten years, but notes scope for further liberalisation (Wölfl et al. 2009).

Where Australia ranks on these various measures can point to areas where regulation may be compared with other developed countries, and hence warrant attention. For example, the Australian Services Roundtable (sub. 9) observed that any area where Australia rated lower than 20th should be a target for reform:

ASR also considers that benchmarking is important in identifying areas for reform. For example, all of the World Bank *Ease of Doing Business* indicators where Australia falls outside the top 20 should be targets for reform; namely: Dealing with Construction

Permits, Registering Property, Protecting Investors, Paying Taxes, and Trading Across Borders. (p. 2)

Whether these would prove to be priorities for reform (or even in need of reform) would require further investigation.

Box 3.10 The World Bank's *Doing Business* indicators

The *Doing Business* indicators cover five aspects of regulation:

- degree of regulation, such as the number of procedures required to start a business or to register and transfer commercial property
- regulatory outcomes, such as the time and cost to enforce a contract, go through bankruptcy or trade across borders
- extent of legal protections of property, for example, the protections of investors against looting by company directors or the range of assets that can be used as collateral according to secured transactions laws
- tax burden on businesses
- various aspects of employment regulation.

The indicators cover nine regulated activities: Starting a Business; Dealing with Construction Permits; Registering Property; Getting Credit; Protecting Investors; Paying Taxes; Trading Across Borders; Enforcing Contracts; Closing a Business.

The methodology behind the *Doing Business* indicators is based on the standard cost model whereby a 'standard business' is constructed with assumptions about its size, location and the nature of its operations. The cost of meeting regulatory requirements is estimated in terms of the time taken for that 'standard business' to comply.

The World Bank collects cost information from more than 8 200 local experts, including lawyers, business consultants, accountants, freight forwarders, government officials and other professionals routinely administering or advising on legal and regulatory requirements.

Source: World Bank (2010).

Targetted benchmarking exercises

Australia's federal structure provides 'natural experiments' in comparative approaches to regulation. Indicators of the effectiveness and efficiency of various types of government expenditures are benchmarked annually by the Commission in the Review of Government Services reports (SCRGSP 2011). This allows jurisdictions to learn from each other about best practices, and greater transparency of performance provides an incentive for governments and agencies to improve.

In an important extension of this approach, the Commission was asked to explore the potential to benchmark regulation, based on a proposal in the Regulation Taskforce (2006) report. The Commission concluded that benchmarking of regulation would be difficult to do on a comprehensive basis, but that it would be possible to benchmark some aspects of regulation across jurisdictions in a way that would provide useful insights (PC 2007a).

Over the past four years the Commission has undertaken a series of benchmarking studies of regulation commissioned by COAG. The first focused on quality and quantity indicators of regulation, in part to establish a baseline. The second benchmarked business registration costs for five different types of economic activity. Interestingly, although business registration costs had been raised as an issue with the Regulation Taskforce, the study found that for most businesses they were very low (PC 2008b). The subsequent exercises benchmarked the collective sets of regulation on food safety, occupational health and safety (OHS), and zoning and planning (PC 2008a; PC 2008b; PC 2009b; PC 2010a; PC 2011c). The Commission is currently benchmarking local government regulation.

Benchmarking targeted at specific areas of regulation has the potential to promote regulation reform nationally. Provided regulatory objectives are broadly the same across jurisdictions, benchmarking the cost of regulatory processes directed at these can be a useful way of highlighting where a jurisdiction is falling behind its peers.

Benchmarking can also be used to identify alternative approaches that are more effective, efficient, or both. ‘Leading practice’ adopts the principles and practice that achieve the regulatory objective in the most cost-effective way. The Commission’s series of benchmarking studies has moved toward identifying leading practice as a useful source of information for reform and does not rank jurisdictions in terms of the compliance burdens imposed for specific regulatory outcomes (box 3.11).

‘In-depth’ reviews

An important category of (ad hoc) reviews are those that examine a particular area of regulation in detail. Such ‘in-depth’ reviews generally have the time and scope to take a comprehensive approach to examining the impact of existing regulation or the need for regulation in a specific area, on particular industries or a sector. In-depth reviews usually arise in response to a perceived problem or an emerging issue. A need for these may also be identified through other reviews — including public stocktakes. (For example, the Regulation Taskforce (2006) identified 14 areas requiring in-depth reviews.)

Box 3.11 Benchmarking to identify leading practice

Commission benchmarking exercises on food safety (PC 2009b), OHS (PC 2010a), and planning and zoning (PC 2011c) did not apply the standard cost model, but undertook a more detailed examination and comparison of the various regulatory systems. As well as comparing the administrative costs to business, they took a broader view of costs and benchmarked regulators, regulatory processes and outcomes.

This approach (which was wider than administrative costs, deeper than costs to a representative business and examined the regulatory regime) was necessary to consider the different ways regulatory regimes can impact on businesses and identify potential leading practices among jurisdictions.

It can be difficult to draw conclusions about leading practice from synthetic benchmarking (the World Bank approach) where outcomes vary, and where the distribution of costs is not symmetric. Also, not only is it extremely difficult to locate 'identical' 'representative' businesses across all jurisdictions, which may reflect the average experience, but also businesses in the upper tail of the cost distribution may face considerably higher costs that may not be warranted.

To provide options for a jurisdiction's reform agenda, leading practices must be transferable between jurisdictions. In the planning and zoning study (PC 2011c) each jurisdiction had a planning system that had evolved independently. While there were broad commonalities, the structural differences were significant, and could explain the different observed outcomes (such as time limits for development assessment). Nevertheless, numerous ideas were identified that were transferable.

Principles are more likely to be transferrable than implementation details. For example, timeliness and transparency are principles that can be applied to any system but don't need to be applied in a uniform way. The concept of leading practices aims to go a step beyond principles. While it does seek to reinforce the applicability of general principles, it also aims to identify elements of practice that can be replicated. Even where there are differences in institutional arrangements, industrial structures, and population preferences, many practices can be applied. For example, a risk-based approach to development assessment — whereby applications are streamed into different processes depending on the level of assessment required — was already being used in all jurisdictions. But it was applied to varying degrees and with different levels of success. Even with different institutional structures, refining and choosing the best risk-based approach is possible.

The need to control for factors that affect the efficiency and effectiveness of different practices means that lessons from intra-country benchmarking are more likely to be transferrable than international benchmarking. For example, all Australian jurisdictions use zoning and other development controls as a way to structure land use, whereas the UK does not.

Source: Appendix F.

Governments have generally commissioned in-depth reviews on an ad hoc basis as the need arises (box 3.12).

Box 3.12 Examples of 'in-depth' reviews

In-depth reviews have been conducted in Australia by a range of taskforces, panels, government departments and agencies. In considering regulations, or issues with a strong regulatory dimension, these have generally (though to varying degrees) shared a common approach involving: consultation; research and the search for evidence in assessing the impact of current regulations; and identification of alternatives.

Such reviews are typically directed at achieving 'appropriate' regulation to meet some broadly agreed objective. This may lead them to recommend new regulation in some cases, as well as amendments to or removal of existing regulation. Also such reviews may look at non-regulatory instruments in combination with, or as an alternative to, regulation.

Some examples of in-depth reviews conducted by taskforces include the Victorian Taxi Industry Inquiry headed by Professor Alan Fels; the 2011 transparency review of the Therapeutic Goods Administration; the 2008-10 Australia's Future Tax System (Henry) Review; the 2009-10 (Cooper) Review of Australia's Superannuation System; the 1998 (West) and the 2008 (Bradley) reviews of higher education; the 2009 National Health and Hospitals Reform Commission; and the 2008-09 (Hawke) Review of the *Environment Protection and Biodiversity Conservation Act 1999*. Other reviews using aspects of this approach include the 2004 (Hogan) Aged Care Review; and the Wallis (1996-97) and Campbell (1979) inquiries into the Australian financial system.

Regulatory reviews and inquiries undertaken by the Productivity Commission and the Victorian Competition and Efficiency Commission (VCEC) also use an in-depth approach. These reviews have tended to involve long time frames and extensive opportunities for public input, including through draft reports. They have been able to examine alternatives to regulation and use a community wide approach in considering costs and benefits.

Parliamentary Committee inquiries into current or prospective regulations also share some (if not all) of the characteristics of in-depth reviews. These inquiries tend to share a strong focus on public consultation via submissions and hearings. However, Committee reviews tend to be more lightly resourced, with less capacity for detailed analysis, than those conducted by standing bodies, panels and taskforces.

Source: Appendix C.

In-depth reviews utilise a mix of approaches, but have usually included extensive consultation at key stages (particularly early on and following release of a draft report, where one is prepared) and empirical and other analysis of the impacts of current regulations and the alternatives. They will often establish a set of principles against which the performance of the current regulation and recommended changes are assessed. Hence they draw on aspects of the approaches discussed above, but generally in greater depth and in a more targeted way. While they will usually seek to reduce *unnecessary* regulatory burdens, some may propose additional regulation, which may bring its own burdens on business or the community.

4 Lessons from past reviews of regulation

Key points

- *Statutory reviews* embedded in legislation can be useful where there is significant uncertainty about the efficiency or effectiveness of regulation.
- *Post implementation reviews* are an important 'failsafe' mechanism for regulation that avoids the regulation impact statement process. They have been growing in number, raising issues about expectations and how they are conducted.
- *Red tape targets* appear to have had some influence as a means of raising awareness of compliance costs. Some jurisdictions have reported substantial savings in such costs, but businesses have been sceptical.
- '*One-in one-out*' rules and *regulatory budgets* may have superficial appeal, but can have perverse effects.
- *Public stocktakes* are effective in identifying areas in need of reform, including reforms that can be taken-up immediately and some that require in-depth review.
- *Principles-based reviews* can be excellent screening mechanisms to identify unduly restrictive regulations, with proof of the net public benefit required to keep the restriction.
- *In-depth reviews* and, to a lesser extent, *benchmarking* exercises are designed explicitly to identify alternative reform options. When targeted and undertaken well, these can be highly effective in driving reform.
- Some common themes for good design of the different approaches have emerged.
 - Governance is fundamental to the effectiveness of all approaches. Independence of the review body has been important for in-depth reviews and public stocktakes, but also in statutory and principles-based reviews.
 - Good consultation and engagement with business and other major stakeholders is essential for most approaches.
 - In-depth reviews are best suited to provide the evidence base for the 'big reforms', which address major areas of regulation or interactions between regulations.
 - Reform is more likely where the incentives for policy agencies, regulators, business and the community are aligned.
 - It is essential to prioritise in-depth reviews and benchmarking. Ensuring the review effort is proportionate to the expected benefits is also necessary for principles-based reviews and sunseting.

Chapter 3 described a number of approaches that have been used to manage different aspects of the stock of regulation in Australia and other countries. This chapter considers in greater detail the lessons arising from the application of the various approaches to reforming regulation — either as part of a continuous improvement approach, or for identifying and reforming specific regulations. The approaches are assessed against the four broad criteria set out in chapter 1: the ability to identify areas requiring reform; identification of options for improvement or more substantial reform; the influence of the approach in promoting the desired changes; and the overall cost-effectiveness of the approach.

4.1 Different approaches target different burdens

The approaches discussed in chapter 3 differ in the types of regulatory impacts and in the scope of the regulations they examine.

Some approaches are comprehensive in that they consider the full range of benefits and costs resulting from a regulation, while others focus on a subset of the impacts. As discussed in chapter 2, regulation reform aims to reduce the costs of regulation and/or enhance the benefits through reducing:

- administration costs for government, some of which are passed onto business in the form of fees and charges
- paperwork and other administrative costs to business, and more substantive compliance costs such as training and investing in systems and capital in order to comply with requirements
- distortions to resource allocation, investment and innovation that result in economic costs, which are ‘opportunity costs’ to business in terms of lost profits, their workers in terms of lost wages, and consumers in the form of unrealised consumption opportunities
- broader ‘opportunity costs’ for the community arising from non-economic distortions, and opportunity costs of benefits forgone if the regulation does not achieve the intended welfare enhancing objectives.

The most comprehensive approaches to reviewing regulation examine all of these sources of cost as well as the benefits the regulation achieves. This level of analysis allows the appropriateness of the regulation to be assessed — that is, whether it is the best way to address a problem or pursue an objective *and* that the benefits of the regulation justify the costs it imposes. The Commission’s review of the chemicals and plastics industry (PC 2008c) is one example.

Some approaches take the benefits of achieving the objectives as given and focus on assessing whether the regulation is the most cost-effective way of achieving the desired outcome(s). This has been the case for some reviews embedded in legislation, such as for the wheat export marketing arrangements (PC 2010f).

Other approaches merely seek to lower the compliance costs to business of the current regulation. The red tape reduction targets, that many Australian jurisdictions have implemented, are a good example of these more ‘shallow’ approaches.

Approaches can also be quite narrowly focused on a specific regulation, look at all regulation related to a particular industry or issue, or be very general where all or most industries and regulations are ‘within scope’ for the review. A review may cover all the regulation impacting on a sector, such as the Wallis and Campbell inquiries into the financial sector (Campbell 1981, Wallis et. al. 1997), or all the regulation impacting on a number of industries or sectors, as with the 2006 economy-wide stocktake review (Regulation Taskforce 2006). Alternatively, a review may cover only a specific regulation or set of regulations, such as the benchmarking exercise for occupational health and safety (OHS) regulation (PC 2010a).

Australian Government reviews are generally limited to Commonwealth regulations. The Council of Australian Governments (COAG) provides the opportunity for the regulations in multiple jurisdictions to be ‘in-scope’ for a review. This is particularly important where there is overlap in regulatory responsibilities or where businesses operate across borders.

Table 4.1 summarises the various approaches according to their comprehensiveness and scope of analysis. As can be seen from the table, there tends to be a trade-off between the comprehensiveness of the approach in terms of impacts examined and the scope of the approach in terms of regulations considered.

The three broad approaches to identifying areas for regulation reform discussed in chapter 3 — stock management, programmed reviews and ad hoc reviews — have various strengths and weaknesses that provide a guide to their most appropriate application. The following sections discuss how well each of the three broad approaches perform in relation to:

- discovering (priority) areas for improvement and reform
- developing options for improvement or more substantial reform
- building support and momentum for implementing improvements or reform.

Table 4.1 Approaches to identifying reforms to the stock of regulation

By their comprehensiveness and scope

	<i>Comprehensiveness</i>	<i>Scope</i>
'In-depth' reviews	Able to examine the objectives of the regulation and apply a benefit-cost test	Usually limited to a specific industry or sector; can look at interactions among regulations and with other interventions
Embedded statutory reviews	May examine the objectives, or be limited to cost-effectiveness of approaches	Usually limited to the specific legislation in which the review requirement is embedded
Post implementation reviews	May examine the objectives of the regulation and apply a benefit-cost test, but extent to which this occurs depends on whether mandated	Usually limited to the specific legislation under review
Public stocktakes	Usually focus on compliance costs for business	Economy-wide or sectoral. Encompasses all regulations that impose costs, including the interaction of regulations
In-principle reviews	Depends on the principle used — generally include a public interest (benefit-cost) test	Potentially broad — screened according to relevance to the principle
Benchmarking	Varies with what is being benchmarked — regular benchmarking is usually tightly focused on a specific set of costs	Regular benchmarking is usually at an economy wide level Intra-national benchmarking is usually targeted
Red tape reduction targets	Usually limited to administrative costs to business; some include substantive compliance costs	Wide coverage of business and not-for-profit organisations. Some include government administration costs
Internal stocktakes	Usually limited to redundant regulation, but could be wider depending on principles used for screening	Can be limited to a single agency's regulation, selected agencies or a jurisdiction
Regulatory budgets	Limited to administrative costs to business and in some cases government	Would depend on the agency making new regulation
'One-in one-out' rules	Uncertain — do not explicitly consider regulatory burden	Would depend on the agency making new regulation
Other stock-flow linkage rules	Potential to examine all regulation related to new regulation	Focus on an area of regulation often related to new regulation
Regulator practice	Mainly administration costs within the regulator's administrative powers. Can flag need for review	Businesses and not-for-profit organisations in the sector or activity regulated

Some potential ‘pitfalls’ or unintended outcomes that could arise with some approaches are raised along the way. The lessons learned from the applications are set out at the end of each section. The final section of this chapter (section 4.5) examines the cost effectiveness of each approach. (More detailed analysis is provided in appendixes B to H.)

4.2 Stock management approaches

The main stock management approaches — regulator-based reforms, stock-flow linkage rules, and red tape targets — are tools used to achieve ongoing improvement. Hence, as a class, they identify opportunities for incremental improvement rather than important new areas for reform. While often wide in scope in terms of regulations covered, these approaches tend to be quite narrow in the range of reform impacts considered, with most focusing on reducing compliance costs for business. These ongoing improvements nevertheless add up, and can make a considerable difference to the overall burden of regulation.

Regulator based reforms

Alongside the RIS and other requirements, the actions of regulators — the bodies charged with administering and enforcing regulation — can also influence the stock of regulation. Because regulators engage regularly with the businesses they regulate, they have considerable opportunity to identify areas of regulation where reform might be required. This can be a valuable source of information that can feed into review and reform priorities. Regulators’ primary role, however, is to administer the regulation.

The adoption of leading practices by regulators can make regulation more effective, enabling greater realisation of its underlying objective, or can reduce the costs of attaining a particular level of compliance. By contrast, poor regulator practices can discourage compliance, waste government resources and/or add to business costs and delays. Even where new or reformed regulation is appropriate and well designed, poor enforcement practices can risk rendering it ineffective, or unduly burdensome, or both.

As noted in chapter 3, while administration and enforcement practices will rightly vary depending on matters including the nature of the regulations being administered and the characteristics of the business being regulated, there is increasingly broad agreement on principles for good practice. These address matters such as: streamlining of reporting requirements on business; risk-based monitoring

and enforcement strategies; mechanisms to address consistency in legislative interpretation; graduated responses to regulatory breaches; and clear and timely communication with business.

While there are many examples of regulators adopting more efficient and less costly practices at different times, the problem of regulator practices adding unduly to regulatory burdens has been raised in submissions to several studies (for example, Regulation Taskforce 2006; PC2008e; PC2009a; PC2009c). In comments to the Regulation Taskforce (2006), for instance, the Business Council of Australia said:

In addition to the contribution to the compliance burden made by legislation itself, the approach adopted by the regulators and enforcers of legislation can add considerable compliance costs. In particular, compliance costs can be unnecessarily high where there is a lack of delineation between the roles of regulators, a lack of clarity over their powers, confusion over their objectives in exercising those powers and a lack of coordination between regulators. The attitude of the regulator to the industry under regulation also has a major impact on compliance costs. (p. 159)

Participants in this study have made similar remarks (box 4.1), and a recent survey of CEO attitudes in Australia has also raised some concerns (AIG 2011).

That said, regulators' capacity to fine tune requirements or adopt better practices is limited to those aspects of the administration and enforcement of the regulation over which they have discretion. It is difficult to generalise as to how significant these discretions are. On the one hand, businesses continue to report that a high share of what they perceive as unnecessary compliance costs are the result of the way regulators interpret and enforce the regulation. On the other hand, the actual scope for regulators to reduce compliance costs may be constrained by their own legislative framework or broader governance arrangements. The areas of discretion vary across regulators, and the scope to reduce compliance burdens in these areas will depend on the nature of the regulation as well as the quality of existing administrative practice.

In its report, the Regulation Taskforce (2006) also noted that many of the underlying problems perceived about regulator behaviour in fact reflect the incentives regulators face:

... what seems clear is that the actions and attitudes of regulators, like those of business, are shaped by the incentives they face as well as the requirements placed on them. For example, the risk aversion exhibited by regulators, which business groups rightly see as a root cause of many of the problems they experience, is to be expected in an environment where any adverse event within the regulator's field of influence is held up publicly as a 'failure', while any beneficial impacts on market performance that a regulator may have are not directly observable and go unremarked. (p. 159)

Box 4.1 Participants' views on the costs imposed by regulators

Department of Innovation, Industry, Science and Research

According to industry information gathered by DIISR [Department of Innovation, Industry, Science and Research] to inform its submission to the 2008 TGA [Therapeutic Goods Administration] consultation, *Use of Third Party Conformity Assessment Bodies for Medical Devices Manufactured in Australia*, assessment in larger markets ... is often quicker at around 90 days versus around nine months in Australia; and cheaper at around AUD 5000 for the European market versus around AUD 100,000 in Australia. (sub. 6, p. 16)

WSP Group

... a regulated business will have to work out how to comply with multiple compliance regimes administered by a single government department or regulator. Often, the business will be issued with multiple 'compliance control instruments' such as licences, registration notices, etc. (sub. 1, p. 2)

Property Council of Australia

... the subsequent high-level commitment by the Council of Australian Governments (COAG) to regulatory reform and removing administrative burdens on business has failed to filter down to regulators. (sub. 7, p. 3)

In addition, the Council also noted that:

Regulator stringency is usually too high. Even when regulation is legitimately needed, it is often applied too broadly, and captures businesses which weren't the intended target... (p. 6)

Australian Chamber of Commerce and Industry

Even where the policy at the Departmental level is sound, the implementation by the regulator has not been in line with the policy intent of achieving efficiency. The APVMA [Australian Pesticides and Veterinary Medicines Authority] appears to be looking at efficiency solely in terms of cost savings for the regulator and not for industry. (sub. 4, attachment, p. 8)

Accord Australasia

Australian regulatory agencies also appear to escape the level of parliamentary and departmental financial and performance scrutiny that is applied to budget-funded agencies. Industry believes that this is due in part to the fact that Australian regulatory agencies are fully cost-recovered. (sub 8, p. 7)

Australian Services Roundtable

Greater efforts to fight regulatory myths, creep and myopia that result in regulations being implemented beyond the extent of the original policy intent, covering an increasing volume of businesses and business operations and failing to recognise opportunities for business co-option into policy implementation in ways that enhance the operation of markets, and deliver policy outcomes at lower cost for business and government. (sub. 9, p. 2)

To address such incentives, the Taskforce recommended several oversight mechanisms with the aim of ensuring good performance by regulators, including achieving a more balanced approach to risk. The recommendations — which were accepted by the Australian Government — covered the areas of: clarifying policy intent; accountability; transparency; and communication and interaction with business. While there have been some developments in line with the recommendations, their implementation has not been systematically monitored; nor has their effectiveness been evaluated (appendix H). Thus, it is difficult to gauge to what extent the previously identified problems with regulator performance have been addressed or the extent of potential gains from further reform in this area.

Stock-flow linkage rules

Stock-flow linkage rules comprise requirements that make the introduction of new regulation conditional on an assessment of, and changes to, the stock. The rationale for these types of rules is that policy makers need ongoing disciplines if they are to exploit opportunities to reduce compliance costs or other burdens. However, depending on their form, they can be expensive to implement and pose risks. For example, with the exception of the United Kingdom (see below), the lack of adoption of ‘one-in one-out’ rules and regulatory budgets around the world confirms that, while superficially appealing, in practice these approaches are difficult to implement as an effective stock management tool.

The ‘one-in one-out’ rule requires the identification of regulations that can be fully removed. While removing largely redundant regulation (the most likely target for agencies) can be useful housekeeping, it is less likely to deliver substantive reductions in compliance costs for business. That is, it may not focus attention on areas of regulation that need improvement rather than removal. Versions of ‘one-in one-out’ that focus on ‘offsets’ in compliance costs (or a proxy such as the removal of ‘must do’ provisions (see chapter 3)), if audited, could overcome this. The UK has adopted a variant of the ‘one-in one-out’ rule which requires offsetting compliance cost reductions. This is reported to be achieving reforms to the stock of regulation, although the magnitude remains unclear at this stage. The main effect, thus far, seems to have been a reduction in new regulation being proposed (appendix K).

The strong version of regulatory budgets fixes the total compliance costs a government or agency can impose on business. Estimating this cost, and then imposing a lower budget target has strong overlaps with red tape targets. The ‘soft’ version of regulatory budgets requires new costs to be offsets by reductions in existing costs. Such budget rules can provide a stimulus for departments to invest in

identifying areas for reform so they can to meet the budget requirements when they introduce new regulation. The rules need to be binding to provide the incentives to make such investments. For example, the voluntary offsets introduced by the Australian Government as a form of ‘one-in one-out’ rule have led to relatively few commitments for offsets. Nevertheless, there have been examples of useful actions to reduce compliance costs as a result of the arrangement (Department of Finance and Deregulation, sub. DR11, pp. 3-4).

Binding stock-flow linkage rules that require an offset within the same regulatory area can introduce perverse incentives. This could include ‘hoarding’ redundant regulation as trading coin or delaying beneficial changes in order to meet future obligations under these rules. They may also cut into new regulation with a net benefit, if an agency already minimises compliance costs. Hence there would be a need for some flexibility in application — such as allowing trade-offs across agencies. However, this would introduce complexity in administration that itself would undermine effectiveness.

FINDING 4.1

Regulatory budgets and ‘one-in one-out’ rules have superficial appeal, but could have perverse effects. On balance, the disadvantages appear to outweigh the advantages. It would be important to assess the effectiveness of the current United Kingdom scheme before pursuing similar approaches.

The appeal of a stock-flow linkage rule is that it forces a consideration of the existing stock of regulation at the time when new regulation is contemplated. It is clearly desirable to encourage agencies to look for ways to streamline and combine regulation so that the objectives of old and new regulation can be achieved without increasing the compliance burden on business.

A more flexible stock-flow rule is the requirement in the RIS that existing regulation be taken into consideration in the development of the regulatory proposal. But this appears to be limited to issues of duplication and overlap rather than used as an opportunity to streamline or reform related regulation. The ‘offset’ arrangement, in contrast, can seek savings from any area of the agencies portfolio, but only on an ad hoc basis. But the voluntary nature of the arrangement imposes little discipline on agencies to examine the accumulation in compliance costs that they are imposing on business. There is, however, potential to strengthen the examination of related regulation as part of the RIS. But this could stretch capabilities at an individual agency level.

FINDING 4.2

The regulatory offset approach adopted by the Department of Finance and Deregulation appears to have brought some benefits without the downside risks of a more rigid requirement.

FINDING 4.3

The existing RIS requirement to examine related regulation can provide a timely opportunity to find offsetting compliance cost savings that are more readily locatable. It would be hard to extend this provision to unrelated sources of regulatory burden, but the current provisions could be more rigorously enforced.

Red tape reduction targets

Red tape reduction targets generally focus on reducing paperwork or administrative compliance costs. They have expanded in some applications to include more substantive compliance costs.

A number of different strategies have been used to identify the sources of savings. These include:

- compliance cost audits — major exercises to identify excess compliance costs through complaints-based or analytical methods. These have the advantage of allowing appropriate targets to be set, particularly across agencies. They are, however, usually very expensive exercises to undertake
- expert panels — made up of business representatives, panels can be a cost-effective approach to identifying the areas of regulation where savings can be made relatively easily
- internal stocktakes — conducted by the department or a central agency, the effectiveness of the approach depends on the quality of the screening tool used and the rigour of its application. They can be a relatively cost-effective way to identify savings, but require that the departments have the incentives and skills for thorough analysis.

Savings are relatively easy to identify where little attention has been paid to the compliance costs of regulation, so there is a lot of ‘low hanging fruit’. As previously noted, over time, as greater attention is paid to reducing the compliance costs in existing regulation and when introducing new regulation, savings become much harder to find. Sticking to high risks forces agencies to make cuts in requirements such as reporting or audits that could undermine the effectiveness of the regulation.

The quantification of savings is integral to the red tape target approach — to provide a discipline on agencies. The estimation of savings also imposes greater rigour on the analysis of the impact of a regulation on compliance costs. These estimates could be made in terms of the dollars of compliance costs saved, a reduction in the number of ‘must comply’ provisions (as in British Columbia), or other measures of burden. Publication of estimates allows businesses to scrutinise the changes to confirm the stated savings are real and that they are likely to be, or have been, achieved.

One concern with red tape targets is that the substantial claimed cost savings are not reflected in surveys of business perceptions of the costs of regulation. For example, the UK’s National Audit Office (NAO 2011), which conducted a series of perceptions surveys relating to the UK Government’s red tape reduction program, found that only one per cent of businesses had noted a net decrease in the regulatory burden between 2008 and 2010. Similar results were reported in the Netherlands. Despite the Government meeting its targets, the OECD (2010c) reported that business remained frustrated at ‘slow progress and the failure to tackle issues that really matter from its perspective’ (p. 34). In response, the Dutch Government has re-energised its communication programme (see appendix K). In Victoria, perceptions also failed to reflect the cost savings identified (Wallis 2011).

This gap between the claimed savings and business perceptions may reflect difficulties in measuring the costs regulation actually imposes. The cost calculators are based on the ‘average’ business, and may overestimate the costs and hence the savings for a majority of business. In addition, the estimates assume a standard set of practices and may fail to take the adjustments firms make to minimise the costs into account. A study in the United States reports evidence that ex ante estimates of compliance costs tend to overstate the realised costs (Shapiro and Irons 2011).

Other reasons for perceptions differing from reality could include: the savings being made against a background of otherwise increasing compliance costs, so the counterfactual is a much higher burden; or the savings being greatest for new firms, or those entering in new areas (such as when they come in the form of system set-up) so firms have not experienced the counterfactual.

FINDING 4.4

Estimates of the savings from red tape reduction targets are usually based on proposed changes in regulatory requirements, and reflect ‘gross’ rather than ‘net’ savings. The savings actually achieved may be overstated. Involvement by business can assist in identifying costs and verifying savings.

FINDING 4.5

Red tape targets can be a useful first step for jurisdictions that have not previously undertaken programs to reduce compliance costs. The potential for savings is more doubtful for jurisdictions, including the Australian Government, that have already engaged in other exercises to reduce compliance costs.

Another issue with red tape targets is that regulations could then be regarded as ‘having been reviewed’ although some of these approaches (or their application) do no more than consider administrative costs imposed on business. The need for complementary reviews is discussed in chapter 6.

Box 4.2 sets out some ‘good design’ features of red tape reduction targets, if they are to work effectively .

Box 4.2 Some good design features of red tape targets

- The targets should include the administration costs of the regulator, particularly where those costs are passed on to business in the form of fees and charges.
- Targets should take into account the previous work undertaken in reducing compliance costs, and to the extent feasible progressively expand the scope of compliance costs covered.
- Consideration should be given to setting agency level targets, where some have more, and some less, scope to reduce costs without affecting benefits.
- A consultative process should be adopted in identifying areas for savings in compliance costs, rather than a major (and costly) costing exercise.
- Savings should be quantified and the estimates made public in a timely way.
- The estimates should be reviewed periodically by an independent body to reduce the scope for gaming by agencies and to build public confidence.
- Incentive payments to agencies may prove effective. These payments could be directed at strengthening the agency’s capabilities in evaluating the effects of regulation on business and the community.

Source: Appendix G.

4.3 Programmed review mechanisms

Programmed reviews usually target particular regulations or, in the case of sunseting, sets of regulations (appendix E). Sunset legislation has the widest target group (though usually limited to subordinate legislation). The Australian

Government's post implementation reviews (PIRs) apply only to legislation that has avoided or is non-compliant with the RIS process. Statutory reviews relate to the regulation they are embedded within, and may be restricted in scope to examine only a subset of the possible impacts.

Sunset legislation

Unless policy agencies utilise the opportunity to package regulation for systemic review, sunseting can be regarded as a 'good housekeeping' mechanism rather than a detector of priority reforms. While good at removing redundant (usually subordinate legislation) regulation, the ability of sunset requirements to achieve deeper or more broad-based reform is constrained by their mechanistic character. Unless related regulations also fall due for sunseting at the same time, there is generally no requirement that it also be reviewed and reformed.

Sunseting is less likely to work well where exemption rules and rollover time limits are lax, allowing undue deferral of review. Mechanisms for delaying sunseting are available in all jurisdictions in Australia.

For example, New South Wales' five-yearly sunseting requirement has seen the postponement of substantial numbers of regulations scheduled to sunset. A report on regulatory impact assessment in New South Wales showed that, of the statutory rules that were due to sunset on 1 September 1998, 63 were repealed and 101 were retained. But for around 70 per cent of the latter, the sunseting date had already been postponed by between three and six years (OECD 1999). Latest data indicate that this problem remains. In 2009 and 2010 the staged repeal of 51 per cent and 42 per cent of expiring regulations respectively were postponed. Similarly, a recent review of Queensland's sunseting provisions found that expiry of substantial numbers of instruments had been delayed over the previous decade due to the granting of extensions. However, the numbers have been falling — down from 100 extensions granted in 1998 to only 32 in 2008 suggesting that the process of regulation review may have become more well-established (Scrutiny of Legislation Committee 2010).

A different problem may arise where the rules are too strict, or if haste provides an excuse for poor process. For example, a review of Victoria's RIS process found (Access Economics 2010):

Despite efforts by VCEC to raise awareness of sunseting regulations well in advance, these are often not considered soon enough because of departmental workloads and/or lack of resourcing for RIS preparation, particularly when a number of regulations are due for renewal within a defined period of time. This means that the RIS process

receives little attention early on, particularly at the stage when alternative options could be considered, and RIS documents are prepared in a rush. (p. 23)

The review also found that most of the compliance savings associated with the RIS process in Victoria came from new regulations rather than re-making sunseting regulations, despite the fact that over half of the RISs assessed were for sunseting regulation (VCEC 2011a).

The effectiveness of the Australian Government's sunset legislation (set out in the *Legislative Instruments Act 2003* (LIA)) would be enhanced if it were able to provide a catalyst for more systemic reviews. These reviews should cover both sunseting and related legislation, including where appropriate, the primary legislation. This approach is potentially not just more cost-effective, but provides the opportunity to improve the quality of regulation.

Even without systemic reviews, considerable preparation will be needed to cope with the volume of regulation.

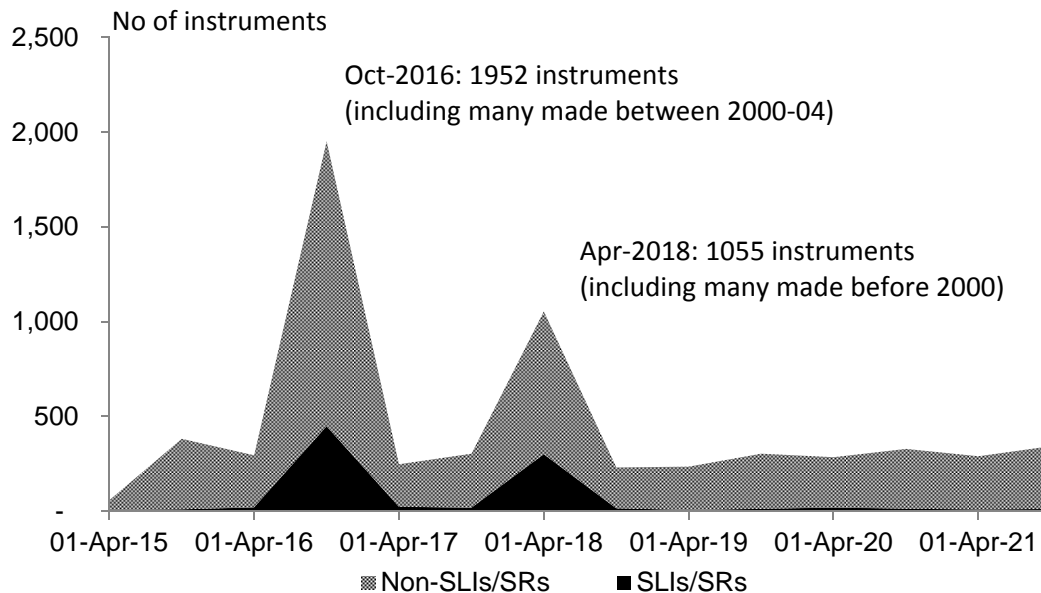
The Australian Government's (2010b) *Best Practice Regulation Handbook* (the Handbook) requirements apply to any regulation remade due to sunseting. A RIS is normally required where there is a significant impact on business or the not-for-profit sector. However, it is unclear whether agencies are adequately prepared to provide the level of review needed (appendix E). In other jurisdictions, there are mixed messages about how well the process works. VCEC (2011a), for example, notes that RISs for sunseting regulations are of variable quality.

Commonwealth legislation will start sunseting from early 2015. The number of regulations that are subject to sunset is large (6 300 primary instruments over a seven year period, with most due in the first three years). Moreover, because of the way the timing is defined for the pre 2005 stock, there are two large 'peaks' (in 2016 and 2018) in which much larger numbers of instruments are due to sunset (figure 4.1).

For the Commonwealth LIA, agencies that wait until the Attorney-General tables the list of instruments due to sunset in 18 months will only have six months to review the sunseting instruments before Parliament has to determine which instruments should continue.

In these circumstances, justifiable concerns have been raised about the capacity of agencies, and the OBPR, to cope with the impending flow of sunseting legislation. The 2008 review of the LIA (Australian Government 2009) reported that, with a few exceptions, relatively little had been done by agencies to prepare for sunseting. Given the strict nature of the exclusions and deferrals, there is a risk of poor process (through inadequate review) in the rush to renew regulation.

Figure 4.1 ‘Twin peaks’: Australian Government regulations by sunset date^a



^a Based on FLRI data at 21 October 2011 for principal instruments that are due to sunset. SLI = select legislative instruments, SR = statutory rules.

Data source: OLDPA (pers. comm.; 25 November 2011).

Business and other stakeholders need sufficient warning of sunset legislation and reviews to coordinate their efforts and participate effectively in consultation processes. The large volume of instruments scheduled to sunset increases the risks that many of the available resources for consultation, review and redrafting could be absorbed in undertaking less significant tasks, such as mechanically rewriting all legislation rather than focussing on issues of substance.

For sunset to yield the greatest benefits, review and reform efforts will need to be prioritised towards areas expected to yield largest gains. A good place to start is regulation that currently imposes significant costs on business and the not-for-profit sector. Identifying these priorities has to be done in a cost-effective way. One option is to draw on the framework developed for the pre-2008 internal stocktake undertaken by the Australian Government Department of Finance and Deregulation to ‘triage’ the sunset legislation. The classifications and proposed actions (lapse, remake without review, remake with review) could then be tested actively with business panels or more widely with the community on a ‘silence is consent’ basis. For those regulations requiring review, the level of review required and appropriate processes should be determined and reviews prioritised based on sunset dates and the time required for adequate review.

A RIS must be completed for all re-made regulation that has a material impact on business. This could also pose considerable burdens on agencies and affected businesses. Redrafting legislation also requires significant resources.

As mentioned, sunseting offers the opportunity to examine related legislative instruments, including primary legislation, in a thematic or systemic review. It is through such reviews that the greatest benefits are likely to be found. While there are some provisions in the LIA to postpone sunseting for some instruments in exceptional circumstances, there is no general provision that either allows, or provides an incentive for, packaging of related instruments.

To support this kind of approach — and since the volume of reviews associated with sunseting threatens to overwhelm departments and agencies, and potentially compromise best practice regulation processes — there would be advantage in amending the LIA to provide greater flexibility. (Good design features for sunset programs are set out in box 4.3.)

Box 4.3 Good design features of sunset programs

Effective sunseting processes need to:

- establish a clear and transparent process to manage the flow of sunseting legislation well in advance
- make the timetable for sunseting legislation publicly available at least 18 months prior to sunset
- enable the packaging of regulations that are overlapping or addressing similar issues even if it means bringing forward the review of some legislation due to sunset later (and vice versa)
- implement effective filtering or ‘triage’ processes which identify which regulations (or bundles) are likely to impose high costs or have unintended consequences that warrant a more in-depth review
- engage with business and the community in the ‘triage’ assessment, and more widely in checking the proposed treatment of the regulations for sunset
- for regulators with ‘high’ impacts, provide for a review that will:
 - demonstrate the case for remaking the regulation
 - examine whether alternatives could achieve the objectives at lower cost
 - become the basis for a RIS for re-made or amended regulation.

Source: Appendix E.

The Australian Government should amend the Legislative Instruments Act 2003 to:

- *allow more effective ‘smoothing’ of the number of pre-2005 instruments due to sunset over the 2015 to 2018 period*
- *provide flexibility and incentives to package related regulations for review, by enabling regulations to extend beyond their sunset date if they are scheduled to be reviewed as part of a package of related regulation within a reasonable period*

A single regulation impact statement should be able to cover related regulation where the regulations are to be remade.

The Australian Government should establish clear and transparent processes for the handling of sunseting legislation. These need to cover:

- *prioritising sunseting instruments against agreed criteria, to identify the appropriate level of review effort and consultation*
- *development of effective data management processes that allow affected parties ready access to information on sunseting instruments, review and consultation processes*
- *testing the proposed review action with relevant interests*
- *indicating the nature of reviews to be undertaken, including the proposed level of consultation*
- *development of subsequent proposals to remake the regulation, including preparation of a regulation impact statement for regulation that has a material impact.*

Timetables for these activities should be published.

Clarification of the roles and responsibilities of different Commonwealth departments and agencies needs to be undertaken as a matter of urgency.

Post implementation reviews

According to the Australian Government’s Handbook, post implementation reviews (PIRs) are required for regulations that have avoided the usual RIS process. Such regulations are likely to have had less analysis and vetting and therefore should be

priorities for review. Having this ‘internalised’ is a strength of the Australian Government’s processes.

PIRs were introduced as a ‘fail-safe’, to ensure any regulation having significant impacts on business that avoids the RIS process will be examined early in its life, to determine whether it is working as intended and that there are no undue costs or unintended consequences. It was also thought to provide a deterrent against avoiding good regulatory process.

The deterrent effect is influenced by the expected stringency of the PIR as a review mechanism. As noted in chapter 3, while the Australian Government’s PIR requirements state that a PIR should generally be similar in scale and scope to a decision-making RIS, a PIR is not required to meet the same requirements as a RIS. However, to ensure that the PIR process is as effective as possible in promoting good regulatory outcomes, PIRs do need to examine the alternatives for achieving the regulatory objective. They should also assess the costs and benefits to ensure that the regulation is appropriate. There appears to be some expectation that PIRs may only need to look at implementation issues. This would provide little opportunity to make significant changes where they were called for to address unexpectedly high costs or poor efficacy.

This may explain the more extensive and growing use of this ‘escape clause’ than had originally been envisaged. Since 2007, over 60 regulatory proposals have now been flagged as requiring a PIR by OBPR. Around half of the total number of PIRs listed since the process commenced in 2007 have arisen over the past year. Among the list of regulations that avoided a RIS are some with major impacts (see box 4.4)

Box 4.4 Some significant regulations requiring PIRs

The OBPR has advised that a total of 61 PIRs have been required for regulatory initiatives, around half in the most recent year. These are either due to non-compliance with the Government’s RIS requirements or an ‘exceptional circumstances’ exemption being granted by the Prime Minister. They cover a range of areas including:

- changes to the arrangements for executive termination payments (2009)
- industrial relations legislation (including the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* and the *Fair Work Act 2009*) (2010)
- pharmacy location rules (2010)
- live cattle exports to Indonesia (2011)
- certain responses to the Australia’s Future Tax System Review, including the minerals resource rent tax and the targeting of not-for-profit tax concessions (2011).

Source: OBPR Best Practice Regulation Report 2009-10. The complete list is in appendix E.

Contrary to their original ‘fail-safe’ rationale, there appears to have been some expectation that post implementation reviews would only address relatively limited implementation matters. If such an approach were to be used as a means of evading the regulation impact statement process, it would pose a considerable risk to the integrity of the Australian Government’s best practice regulation requirements.

A PIR has the advantage that some information on the actual costs and outcomes of the regulation may be available. However, as the intent of the RIS is to avoid the costs of ‘bad’ regulation, delaying a PIR could unnecessarily incur costs. While a large number of PIRs are scheduled to commence soon, in some cases PIRs are not scheduled to commence for a number of years. This is because the 1-2 year period for the commencement of a PIR starts from the date of implementation of the regulation, rather than from when the legislation came into effect (or passed by parliament for legislation that was retrospective). For policies with delayed implementation or that are implemented over a number of years, this can potentially lead to substantial delays in the completion of PIRs.

The evidence provided after implementation on the efficiency and effectiveness of the approach taken creates an opportunity for more thorough analysis. Experience with the regulation means that business would be better able to comment on the assessments made by the department. Given this, a consultation PIR, similar to COAG’s consultation RIS, could be useful.

Although only three completed PIRs have been posted, it is notable that two were undertaken in conjunction with a RIS that proposed significant changes in the regulation. This supports the concerns that PIRs were designed to address — that regulation made in haste and unable to follow good practice is more likely to need revision. Having to undertake a PIR may have brought these issues to light more quickly than would otherwise have been the case. This suggests that allowing PIRs to be deferred can reduce their potential to act as a catalyst for revising poor regulation.

There is a lack of clarity in the timing required for a post implementation review (PIR). While a PIR has to commence within two years of the regulation being implemented, there can be considerable discretion in the interpretation of implementation, and the timing for the completion of the review is not specified. This could lead to considerable delays.

Implementation of a PIR within a relatively short timeframe is desirable, but this heightens the prospect that those officials responsible for developing the regulation in question will still have responsibility in the relevant policy area. The incentive for those involved to conduct a rigorous review will accordingly be reduced, particularly for ‘sensitive’ matters (which account for a significant proportion of the regulations requiring PIRS). To ensure rigour in PIRs, it is important, therefore, that they be conducted independently of the policy department, particularly in more significant cases.

Post implementation reviews are not addressed at any length in the Handbook (Australian Government 2010b). The Commission understands that more detailed guidelines for PIRs are in development. This is an opportunity to ensure that the PIRs will be the effective ‘fail-safe’ mechanism intended. Some good design features for PIRs are provided in box 4.5.

Box 4.5 Good design features for post implementation reviews

Post implementation reviews (PIRs) should require the same rigour as the regulation impact statement (RIS) process. They should require:

- ‘arms-length’ reviews be undertaken for any regulations assessed as of major significance
- provision to be made for data generation to monitor the costs of implementation and the outputs and outcomes
- impact assessment be forward (as in the case of a RIS) as well as backward looking
- alternatives to achieving the objectives be evaluated
- consultation with stakeholders impacted or potentially impacted by the regulation.

Source: Appendix E.

RECOMMENDATION 4.3

The Australian Government should ensure that the Best Practice Regulation Handbook includes guidelines for post implementation reviews (PIRs) that:

- ***require PIRs of major significance to be undertaken at ‘arms-length’***
- ***require that all PIRs commence within two years of the regulation coming into effect (or in instances where regulation is retrospective, the date the regulation is made), and specify when PIRs are to be completed***
- ***require that all PIRs meet the requirements for a regulation impact statement (and that the analysis be commensurate with impacts)***
- ***require that a draft PIR be released as part of the review consultation process for regulation with significant impacts***

-
- *recommend the amendment or removal of the regulation, should it fail the net benefit test.*

Ex post review requirements in new regulation

It is a requirement of the Australian Government's (2010b) *Best Practice Regulation Handbook* that a RIS outline how a regulation will be subsequently reviewed. The Handbook states that a RIS should indicate when the review is to be carried out and how the review will be conducted, including whether special data is required to be collected. However, the Handbook does not provide guidance on what type of review would apply to different circumstances. Nor does the Handbook provide guidance on the appropriate scope, independence, or transparency of ex post reviews for regulations with a significant impact on business.

In practice review requirements appear able to be satisfied in a number of ways:

- for legislation that has a relatively minor impact on business or the not-for-profit sector, sunset provisions may be deemed adequate — although these are ten years out
- a review can be embedded in the legislation (a statutory review) — but this can have limited scope (see below)
- the agency responsible for the regulation may have a planned program of reviews that would cover the regulation — but whether the plan is followed is not monitored.

The Australian Government, following a recommendation of the Regulation Taskforce (2006), introduced a requirement that all regulation not subject to sunset or other evaluation be reviewed every five years. This 'five yearly review' requirement (appendix E) was intended as a 'catch-all' mechanism to ensure that no regulation that impacts on business can go too long without a review. As discussed in chapter 3, if the reviews foreshadowed in RISs took place, few regulations with significant impacts would fall into this category, and the Commission has been informed that this appears to be the case.

Nevertheless, there is an issue as to the level of review that may be deemed to satisfy the five yearly review requirement. For example, internal stocktakes or red tape reviews may have 'reviewed' regulation for redundancy or compliance costs, but not for distortions or for compounding effects on business.

Even internal to government, there does not appear to be a systematic process for monitoring whether ex post reviews set out in RISs have occurred. Certainly, the findings of such reviews are not in an accessible and centralised location.

The RIS review requirements are only for those regulations that have been assessed as having a material impact on business or the not-for-profit sector. For example, in 2009-10 OBPR reported that 122 Australian Government and 34 Ministerial Council (COAG) proposals required a RIS. OBPR assess all proposals for the likely impact in order to apportion effort to the assessment of the risk of the regulation imposing a regulatory burden. Proposed regulation is assessed as having a major impact (category A or B) or a minor (but material) impact (category C and D). The vast majority of regulatory proposals fall in this second category — in 2009-10 only 8 were assessed as having a major impact (5 Australian Government and 3 Ministerial). This major/minor categorisation would be useful in identifying the nature of the review required.

Another feature that should be used to identify the type of review required is the extent to which there is significant uncertainty about key impacts of a regulation. For example, where some or all of a regulation was intended as a transitional arrangement, a review might be required to assess whether the arrangement continues to be needed. In these cases, a statutory review, that is embedded in the legislation, would be appropriate.

FINDING 4.8

The review requirement in regulation impact statements is not accompanied by subsequent monitoring to ensure that such reviews are undertaken.

Statutory reviews

The scope of statutory reviews can vary substantially. The terms of reference for the review may be set out in legislation or open to the agency required to commission the review. In any case, ideally the review should target the areas of uncertainty in the impacts of the legislation. But if the review is narrow in scope, care is needed to ensure that the statutory review is not mistaken for a full review of the regulation.

The need for an embedded statutory review is identified during the development of the regulation. As far as the Commission is aware, this is done on an ad hoc basis by the departments drafting the legislation. Where the new regulation is introduced in response to a review or inquiry, the need for a review point during or after implementation may be set out in the review recommendations. An example is the inclusion of reviews in Part 3A of the *Trade Practices Act 1974* (now the *Consumer and Competition Act 2010*).

At the Australian Government level, the number of statutory reviews and the scope of these reviews is not recorded in any consistent way, other than being flagged in

agencies' annual regulatory plans. Like other reviews, there is a need for better communication of upcoming statutory reviews, their findings and recommendations, and the government response and implementation of recommendations (see chapter 6).

Where the reviews have been undertaken in a transparent manner, they appear to have been an effective mechanism for promoting changes to the regulation to make it more efficient and effective. Well-targeted statutory reviews can be highly cost effective because they focus on areas of uncertainty that could impose unnecessary burden, including early identification of whether the regulation is effective. They are also more effective if data collection has been provided for, or is otherwise available (box 4.6).

Box 4.6 Good design features of an embedded statutory review

Review requirements should be embedded in legislation when there is significant uncertainty in regard to the effectiveness of the regulation, the efficiency of the chosen approach, or the impacts of the regulation. To be a cost-effective approach, the review clause ideally should:

- identify the areas of uncertainty that have motivated the review, including, if it is the case, the long term appropriateness of the regulation
- set the timing for the review at a point where sufficient new evidence would be available to make an assessment
- establish monitoring and data collection processes that are proportionate to the usefulness of such data in informing the review
- set out the governance arrangements for the review, including the degree of independence required, consultation processes and publication of review findings.

Source: Appendix E.

FINDING 4.9

Embedding review requirements into legislation has proven an effective approach where there has been uncertainty surrounding the impact of regulation — particularly where it could have significant impacts. There would be benefits in more systematic use of such statutory reviews.

Other ex post reviews of regulation

Statutory reviews focusing on areas of uncertainty are a special case of an ex post evaluation. Where regulations are assessed as potentially having a high impact on business, the not-for-profit sector, or possibly the community more broadly, an

ex post review is arguably the most important stock management tool. This review should assess whether the regulation is efficient, effective and remains appropriate.

The Commission understands that, in practice, most regulations that have required a RIS are reviewed within five years. However, there is little information available on the findings of the reviews and whether any changes to regulation have occurred as a result. Without this information it is not possible to assess if the reviews were undertaken, and whether any recommendations were made to improve the effectiveness or efficiency of the regulation. In particular, there is no way to track if new regulation with a major impact on business or the not-for-profit sector (assessed by the OBPR as category A or B) is reviewed.

There is a move in other countries for greater requirements for ex post evaluation of regulation. For example, both Canada and the United States have recently established requirements in their regulatory systems to undertake ex post evaluations of significant regulations. In particular:

- the Canadian Government explicitly requires evaluations of both the stock and flow of regulation in its 2007 *Cabinet Directive on Streamlining Regulation* (CDSR). In addition, rolling five year evaluation plans are required (TBCS 2009a; appendix K)
- in the USA, President Obama's Executive Order 13563 (issued 18 January 2011) requires retrospective reviews of existing regulation alongside its longstanding regulation impact assessment process (Sunstein 2011a; appendix K).

Stronger ex post review requirements for new regulations are also proposed in the European Union and the UK (appendix K).

FINDING 4.10

There has been relatively little ex post evaluation of regulation (including reforms) reported. This has resulted in an information gap on the effectiveness of regulations in meeting their objectives.

While ex post evaluation can provide important information to improve the quality of regulation (and to impose discipline on both the designers and administrators of the regulation), such evaluations are often costly to do well. Review resources need to be targeted to where the potential gains are the greatest. As noted, where there remains significant uncertainty about likely impacts, statutory reviews can target review resources to the major areas of concern. However, apart from the 'known unknowns', a review to address 'unknown unknowns' is important where the regulation has a major impact on business or the community. Such regulation warrants more comprehensive and timely review than regulations anticipated to have a minor impact on business. For these regulations, a screening level

‘evaluation’ to flag a need for a more comprehensive review would be more cost-effective.

The Canadian Government’s approach to ex post review requirements in their RIS process provides one model. For example, when the impact of a regulatory proposal is assessed as ‘high’ in a *Triage Statement*, federal departments are required to complete a Performance Measurement and Evaluation Plan (PMEP) (box 4.7). Completing a PMEP is discretionary when a proposal is assessed as ‘low’ or ‘medium’ in the *Triage Statement*. Moreover, rather than inserting an automatic repeal (sunset) clause in legislation, a five yearly review clause is the preferred approach. Such five yearly reviews are then subject to the requirements set out in the Treasury Board of Canada Secretariat’s (TBCS 2009b) *Policy on Evaluation*.

Box 4.7 The Canadian Government’s ‘Performance Measurement and Evaluation Plan’

The Performance Measurement and Evaluation Plan (PMEP) is designed to provide a ‘concise statement or road map to plan, monitor, evaluate, and report on results throughout the regulatory life cycle’ (TBCS 2009b, p. 1). Information from the PMEP Template is carried forward into the ‘Performance measurement and evaluation’ section of the Canadian Government’s version of the Australia’s Government’s Regulation Impact Statement (RIS) (an ex ante evaluation).

A completed PMEP should not be more than 12 pages in length and comprise the following 9 sections.

1. Description and overview of the regulatory proposal
2. Logic model
3. Indicators
4. Measurement and reporting
5. Evaluation strategy
6. Linkage to the program activity architecture
7. Regulatory Affairs Sector review
8. Assistant Deputy Minister sign off
9. Departmental contact.

Source: TBCS (2009b).

While a formal evaluation plan may be an appropriate response, the benefits from the process must exceed the costs. And like all of the approaches discussed in this chapter, without adequate resources they are unlikely to achieve their objectives of improving the quality of the stock of regulation.

The Australian Government's Best Practice Regulation guidelines should be modified to:

- *require a formal review and performance measurement plan in cases where the expected impact of a proposed regulation is rated as 'major' by the Office of Best Practice Regulation (OBPR)*
- *encourage the use of embedded statutory reviews where there are significant uncertainties regarding the effectiveness or impacts of the proposed regulation*
- *ensure that any proposed review is proportionate to the potential impact of the regulation*
- *ensure that all reviews foreshadowed in regulatory impact statements take place within five years.*

If this process were adopted, the current, more encompassing five yearly default review requirement could be dispensed with.

4.4 Ad hoc reviews

Public stocktakes and principles-based reviews generally cover many areas of regulation, and are well suited to identifying areas for reform that may not be known to government. They tend to be more limited in the options for reform they can identify, but if done well can be effective in promoting reform.

In-depth reviews are focused on finding options for reform where a need for reform has already been identified. They generally provide a comprehensive evaluation of the impacts of specific sets of regulation related to an industry or issue as part of analysing reform options and making recommendations. Benchmarking, through drawing comparisons, can help identify areas where a country or jurisdiction is lagging and, when targeted, can help identify options for reform.

Public stocktakes

Public stocktakes are designed as a 'discovery' mechanism for unnecessary regulatory burdens. They are particularly suited to identifying areas imposing high compliance costs on business, including where the accumulation of regulation has compounded the costs of doing business. Public stocktakes have also been effective in throwing up challenging areas requiring more detailed examination, helping identify priorities for in-depth reviews. For example, the Regulation Taskforce

(2006) identified 14 regulatory areas deserving in-depth review, of which 11 have since been completed (box 4.8).

Public stocktakes are one of the few mechanisms that can identify problems arising from inconsistencies and overlaps in regulation. A good example is the inconsistency in environmental and OHS requirements in relation to automotive repair identified by a sector stocktake approach in New South Wales. The barrier to prevent the spread of oil spills required by the environmental regulation was banned as a safety hazard in the OHS regulation (Small Business Regulation Review Taskforce 2006).

As a complaints-based approach, stocktakes are less well suited to identifying regulations that restrict competition, or that confer advantage to incumbents, unless the issue is raised by aspiring entrants.

The record of public stocktakes in achieving reform is mixed. Some, such as the Regulation Taskforce (2006) have had relatively high ‘strike rates’. The profile of that review, the commitment of quality resources, and the strong political backing it received, all appear to have contributed to its success (Banks 2007b). Such general public stocktakes would appear to require considerable commitment from government and industry to be successful.

The Commission’s own sectoral stocktake program had ‘wins’ in terms of removal or amendment of costly regulations in specific sectors, though fewer than might have been expected in some areas. As mentioned, the New South Wales industry stocktake program, which used an industry panel approach rather than the more widespread consultation approach, proved to be a useful low cost mechanism.

The cooperation of business is central to making stocktakes work well. This can be threatened by review fatigue, either because there are too many reviews or there is poor implementation of recommended reforms and too little is seen to be achieved. Businesses can find it difficult to distinguish the source of regulatory problems where they are subject to regulation from multiple jurisdictions. Often it is the sheer accumulation of regulation, as well as overlap and inconsistencies, that is the problem. The broad scope of stocktakes provides one of the few mechanisms to identify where it is the interactions of regulations — across agencies, sectors and jurisdictions — that are imposing regulatory burdens.

Box 4.8 Regulation Taskforce's review recommendations

In its *Rethinking Regulation* report, the Regulation Taskforce (2006) made 178 recommendations of which 160 were accepted wholly or in part by government following the release of the report. According to the Department of Finance and Deregulation, 110 have now been completed, 42 are in progress and eight are not proceeding.

The report's recommendations included 66 priority reforms. These were based on a judgement of the prospective gains of the reform (in terms of breadth and depth of impact), the ease of implementation, and logistical considerations — for example, the need to avoid overloading COAG or particular portfolio areas.

14 regulatory areas were indicated as priorities for review. The following have since been commissioned and completed:

- Superannuation tax provisions — Super System Review Panel (2010)
- Anti-dumping regulations — Australia's Anti-dumping and Countervailing System (PC 2009d)
- Wheat export ('single desk') arrangements — Wheat Export Marketing Arrangements (PC 2010f)
- Childcare accreditation and regulation — Early Childhood Education and Care Quality Reforms (Early Childhood Development Steering Committee 2009)
- Privacy laws — ALRC (2008)
- Food regulation — PC (2009b)
- Chemicals and plastics regulation — PC (2008c)
- Consumer protection policy and administration — PC (2008d)
- National trade measurement — 2006 review commissioned by the Ministerial Council on Consumer Affairs
- Implementation of procurement policies — Department of Finance and Deregulation (2008)
- Health technology assessment — Department of Health and Ageing (2009)

Reviews yet to be concluded include:

- Energy efficiency standards for premises — the CSIRO has been tasked with the review and it is scheduled to be completed by the end of 2012
- Private health insurance regulations — no review is required following a package of changes to private health insurance arrangements in April 2006
- Directors' liability provisions under the Corporations Act — Treasury released an issues paper in 2007.

Source: Appendix B.

For stocktakes to be effective mechanisms for identifying areas for reform, they need to engage widely and well with businesses. General public stocktakes are therefore best undertaken about every ten years. This also provides time for governments to respond fully to the recommendations. In sectors experiencing rapid regulatory or context change, a shorter period between stocktakes may be called for.

One of the challenges for public stocktakes is screening the complaints to identify those that are ‘in-scope’ for the review. Business is not always able to identify the source of the regulation that is burdensome, especially where the burden arises from the interaction of the regulations. This can be a problem for sectoral or industry stocktakes, and for those conducted for a single jurisdiction. While the Regulation Taskforce was commissioned by the Australian Government, it did identify cross-jurisdictional regulatory issues that COAG drew on to form the core of the SNE reform agenda.

Once a complaint is assessed as ‘in-scope’, its validity must be tested and, if found valid, solutions formulated. Most stocktakes call for business to provide evidence of the problem and to suggest solutions, but both problems and solutions need to be examined carefully before reforms can be recommended. This requires considerable analytical skill in the review team. It also requires good process, involving several stages: first, the complaint is passed to the regulator or policy agency for verification; second, their response is assessed by the review team and tested further with business if needed; and third, preliminary recommendations should ideally be tested with stakeholders before final recommendations are made.

Like other reviews, the value of regulatory stocktakes depends on their governance arrangements, consultative and other processes, and their resourcing.

Where businesses and their representative organisations find themselves involved in stocktakes (and other reviews) in a number of jurisdictions, or across a number of agencies this can stretch their capacity to engage effectively in the consultation required.

Greater coordination of stocktakes (and reviews) would help to reduce this burden. Better still, cross-jurisdictional cooperation on a general stocktake could replace the need for exercises at the single jurisdiction level. To be successful, major public stocktakes need visible political support, expert taskforces with sufficient independence to be trusted by business, and effective consultation strategies. They are expensive to undertake. Given this, and the fact that businesses care about the

impacts of regulation rather than who is doing the regulating, cross-jurisdictional cooperation on major stocktakes is likely to provide the most cost-effective approach.

Some good design features for public stocktakes are set out in box 4.9.

Box 4.9 Good design features for public stocktakes

Broad stocktakes of regulation are likely to be most effective when:

- they have visible political support and commitment to enact the reforms
- there is an independent chair, and an advisory panel which includes business representatives
- there are effective consultation strategies to engage with business and sufficient time for meaningful engagement
- the supporting secretariat has evaluation skills and subject knowledge. Seconding staff from relevant agencies for the support team has advantages, though it is desirable to forge an independent ‘culture’
- complaints and reform options are systematically tested with policy departments and regulators.
- there is a commitment by government to report on the progress of the recommendations, from response to implementation.

Source: Appendix B.

RECOMMENDATION 4.5

Future regulatory stocktakes by the Australian Government should be able to identify individual jurisdictional, as well as federal and cross-jurisdictional, regulations that are imposing unnecessary burdens. This would require the cooperation of State and Territory governments to facilitate the vetting process and, ultimately, to respond to the review’s recommendations, which should be progressed through COAG’s Business Competition and Regulation Working Group. Where coordinated action is required, the recommendations should help inform the priority-setting processes for the Seamless National Economy agenda.

Principles-based reviews

The Legislative Review Program (LRP) under the National Competition Policy (NCP) was arguably the first application of a guiding principle being used to screen all regulation for potential reform. Importantly, the onus of proof was on those seeking to retain anti-competitive restrictions to demonstrate a net benefit. It is

testimony to the success of this approach that the ‘competition principle’ has since become embedded in the RIS process and most reviews.

While the competition principle itself is a powerful indicator of potential reform gains, there can be other sources of burden. Most jurisdictions applied the principle as a first screen, and followed up on those regulations which had to be terminated or a review undertaken to assess whether retaining the regulation was in the public interest. Regulation that was not anti-competitive could still have been inefficient or not very effective. The Australian Government accordingly used the NCP’s LRP to screen all regulations for other sources of undue burden at the time.

The initial screening for restrictions on competition was followed by assessments to verify that there would be net benefits from specific reform actions. Where the issues were complex, such as where the regulation had aspects that should be retained or the net benefits were in dispute, in-depth reviews were required. These assessed whether restrictions on competition were warranted and whether other less restrictive options would achieve the objectives at a lower cost.

Principles-based reviews are more demanding and resource-intensive than general stocktakes. The LRP demonstrated the enormity of the effort required to undertake such a comprehensive review of regulation across the economy (appendix D). The program ran five years longer than initially envisaged. Resources were often stretched thin and the quality of some of the reviews was inevitably poor. For smaller jurisdictions the gains from some of their review effort may not have justified the costs involved. A few high profile regulations managed to avoid review and/or reform. The NCP included a requirement to review all regulation ten years after the completion of the LRP. Given the widespread adoption of the competition principle, there should be relatively little regulation that has not been subject to a competition test.

The ‘seamless economy’ principle

A current example of a principle-based approach, although applied less comprehensively, is COAG’s SNE reform stream. Areas of regulation are screened to assess whether greater national ‘coherence’ would be beneficial. Based on the principle of subsidiarity, regulation should be undertaken at the ‘lowest’ jurisdiction unless a case can be made that a national approach would provide a net benefit to the whole community. Given the complexity of many of the issues that cut across jurisdictions in applying this principle, as well as the challenge of getting agreement, the process for identifying and prioritising reviews and reforms is crucial (see chapter 6).

Incentives

Reviews motivated by attainment of competition and coherence as key reform principles have been influential in Australia. Reward payments offered by the Australian Government to state and territory governments have been central to encouraging participation in these reform programs. In the case of the NCP, the reward payments created pressure for state and territory agencies to achieve their review and reform targets (PC 2005b). Incentive payments are also a feature of the current COAG SNE reforms.

While payments form one type of incentive, public scrutiny can provide another kind of incentive (or discipline). COAG has committed to independent reporting on the progress and performance of reforms, and to the evaluation of the impacts and benefits of reforms. In part this reporting is required to support the system of reward payments, but such transparency also adds to political and public pressure to progress and complete the reforms.

The COAG approach to reform of regulation under the principle of national coherence has been noted by the OECD as a unique vehicle for achieving reform in a federation. One of the gaps in regulatory policy for most countries with a federal system is achieving cooperation on reform across jurisdictions (OECD 2010f). The experiences with the NCP and COAG SNE have yielded some useful design features for any future cross-jurisdictional principle-based reviews (box 4.10).

Box 4.10 Good design features for principle-based reviews

Cross jurisdictional principle-based reform efforts should have:

- robust screening criteria to identify potential areas for reform and additional criteria to set priorities for review and reform
- transparent processes that utilise business representatives to test and refine priorities
- attention paid to the cost of achieving the reforms, especially for smaller jurisdictions
- attention paid to sequencing of both reviews and reforms
- mechanisms to engage all jurisdictions in reform and ensure political support (reward payments are one mechanism)
- a commitment to report on the progress of reforms, from government responses to recommendations, and implementation.

Source: Appendix D.

The NCP experience and the current review being undertaken of the impacts and benefits of the COAG SNE point to the need to prioritise review and reform efforts. While the NCP was successful overall, resources were stretched, and the quality of some reviews and the subsequent reforms were less than desired. As the SNE experience also attests, attempting to do too much at once can dilute available review resources, reduce scope for effective stakeholder participation, and ultimately compromise the potential for beneficial reforms.

International standards

Several submissions to this study challenged governments to justify applying Australian Standards where there are broadly accepted international standards, given the costs this involves. There may be scope to apply a principles-based approach to identify opportunities for reform where acceptable international standards already exist but differ from the local standards (particularly where there has been Australian input developing these international standards). As Accord (sub. 8) noted in its submission to the study, it:

... has itself embarked on a trade-related project to map how unique Australian requirements are acting as a barrier to trade and the transfer of new technologies into Australia. Much of Australia's regulation of chemicals and plastics is unaligned with that of our major trading partners and these, in essence constitute a 'behind-the-border' barrier to trade. (p. 6)

The Australian Services Roundtable (sub. 9) also sees value in greater use of international standards, recommending:

Greater reliance on international standards over domestically developed rules and standards which have the effect of facilitating international trade and competition, combined with a stronger effort to progress Australian interests in the development of international standards. (p. 2)

Other principles?

Another principle that is worth consideration is whether restrictions on mobility of the factors of production — labour and capital (including intellectual property) — are justified. For example, the mutual recognition of occupational licences between different Australian and international jurisdictions (for example New Zealand) provides a low cost, decentralised way of removing some of the impediments to labour mobility, while allowing jurisdictions to retain a degree of regulatory independence (PC 2009f). Nonetheless, the Commission in its *Annual Review of Regulatory Burdens on Business: Business and Consumer Services* found that duplicate and inconsistent regulations that applied to the recognition of training

(which can also be an impediment to labour mobility) remained difficult to justify (PC 2010h). The Commission (PC 2010d) also found that some provisions in Australia's recent preferential trade agreements (such as intellectual property protections) potentially entail significant costs and risks.

Given the current structural pressures within the Australian economy undue regulatory impediments to adjustment could be particularly costly. (The recent Business Competition and Regulation Working Group consultation paper on the future regulatory reform priorities includes this issue as one of the possible themes for SNE II.)

FINDING 4.12

Based on experience with the NCP's Legislative Review Program and the Seamless National Economy Agenda, principles-based reviews have considerable potential to identify and achieve significant reforms, provided there is effective screening and sequencing.

RECOMMENDATION 4.6

The Australian Government should give consideration to extending principle-based reviews to the following areas:

- *reviewing regulations that avoided review during the National Competition Policy Legislative Review Program, or that were reviewed but retained*
- *applying the principle of accepting recognised international standards unless a case can be made that Australian standards delivers a net benefit to the community*
- *applying the principle of removing restraints on factor mobility unless they can be shown to involve a net benefit to the community.*

Benchmarking

With different jurisdictions following different approaches to common regulatory objectives, benchmarking can potentially provide useful information on comparative performance, leading practices and models for reform.

Benchmarking that ranks jurisdictions or countries can create pressure for reform. The influence of such benchmarking indexes depends on the credibility of the organisation doing the ranking. The World Bank's *Doing Business* reports contain data that enable international comparisons to be made annually across a range of regulatory areas. The OECD also publish several indexes that reflect regulatory restriction on trade and investment (appendix F). The comparison can contribute

the identification of areas where reform might be warranted. For example, the Australian Services Roundtable (sub. 9) observed:

... all of the World Bank *Ease of Doing Business* indicators where Australia falls outside the top 20 should be targets for reform: namely Dealing with Construction Permits, Registering Property, Protecting Investors, Paying Taxes, and Trading Across Borders. (pp. 2–3)

Further investigation will generally be needed, however, as such benchmarking exercises necessarily employ relatively blunt indicators. However, the results can guide the prioritisation of reviews to examine the need for reform in these areas in more depth.

FINDING 4.13

International benchmarking, such as the World Bank's Doing Business report can provide a useful initial guide to areas where more detailed review of regulation is needed.

More targeted benchmarking exercises aim to describe, and if possible measure, the differences in the regulatory approaches to common issues and the outcomes achieved across jurisdictions, normally within a country. This can provide information that feeds into the priorities for reform and the design of reform options. The value of benchmarking depends on what is included in the benchmarks. For example, the comparative compliance cost of a particular type of regulation is not very useful if the outcomes achieved are very different. The most useful benchmarking exercises link the approach to the outcomes achieved, and seek to identify principles and practices that can be applied in other jurisdictions to improve efficiency and effectiveness of regulation (design and administration).

The Commission benchmarking exercises have gone beyond administrative cost outcomes for firms to include substantive compliance costs, distortions and unintended consequences, as well as the desired outcome. The complex nature of the regulations examined mean that only selected impacts of regulation can be quantified, and comparisons are often qualitative in nature. These benchmarking exercises aim to identify leading practices and assess the transferability across jurisdictions, recognising that the regulatory approach is often constrained by the institutional arrangements in a jurisdiction.

FINDING 4.14

Benchmarking across jurisdictions has proven a useful tool in Australia's federal system, by identifying and helping to promote a better understanding of leading regulatory practices.

The Commission’s benchmarking work has been a learning experience, ultimately going well beyond conventional benchmarking practice based on standard cost models or other indicators. These lessons are reflected in the good design features set out in box 4.11.

Box 4.11 Good design features of benchmarking

Benchmarking across jurisdictions should:

- provide quantified indicators of relative performance where possible, including the distribution of business experiences
- where quantifiable indicators are likely to be misleading or expensive to construct, comparative descriptions should be framed to encourage governments to ask “why is it so?”
- use surveys where needed to collect information and impressions on a consistent basis
- seek to improve the consistency of data collection by regulators to enhance the potential use of these data sets for benchmarking purposes
- go beyond comparisons of regulatory provisions, to benchmark differences in the administration and enforcement of regulation (the behaviour of regulators) and to assess the sources of differences
- identify leading practice, where possible including assessing the transferability of the practice across jurisdictions
- not assume common outcomes from a regulation, but test to see if this is the case, and, where not, include outcomes in the benchmarking exercise
- be conducted at arms-length, but build cooperative relationships with the jurisdictions involved.

The resource demands of this type of benchmarking have been significant (akin to a public inquiry), so it is important that areas for benchmarking are carefully selected. Timing is also important if the findings are to be influential in supporting reform as, unlike other reviews, benchmarking studies do not normally make recommendations for reform. Rather, they provide information that can help build momentum for reform, and that can assist in identifying reform options.

In-depth reviews

When it comes to major areas of regulation with wide-ranging effects, for which significant reforms may be required, there is generally no substitute for in-depth reviews. In-depth reviews can confirm the need for reform in an area, and specific

needs within it, particularly where costly ‘cocktails’ of regulations have emerged. Such reviews need to be able to adequately assess the appropriateness, effectiveness and efficiency of regulation — and to do so within a wider policy context, in which other forms of intervention may also be in the mix.

Many in-depth reviews have been influential in driving reform in Australia. For example, Campbell (1981) and Wallis et al. (1997) inquiries transformed the regulatory landscape for the financial system. The Commission has conducted many inquiries with significant regulatory dimensions, with a majority of its recommendations being accepted (appendix C). Most of these reviews have had the advantage that all related regulations could be examined and reforms considered in the wider context of the range of policies involved. For example, the Private Health Insurance Inquiry (IC 1997) recommended a change to the long-standing ‘community rating’ regulation that was accepted and implemented. The recent inquiry into executive remuneration (PC 2010g) resulted in significant regulatory changes to enhance the governance of corporations. The Commission’s study on the not-for-profit sector (PC 2010e) has seen the Australian Government adopt the recommendations for major changes to the Commonwealth regulation of these organisations. This followed a series of studies supporting reform including the Industry Commission’s 1995 report on charities.

But there are less successful examples too. Lack of progress since the Commission’s inquiry into chemicals and plastics (PC 2008c) has been raised by participants in this study. An earlier example of recommended reforms not being accepted was the Broadcasting Inquiry (PC 2000), and a recent one is the removal of the ban on parallel importation of books (PC 2009e). That said, some reports can have ‘shelf life’ (appendix C).

In-depth reviews are generally commissioned where a need for reform in a significant area has been identified, but options need to be developed and the returns to reform better understood. In-depth reviews usually make specific recommendations on the best way forward. These reviews examine whether regulation is an appropriate response as well as seeking to ensure regulation is efficient and effective.

In-depth reviews need to involve extensive consultation and considerable analysis of the issues and the options. They may include benchmarking to assist in identifying what has worked in other jurisdictions, while an ex post evaluation of the current regulation is also undertaken. In-depth reviews may involve surveys to generate new data, and often draw on existing data sources to assist in analysing the issues. But perhaps the most important feature of good in-depth reviews is their transparency. Features such as publication of submissions, public hearings or

meetings and, above all, the publication of a draft report with preliminary findings and recommendations, are all important features. They ensure that all stakeholders can be heard and that the analysis and conclusions can be properly tested. Transparent processes can also help build support for reform.

FINDING 4.15

The more influential and credible reviews of key regulatory areas have involved extensive consultation, including through draft reports, and have been conducted independently. Political commitment and periodic monitoring of implementation are needed to progress the recommended reforms.

Sound governance arrangements for in-depth reviews are critical in delivering robust conclusions and in building support for reforms. Some good design features are provided in box 4.12.

Box 4.12 Good design features of in-depth reviews

- Governments commissioning in-depth reviews should place a premium on independence and transparency:
 - those heading the review should be at arm's length from the relevant policy area and regulator, with no conflicting interests
 - ideally, secretariats should also be separate from the commissioning agency
 - an appropriate mix of skills is required for those involved in the review
 - the review should be announced with a clear timetable, allow adequate time for consultation, and require reports to be made public in a timely way.
- Major stakeholders should have adequate opportunity for involvement. Ideally consultation processes should include:
 - release of terms of reference and information about the review
 - an issues paper and submissions, which are publicly available
 - a draft report, inviting feedback on initial review conclusions.
- Terms of reference should provide adequate direction while not constraining the review in considering relevant issues.
 - The review should be required to give consideration to the regulatory burden in making recommendations.
- The final report should be publicly released and timely responses made. These should be monitored and publicly reported as should implementation of the subsequent reforms.

Given the significant cost of in-depth reviews, as with benchmarking, they need to be directed at areas where the potential gains from reform are likely to be high. This means that while there will always be unanticipated circumstances that demand such reviews — including to avoid reflexive regulatory responses to emerging ‘issues’ — forward planning and prioritisation have important roles to play. The issue of prioritisation is addressed in chapter 6.

4.5 How cost-effective are the approaches?

Getting value for money from efforts to manage and review the stock of regulation requires that each approach be directed to where it can bring the highest returns. Effort includes not just the financial costs to government of undertaking reviews, but the costs to others who contribute, both in terms of time and financial costs. It can also include political capital that might have to be expended to commission the review and have its recommendations implemented.

The costs of the various approaches have varied considerably even within each category. For example, the costs of running a red tape compliance cost assessment in the UK amounted to around £18 million, whereas Victoria avoided any such cost in its own red tape reduction program.

Some approaches involve greater effort than others. For example, while running a sunset program is high effort in total, in terms of effort expended for individual regulations the effort required is relatively low. In-depth reviews, on the other hand, are inherently high effort. Based on the costings and analysis of influence set out in appendixes B to H, figure 4.2 gives a rough indication of how the approaches are likely to fit into an effort-return matrix. The columns are the expected return to the reform effort, while the rows are the cost of undertaking the approach. The assessment applies to approaches for the Australian Government. There may be scope for some approaches to work better in other countries. In many ways this depends on where a jurisdiction is at in terms of addressing the burdens in the stock of regulation, including the quality of the flow management processes.

The *high effort-low return* quadrant should normally be avoided. This category could include major red tape costing exercises, stocktakes that are too close together and, unless carefully undertaken, risky approaches such as regulatory budgets. On face value, ‘one-in one-out’ rules appear easy to implement, but a crude quantitative rule is unlikely to provide much benefit, and sophisticated approaches more akin to a regulatory budget would be required. However, a more flexible stock-flow linkage rule that encourages consideration of streamlining, reducing overlap, and other

offsets) would be relatively low cost and could be effective in prompting agencies to seek ways of improving the stock.

Figure 4.2 Approaches to managing and reviewing the stock of regulation

An effort-impact matrix (for individual areas of regulation)

	Potentially low return	Potentially high return
High effort	<ul style="list-style-type: none"> ➤ Broad redtape cost estimation ➤ Regulatory budgets and one-in one-out^a ➤ Frequent stocktakes 	<ul style="list-style-type: none"> ➤ In-depth reviews ➤ Embedded statutory reviews ➤ Benchmarking ➤ Packaged sunset reviews
Low effort	<ul style="list-style-type: none"> ➤ Sunsetting ➤ Regulator stock management ➤ Red tape targets^b ➤ RIS stock-flow link 	<ul style="list-style-type: none"> ➤ Known high cost areas and known solutions from past reviews ➤ Regulator management strategies where weak in the past ➤ Periodic stocktakes

^a High effort to do well and potential for perverse impacts. ^b Where the awareness of compliance burdens is still lacking can be high return.

In the *low effort-low return* quadrant, there are a number of approaches that can deliver on-going improvement. This does not mean that these approaches are not warranted — rather, that to ensure that effort is proportionate to return, these should be business-as-usual activities. For regulator-based reforms and red tape targets, the challenge is to undertake these as efficiently as possible, given that the returns per regulation are relatively low (unless little has been done to limit the burden of regulation). The routine or ‘housekeeping’ element of sunsetting could be categorised here where regulations are allowed to lapse after an initial screening.

Ideally, most of the reforms in the *low effort-high return* quadrant would have been achieved. But there may be proposals ‘on the shelf’, where the review work has been done, but recommendations are yet to be implemented. In some such cases, the political ‘effort’ required to implement the reform may be high. This low effort-high return quadrant may also have reforms that have yet to be completed. A common opinion expressed in consultations was that finishing the current COAG agenda should take precedence over embarking on new areas of regulation reform. There may also be low cost approaches that regulators can take which deliver much lower compliance costs and reduce distortions. In addition, stocktakes may also turn up some unexpected alternatives facilitated by changing technology, market structure

and preferences. These provide a set of ‘must do’ type reforms that should be relatively easy to implement.

The *high effort-high return* quadrant is where prioritisation of necessary review and reform activities is most important. Statutory reviews, systemic reviews for sunseting regulation that needs to be remade, other in-depth reviews and benchmarking all should provide a thorough analysis of the costs of regulation and options for reform.

Governments will clearly continue to need a mix of tools in order to minimise regulatory burdens while achieving the benefits of regulation. A good regulatory system should apply the right tools in the right places and at the right times (chapter 6). But any overall regulatory system will be better for all tools being applied in the most cost-effective way, using the good design features that have emerged as lessons from past experience (as set out above for each approach).

The review tools described in this chapter draw on evaluation methods to analyse problems and to evaluate the options for reform. The next chapter looks at the range of evaluation methods and how they are best used.

5 Evaluation methods

Key points

- Ex post evaluation of regulation and regulatory reforms is an essential part of assessing the value added by regulatory processes.
- Most evaluation methods collect evidence to assess the causal links between the regulatory (or policy) changes and the target outcomes.
 - These include performance measurement, impact assessment and cost-benefit analysis.
 - Process audits assess the achievement of the processes set out in the reform program.
- A number of countries have recently introduced programs of ex post evaluation of new regulation and regulatory reform.
 - In Australia, sunset provisions for subordinate legislation could encourage more systemic evaluation efforts. The Council of Australian Governments has also established a system of process reviews and an impact assessment of regulation reforms under its Seamless National Economy stream.
- Ex post evaluations should: report on change relative to a counterfactual; be proportionate to the expected value of the information generated by the evaluation; be explicit about what is being evaluated (noting any significant gaps in coverage) and the underlying assumptions; and apply a 'benefit-cost' or 'results-based' framework.
- Quantification of the impacts of regulation reform brings additional rigour to ex post evaluation, and can provide better insights about net outcomes. However, not all outcomes may be able to be quantified.
 - Different quantitative evaluation methods are designed to estimate different types of reform outcomes.
- Greater attention needs to be paid to the assessment of the impact of regulation on risk. This can be difficult. But whether a regulation has actually reduced risk and not simply transferred the risk exposure (or created new risks) should be tested.

Chapters 3 and 4 described a number of approaches to reviewing and reforming the stock of regulation. To use these approaches, it is necessary to evaluate the effects of regulations and of any reform. There are a number of approaches and tools that can be used. At the most basic level, process audits assess whether the proposed regulatory change has been implemented. Performance measurement usually aims to establish whether a regulatory initiative has met its objectives ('effectiveness'). It may also assess whether the approach is undertaken at least cost ('efficiency'). At the broadest level, impact assessment reports on the outcomes of a regulatory change, including unintended impacts. Cost-benefit analysis quantifies the costs and benefits to answer the question of whether, once all the impacts are taken into account, the change added to, or detracted from, community wellbeing ('appropriateness'). With the exception of process audits, all these approaches sit within a broad benefit-cost (summative) evaluation framework.

The terms of reference for this study specifically asked the Commission to assess methods and approaches for evaluating regulation *reforms*. A focus on evaluating reform outcomes is important not only in its own right, to determine the extent to which desired outcomes were achieved, but also to help garner or maintain support for further necessary reforms. This type of evaluation requires the application of a broad benefit-cost evaluation framework. However, the methods relevant to evaluating *reforms* are essentially the same methods used to evaluate regulations generally, or indeed to evaluate regulatory *proposals*. Many of the review approaches discussed in the preceding chapters make use of some of the evaluation methods discussed in this chapter. In practice, there appears to have been more reliance on qualitative than quantitative methods.

Section 5.1 notes the role of evaluation in the regulatory system. Drawing mainly on appendix I, section 5.2 describes the methods and approaches that have been applied to undertaking evaluations of regulation reforms. Section 5.3, which summarises appendix J, focuses on quantitative methods of evaluation, and determines the most suitable approach given the nature of the reforms being evaluated.

5.1 The role of evaluation

Evaluation of regulation and reforms can be undertaken before a regulatory change has been implemented (ex ante evaluation), or after it is in place (ex post evaluation). The key difference is that ex ante evaluation is based on an estimate of the potential effects of a reform (taking into account the probability of the reform being implemented as intended), whereas ex post evaluations are based on observed impacts.

While there is a strong rationale for applying the results from previous ex post evaluations and for undertaking evaluations throughout the regulatory cycle (chapter 6), this does not mean that evaluations should always happen (nor that they are necessarily useful when they do). Evaluations are not costless, results can be difficult to interpret and, if not undertaken well, can be misleading. Ensuring the right type of evaluation is applied consistently and at the right time is crucial.

Internationally, evaluations of regulations have not been undertaken on a systematic basis, and rarely occur for regulatory reforms as such. (Systematic evaluation of expenditure programs is more common, but still not widespread.) Moreover, where evaluations have been undertaken, many have not been very influential. However, some governments are moving to strengthen the role of evaluation in their regulatory systems (box 5.1).

In Australia, ex post evaluations of regulations and reforms have tended to be undertaken on an ad hoc basis as part of more in-depth reviews, rather than as an automatic part of the regulatory cycle. A key exception is National Competition Policy (NCP), where the Commission was asked to evaluate these reform impacts.

There has been a move toward more systematic evaluations of expenditure programs in the Australian Government. Ex post reviews of regulation are a natural complement to this. The Council of Australian Governments (COAG) reform agenda includes systematic performance measurement and impact assessment, including a review of the impacts of the Seamless National Economy (SNE) regulation reforms (PC 2010b). At the Australian Government level, the introduction of sunseting could see the scope of ex post evaluations widened if agencies plan systemic reviews of related regulation in preparation for managing the sunset of their subordinate regulation.

A recent focus of the Organisation for Economic Cooperation and Development (OECD) has been on evaluation of regulatory processes. Here the question is the extent to which good regulatory processes such as a regulation impact statement (RIS) for new regulation, and the various approaches for reforming the stock of regulation, reduce the regulatory burden, enhance the effectiveness, and/or the overall appropriateness of the regulatory stock.

Box 5.1 International experience of ex post evaluation

An Organisation for Economic Cooperation and Development (OECD 2010f) review of regulatory systems in a number of countries concluded:

Ex post evaluation — whether of individual regulations, regulatory processes, or regulatory frameworks — is a near universal weakness. No country is strong in all aspects of regulatory management across the cycle. (p. 50)

Canada

The Canadian Government explicitly requires evaluations of both the stock and flow of regulation in its 2007 *Cabinet Directive on Streamlining Regulation* (CDSR). In addition, rolling five year evaluation plans are required (TBCS 2009a)

United States

Greenstone (2009) suggested that ex post evaluation of regulations is seldom undertaken in the United States. Hahn and Tetlock (2008) found ‘little evidence’ that evaluations of regulatory decisions over a number of decades had had a ‘substantial positive impact’. However, in 2011, the Obama administration made Executive Orders requiring federal and independent regulatory agencies to undertake retrospective reviews of existing regulations. (Obama 2011a,b)

United Kingdom

The United Kingdom National Audit Office (NAO 2010b) stated:

In 2007 we reported that there continued to be an unstructured and ad hoc approach to post implementation review across all departments. Since then, we have found greater numbers of Impact Assessments include a statement of when a review should be conducted, although relatively few have been carried out to date. (p. 9)

In addition, sunset clauses and the ‘one-in, one-out’ rule appear to have provided incentives for evaluations.

European Union

Although there are requirements that regulations be subject to interim and/or ex post evaluations, the scope of the evaluations has been described as limited to ‘outputs and internal efficiency, and not results’ (Rambøll Management/Euréval/Matrix 2009, vol. I, p. vi). Furthermore, evaluations ‘are less influential in the setting of political priorities or choosing between different options *per se*’ (EC 2005b, p. ii), and are used more for fine-tuning. However, the European Commission has ‘started to systematically evaluate existing legislation ex post, indicating that all major existing policy instruments, whether expenditure programmes or regulatory measures should be evaluated on a regular basis’. (EU 2010, p. 124)

Source: Appendix K.

There is growing evidence that a robust RIS process can deliver considerable savings through better quality regulation. For example, the Victorian Competition and Efficiency Commission (VCEC 2010) estimated savings in the costs of regulation achieved through their RIS and business impact assessment processes were substantial:

... on average, for every dollar spent on these processes, gross savings of between \$28 and \$56 are identified' (p. VII).

In their 2010-11 annual report, VCEC (2011c) reported that quantifiable benefits of new and amended regulation (\$1 814 million) outweighed its costs (\$1 052 million). However, the cost of sunseting regulation was reported as \$25 million compared with a quantified benefit of \$2 million.

Where evaluations are undertaken, the total impact of new regulations and reforms can be estimated. For example, in the United States the Office of Management and Budget (OMB) provides Congress annually with an estimate of the expected costs and benefits of all new 'significant' regulation passed in the previous year. In its 2011 report, OMB (2011) stated:

The estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2000, to September 30, 2010, for which agencies estimated and monetized both benefits and costs, are in the aggregate between \$132 billion and \$655 billion, while the estimated annual costs are in the aggregate between \$44 billion and \$62 billion. (p. 3)

Evaluation of the impacts of various regulatory reforms is a key part of assessing the performance of the stock management parts of the regulatory system. Targeting ex post evaluation to where it provides the greatest information for improving the stock of regulation contributes to a more efficient and effective regulatory system.

5.2 Ex post evaluation methods

Evaluations can cover some or all of a range of impacts

Most evaluation methods seek to test the causal relationships between the changes induced by a regulation and the outcomes that the regulation aimed to achieve. To do this, they gather evidence on the changes in inputs, outputs, outcomes, impacts and overall community wellbeing that result from, or are part of, the reform (box 5.2).

Box 5.2 The effects of regulations and reforms: some definitions

Inputs — the effort required to develop, design and implement the reform, as well as the effort required to enforce and ‘fine tune’ regulations.

Outputs — a direct consequence of inputs to a reform that can have several levels, including:

1. The legislation (or its removal), and the systems and processes put in place to administer the regulation — direct consequences of the inputs
2. The change in behaviour of businesses or others in response to the new regulation.

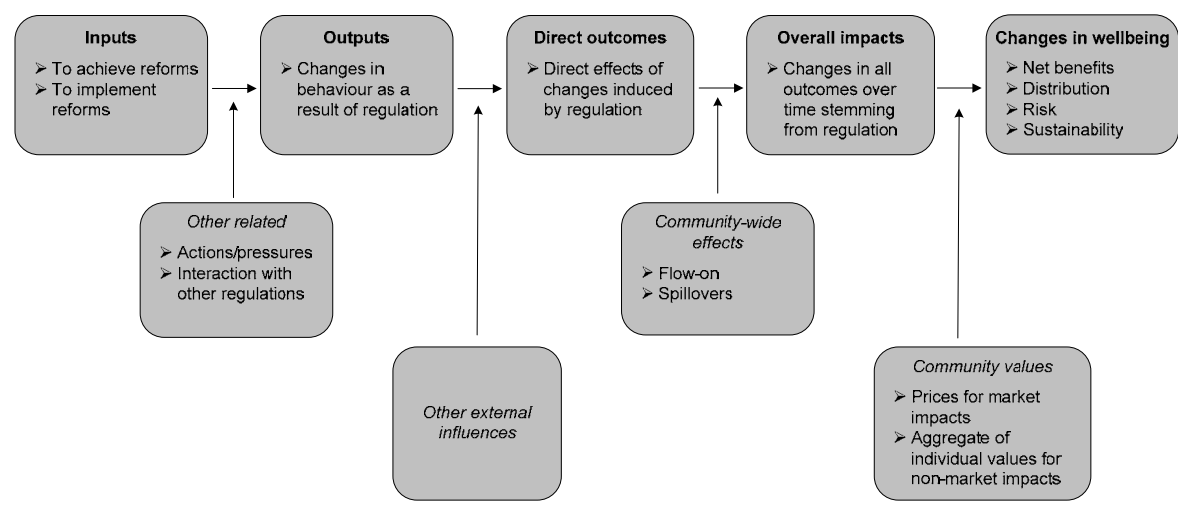
Direct outcomes — the direct consequences of the changes in the behaviour of businesses or other directly affected entities. They include adjustment costs, changes in compliance costs, prices, production processes allowed, and market access for businesses and regulators that are directly affected. These outcomes are usually intended, but there can be unintended direct outcomes. While direct outcomes depend on the outputs, they also can vary with the external environment.

Overall impacts — the full set of changes, including ‘community-wide’ effects, once the flow-on and spillover effects are taken into account. Flow-on effects arise as resources are reallocated through the economy in response to changes in demand and supply (comparative static effects), and as reforms affect investment decisions and innovation (dynamic effects). Spillover effects include any other type of change (intended or otherwise) that results from the direct outcomes. Overall impacts are the time series of changes in outcomes, and reflect both the magnitude and distribution of the changes.

Changes in community wellbeing represent the final cumulative effect of the reform on the community’s wellbeing. To the extent to which the people in a community care about the distribution of change across time and/or across different groups in the community, these dimensions of the impacts have an additional effect on community wellbeing. If all the impacts are economic in nature, they can be expressed in dollar terms and ‘added-up’ to estimate the net benefit, providing a single measure of the change in wellbeing resulting from the reform. But if some changes are in the natural environment, or in social outcomes (including distribution), it is more difficult to assign monetary values to these impacts (appendix J). Hence many evaluations do not take the extra step of assigning relative values in order to move from an impact analysis to a cost-benefit analysis.

Figure 5.1 sets out a framework based on these relationships. The evaluation task usually becomes increasingly complex as the assessment moves from the input-output end of the spectrum to the net effect of the impacts on community wellbeing. This is in part because external factors play an increasingly greater role along this assessment spectrum making attribution of change to the reform more difficult. The relationships also become more complex, and unintended outcomes are more likely to arise.

Figure 5.1 The broad evaluation framework



If the impacts have not happened as expected, it is usually for one of three reasons:

- the reform was not fully implemented as designed
- the reform may have been based on a false premise – the theoretical relationships on which the reform was designed was not applicable for achieving the objectives of the reform
- changes in the external environment could have occurred that undermined the effectiveness of the reform. That is, the assumptions about the external environment required for the theoretical relationships to hold were not fulfilled.

Process audits assess the first of these reasons, which is only the first step in assessing why a reform was successful. Performance measurement assesses whether the intended outcomes have arisen, but cannot test whether this is causally related to the reform. Evaluation methods should test the theoretical relationships on which the reform was based against the evidence. Hence they are both diagnostic and predictive, that is, they are useful for identifying why the reform was successful or why it was not, and for informing how other changes are likely to affect the outcomes of interest. For these reasons any good review of regulation is an evaluation, even if the review does not follow a formal evaluation methodology.

Evaluations can be qualitative as well as quantitative

Both quantitative and qualitative approaches can be applied to testing the underlying theoretical relationships on which a reform is based. They also provide evidence for reporting on the outputs, outcomes and impacts of regulations and reforms. Most in-depth reviews use both quantitative and qualitative evidence.

Quantitative methods

There are three broad types of quantitative evaluation — performance measurement, impact assessment and cost-benefit analysis.

The simplest of these is *performance measurement*, where the results of a reform are measured relative to a target. Performance measurement approaches only report on selected outcomes — usually those being sought by the government, but occasionally also unintended but possible outcomes are monitored. Performance measures tend to focus on direct outcomes, where the line of causality running from the policy change to the outcome is well accepted.

The choice of indicator is critical in determining how useful performance measurement is in assessing whether the reform objectives are being achieved. Proxy measures are used where the objective is difficult to measure, for example a change in the number of reported break and enters can be a proxy for levels of crime that result from increased police patrols. Care is needed when using proxy measures if there are changes in the external environment that might affect the measure. In the example provided above, if a hot line was also set up that improved the reporting of break and enter, the proxy measure may understate the effectiveness of the increased patrols. Care is also needed in setting the target for a performance measure as the ‘without’ reform scenario need not be ‘no change’. For example, crime could have been trending down anyway. Performance measures should be independently verifiable, meaningful and understandable. They also need to be timely and cost-effective (TBCS 2009b).

An important example of performance measurement is the monitoring and evaluation of the COAG reform agenda by the COAG Reform Council (CRC) (box 5.3). The CRC monitors, assesses and publicly reports on the performance of the Australian, state and territory governments in achieving the outcomes and performance benchmarks specified in the six National Agreements. In addition, for the six National Partnerships with reward payments, the CRC provides COAG with an independent assessment of whether predetermined performance benchmarks have been achieved prior to reward payments being made.

The COAG reporting exercise demonstrates the use of qualitative as well as quantitative application of performance measurement. The CRC’s reporting for the Seamless National Economy reform agenda is limited to process indicators. It tracks progress in achieving the intended reforms rather than the impacts of the reforms.

Box 5.3 Performance indicators for the COAG reform agenda

The COAG Reform Council (CRC) monitors and reports on milestones for progress of governments for the COAG reform agenda. Each National Partnership is underpinned by an implementation plan which articulates the outcomes sought in each reform area and, where possible, identifies key milestones for jurisdictions. The CRC's assessment of performance is evidence-based and draws on a range of inputs, including:

- detailed progress reports and formal comments provided by jurisdictions
- additional information from jurisdictions requested to assist the assessment process (such information is treated as an addendum to jurisdictional progress reports)
- independent research on legislative and regulatory activities of governments, based on publicly available information.

Results are reported in summary form, using a 'traffic light' representation of progress against milestones. Where a reform stream has more than one milestone and the CRC's findings result in different ratings being applied to the individual milestones, the overall summary rating is determined by giving greater weight to milestones requiring more substantive reform action. Where this is the case, the basis for its weighting of the milestones is provided.

Source: CRC (2010).

Impact assessment approaches seek to identify the full range of impacts, although often only some types of impacts are amenable to quantitative analysis. Impact assessment can include evaluation of the distributional effects of regulations and reforms. An impact assessment may provide snapshots of the impacts at points in time rather than providing a time series of impacts. The Commission's analysis of the impacts of NCP is one example of this approach. The Commission evaluated the change in economic activity once the full effects of the NCP reforms had worked through the economy. It also estimated the distribution of the change in household income and regional economic activity (PC 2005b). The current study on impacts and benefits of the COAG reform agenda is using an impact assessment approach (PC 2010b).

Cost-benefit analysis (CBA) is the most demanding of the quantitative evaluation methods, and for that reason is less commonly undertaken in full. It requires estimation of the flow of both costs and benefits that result from a reform. This involves identifying the time series of impacts, and converting them into a common metric (generally dollars) that is discounted to express the 'net present value' of the outcomes over time.

CBA is most commonly applied for major expenditure programs, where both the benefits and costs are expressed in monetary terms. CBA is usually applied *ex ante*, to identify the best option where the flows of benefits and costs vary across options.

CBA also enables comparisons, based on discounting, where the impacts occur over various periods. The choice of discount rate can be critical for long periods, such as estimating the impact of climate change policy (Stern 2006; Baker et al. 2008; Harrison 2010). CBA can be applied where reforms have non-market effects, but could need to use methods such as contingent valuation and choice modelling to put monetary values on these types of non-market outcomes (appendix J).

The results of the different types of evaluations can be presented using various summary measures, depending on which effects are being evaluated (box 5.4).

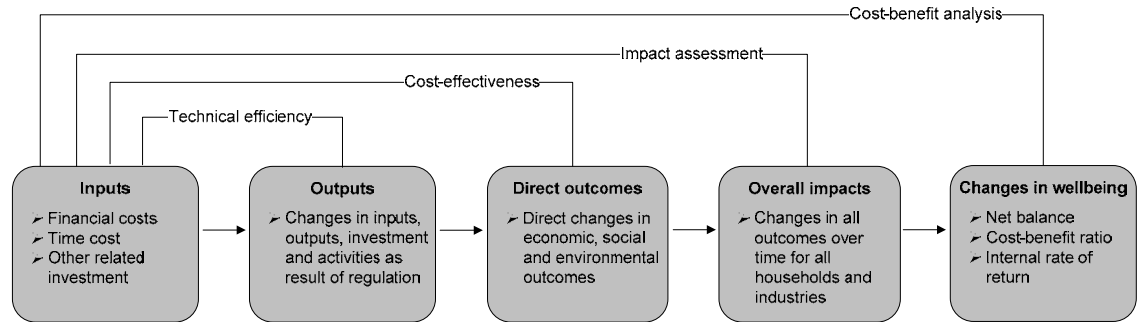
Box 5.4 Summary measures of the effects of reforms

The effects of reforms can be presented using a variety of summary measures:

- technical efficiency — which measures the relationship between inputs and outputs
- cost-effectiveness — which measures the relationship between inputs and outcomes (usually only intended outcomes)
- impact assessment — which lists the full set of outcomes, intended and unintended, including the input costs to identify the ‘net balance’
- cost-benefit analysis — which expresses all impacts in a common metric and time period to be able to ‘add-up’ the impacts to estimate the net benefit, or to express the benefits as a ratio of the costs of undertaking the reform.

The figure below applies these measures to the framework set out in figure 5.1.

Some evaluation summary measures



Qualitative methods

Qualitative evidence typically comes from consultations where respondents provide ‘narratives’ about their experiences. For example, in submissions to this study, a number of narratives are provided about the burdens of the current regime for regulating chemicals and plastics (CropLife Australia, sub. 3; Accord Australia,

sub. 8). Case studies and perceptions surveys are good sources of qualitative evidence, as are examples gathered through consultative processes. For example, the Commission's inquiry process is designed to harness narrative evidence through consultations, submissions, roundtables, and public hearings.

'Perceptions surveys' can also be used to capture the assessment of business about changes that result from a reform. For example, the Australian Industry Group (AIG) recently conducted a survey of its members on their perceptions of the level of red tape and other regulatory burdens (AIG 2011). This type of information is subjective, reflecting the views and opinions of the respondents — although often presented in quantitative terms (such as shares of respondents agreeing with a statement). The framing and sample selection of such surveys need to be assessed to understand any likely bias in the responses.

Good qualitative evaluation methods seek alternative viewpoints, using 'triangulation' methods to test the robustness of the evidence from different sources. For example, case studies should be chosen that would identify differences in impacts, while consultations should cover the full range of major stakeholders.

Evaluation that focuses on processes is inherently qualitative (although often objective) in nature, even if assessments of process are reduced to numerical indicators. Process audits (formative evaluations) are commonly undertaken for both regulation and expenditure programs during their implementation. These are often conducted internally by agencies, but can also be external audits. In the Australian Government case, the Australian National Audit Office (ANAO) undertake process audits and performance audits. Performance audits expand the scope of process audits to consider the achievement of the policy or program objectives or intent as well as the achievement of process. The CRC reporting of the SNE is effectively a process audit.

FINDING 5.1

Regardless of the method used, a good evaluation will seek to assess change against a counterfactual, look for confirming evidence from multiple sources (triangulation) particularly when relying on subjective evidence, and report on the confidence in the findings made by the evaluation.

Essential features of robust evaluation

Regardless of the method of ex post evaluation chosen and whether it is qualitative or quantitative, there are some features that lead to more robust evaluation. Two that are particularly important are evaluation against a 'counterfactual' and 'sensitivity

analysis'. These are described below. (More detail is provided in appendixes I and J.)

Change should be reported against the 'counterfactual'

When either quantitative or qualitative approaches to evaluation are used, the evidence of costs and benefits should be presented in terms of the change relative to what otherwise would have happened in the absence of the reform. This is known as the 'counterfactual'. Defining a counterfactual is challenging, but failure to report changes against it can lead to the net impact of the reform being under- or overstated.

There are several ways to define a counterfactual, including:

- 'natural experiments' where some jurisdictions implement a reform and others do not
- before and after evidence — this involves looking for the change in the outcomes of interest before and after the reform, but assumes 'no change' in the trend
- deviation from historical trend — where the baseline is projected based on historical trends where the changes in other 'exogenous' variables remain the constant
- deviation from baseline — where the baseline is adjusted for changes in other variables that also influence the outcomes of interest.

Changes from a counterfactual can be measured in quantitative terms or described in qualitative terms. The important thing is that observed change is not just attributed to the reform: careful consideration of what would have happened in the absence of the reform is essential.

Performance measures report on change from a baseline through the choice of the target. If, for example, the trend is for improvements in the absence of the reform, the target will need to be higher than this underlying trend to be meaningful. Where an outcome is deteriorating, the most appropriate target may well be lower than the current level if the policy cannot completely reverse this trend. This can be difficult to explain if the trends are not well known.

Quantitative evaluation methods use statistical and modelling tools to explicitly define the counterfactual. But even qualitative methods can apply the concept. For example, in 'most significant change' methodology the questions are framed to compare actual experience against a 'without reform' scenario (appendix J).

Despite the importance of reporting changes relative to a counterfactual, it is not common for policy evaluations to do so. For example, the EC (2006) review of a large number of cost-effectiveness evaluations of expenditure programs noted that only one established a counterfactual — most just focused on program expenditure and intended outcomes, and ignored other costs and benefits.

Sensitivity analysis – reporting confidence in the assessment

Evaluations should provide an assessment of the confidence that can be attached to the evidence presented. Quantitative evaluations can use statistical methods such as confidence intervals or other forms of sensitivity analysis. This can include testing the validity of the evaluation approach (for example, testing the assumptions that underpin economic modelling frameworks).

‘Triangulation’ is often applied to qualitative evidence. This method of testing the robustness of the evidence relies on obtaining different perspectives. For example, a business will have its own perspective of the impacts of a regulation reform while the firm’s workers and customers may have different views. An industry representative may have a wider perspective, as may experts in the field. If all concur on the conclusions drawn from their different perspectives, then this strengthens the confidence in these conclusions. Methods, such as the Delphi method (appendix I), can also be applied to find common ground.

FINDING 5.2

Evaluations of regulations and regulatory reforms generally need to draw on both qualitative and quantitative methods. The selection of these should be determined by their ‘fitness for purpose’, relating to the nature of the task and access to data. Quantitative methods are desirable where practicable and could be more widely used. Partial quantification can often be better than none, but should be supported with qualitative evidence

Choosing the right evaluation method

Embedding evaluation in the regulatory cycle is integral to good regulatory practice. In order to gain the greatest benefit from evaluation, it is important to choose the right approach to evaluation. This will depend on the nature of the reform and the circumstances of the evaluation. Each approach and measure has strengths and limitations, and there is no ‘gold standard’ that is the best in all situations. So how should the choice be made?

One important selection principle is ‘proportionality’. Evaluation effort should be determined by the expected value of: contribution the information makes to improve regulation; lessons the evaluation provides for future reform efforts; and incentives created by the publication of evaluation findings. The European Union (EU) includes the proportionality principle in its evaluation guidelines. It is embedded in legislation that requires evaluations be undertaken such that:

... the *scope, frequency and timing* of evaluations should be adapted to *decision-making needs* and to the *life cycle and nature* of each activity, as well as to the *resources* available. (EC 2004, p. 16).

In considering how ex post evaluation methods can be best matched to the application, important questions include:

- what impacts are to be assessed, including over what time period?
- how is the evidence to be collected, verified and analysed?
- how is the information generated in the evaluation to be communicated?

Deciding which impacts to include in an evaluation

As discussed in chapter 2, regulation reforms can have several types of impacts, including direct effects, spillover effects and unintended consequences (box 5.5). Reforms can change both the sources and the magnitude of the costs and benefits of regulations. Reforms can also change the distribution of costs and benefits — who faces which types of costs, and who benefits. These costs and benefits may be economic in nature, or may include non-market outcomes such as change in the quality of the natural environment. Other aspects of changes that may impact on individual, and hence community welfare, include changes in the exposure to risk and changes in expectations about the future.

Regulation is often a response to a perceived risk. But a single observed event does not provide any information about the probability of the event occurring again. The ex ante analysis needs to estimate both the probability of the ‘event’ (if it occurs) and the consequences. Regulation may be targeted at reducing the probability of the event, mitigating the consequences, or both. Hence the impact of the regulation aimed at reducing risk comes from fewer events and/or lower costs associated with events.

Box 5.5 Impacts of regulation reforms

The impacts of regulation reforms could potentially include:

- *direct effects* of reforms on target groups which induce a change in behaviour. This includes:
 - lower fees for business from savings in the administration costs of regulators, or lower costs to government where administration costs are not passed on in fees
 - savings in administrative activities and hence costs arising from lower compliance requirements
 - reductions in the need for training staff and investments to remain compliant
- *dynamic effects* of reforms on target groups arising from changes in incentives that influence investment and innovation
- *flow-on effects* to other industries and groups as relative prices and opportunities change, which lead to changes in the distribution of resources (such as labour and capital) through the economy. These indirect effects are a consequence of the direct and dynamic changes induced by the reform, and may be intended or unintended
- ‘*spillover*’ effects — other effects, direct and indirect (positive or negative), that are usually unintended.

These impacts are generally long lasting, although they may also take some time to become manifest. There may also be some temporary impacts including:

- the costs to government and business of implementing the reform
- adjustment costs — these are transitional effects that arise as part of the process of change that is induced by reforms, such as underemployed resources.

Impact assessment seeks to identify and quantify the full range of outcomes that arise over time in response to the reform to facilitate the comparison of the positive and negative effects on the community. Where the distribution of impacts, positive and negative, is not evenly spread across the community, impact assessment should include the distributional dimension. This may be limited to identifying the impacts on specific groups in the community, usually those who face disadvantage and so would benefit most from improvements and suffer most from costs. Similarly, if the impacts vary considerably across time or persist over time, impact assessment should report the time dimension.

If events are rare (such as terrorist attacks) it can be difficult to assess whether a regulation has had the desired deterrent effect. In such cases the evaluation may examine changes in ‘leading indicators’ or ‘precursor indicators’ to assess whether the regulation has been effective. However, as with other proxy indicators care is needed to ensure they are not subject to external influences.

Evaluating the impact of regulations on risk is often difficult, but given that risk reduction is so often the motivating factor for regulation, it is essential that more

regulations are evaluated to see if they did in fact reduce risk, and to measure the costs of achieving this. These costs will not always be economic (for example, the expenditure on enforcement), but can include costs to individual privacy, choice and control, and in some cases even higher levels of risk in other areas. Such risk-risk trade-offs are often ignored in policies that seek to constrain behaviour, or distort perceptions of risk (Graham and Weiner 1995).

FINDING 5.3

The assessment of risk and the impacts of regulation on risk is essential to good policy. Lack of evaluation of the impacts of regulation on risk means there has been little evidence on which to base sound regulatory design.

Whether a reform is worthwhile depends on the balance of the costs and benefits. A full evaluation will seek to report evidence to confirm (or deny) the all potential costs and benefits that theory and ‘feelings’ suggest might result from the reform. However, given the difficulty of undertaking a full impact assessment, most evaluations report on only a subset of the potential impacts. The decision about what types of impacts to evaluate should be guided by the principle of proportionality. It could take into account factors such as:

- the objective of the evaluation (what it is trying to discover) — for example, there could be a particular interest in the effects of a reform on business compliance costs, or on the environmental impacts of a reform
- the scope of the regulation or reform — reforms with relatively narrow (or shallow) impacts might only justify a simple evaluation, particularly if theory suggests that some of the potential impacts (such as the flow-on and spillover effects) are likely to be very small and in any case unlikely to be observable.

Where some impacts are unambiguously positive, but require further effort to estimate — the evaluation could report a lower bound estimate of the benefits of reform and include a qualitative identification of such benefits that have not been included. For example, a reduction in compliance costs for businesses is unlikely to have a net negative flow-on effect. Moreover, while evaluating the distribution of these gains could be of interest, it would not always be warranted.

Collecting and analysing the evidence

A second important consideration in choosing the right approach to a particular evaluation is the availability of evidence. Each approach has different requirements, and the availability of data and other sources of evidence limit the analytical tools that can be employed.

For this reason, the regulation-making process for regulations thought to have a major impact, should include planning for data collection so that the information is available for the evaluation. For example, statutory reviews should identify the data needed to undertake the evaluation required by the legislation. If an evaluation has to rely on secondary data, this may limit the scope of the approach.

As discussed, qualitative evidence is more robust when the full range of stakeholders affected by the reform are consulted. Evaluators of reforms may find that stakeholders, having achieved the reform, have moved on and so are less interested in reporting on the changes. It can also be difficult for businesses to make ‘before and after’ comparisons (appendix J).

Matching the evaluation method to the requirements

Table 5.1 sets out the main evaluation approaches, indicating how well they are suited for different applications in terms of the impacts covered, the evidence and analysis required, and the purpose of the evaluation. Choice of an appropriate method for evaluation largely depends on the nature of the reform and the purpose of the evaluation.

Presenting the findings

The way the results of evaluation are presented, as well as the quality of the evaluation, affect how useful they are, such as in setting regulatory reform priorities. The European Commission (EC 2007) has suggested that:

The information needs to be politically relevant, concise and easily comprehensible. Evaluation functions should therefore promote the use of evaluation decision-making by ensuring that policy implications and lessons learnt from (and across) evaluations are synthesised and appropriately disseminated. (p. 11)

A comprehensive evaluation report would:

- describe the reform being evaluated, including the timetable followed, agencies involved and others affected by the reform
- identify the expected impacts of the reform, including the causal sequence from inputs to impacts (this should have been set out in the regulation impact statement (RIS) for the reform if associated with new legislation, or in the review that underpinned the reform)
- set out how evidence on the impacts of the reform was collected, including the parties consulted, and other sources of data and information

Table 5.1 Matching evaluation approaches to requirements

<i>Evaluation approach</i>	<i>Uses</i>	<i>Purpose of evaluation</i>	<i>Evidence needed</i>
Process audits	Reporting on implementation progress, adoption of good practice and continuous improvement	Efficiency at process level	Only to the extent to which process guarantees an outcome
Performance audits	As for process audits, but wider scope to identify strengths and weaknesses	Efficiency (potentially effectiveness)	Can include performance indicators of target outcomes
Performance measurement	Monitoring and reporting on achievement of objectives	Effectiveness assessment	Measures of indicators relative to target
<i>Impact assessments</i>			
Compliance cost calculators	Evaluating regulations that largely change administrative costs	Lists subset of benefits and costs	Changes in paperwork time, training, investments in systems etc.
Partial equilibrium	Evaluating regulations that directly affect incentives or relative prices, or other outcomes	Lists benefits and costs	Direct changes in decisions about production, consumption, investment etc.
General equilibrium	Evaluating regulations that affect incentives or relative prices and the distribution across the economy	Lists benefits and costs	Direct and flow-on changes in decisions about production, consumption, investment etc.
Cost-benefit analysis	Evaluating regulations and reforms that have large costs and benefits. Ex ante evaluations feed into decision making processes. Ex post evaluations identify what works and why.	Net return on reform — appropriateness	As above plus the values the community places on the various impacts

- present the analysis of the impacts of the reform in a clear and concise manner, explaining the assumptions made to undertake the analysis (including the counterfactual) and draw conclusions about the overall impact of the reform using appropriate summary measures
- discuss the confidence in the evidence and the conclusions drawn about the impact of the reform
- draw out any lessons from the analysis about how to improve the effectiveness of future reforms (or fix problems with the regulation being evaluated), and how to improve future evaluations.

The level of detail in each of these categories would depend on the audience for the report. Technical detail on the analytical approach and the assumptions that underlie it are needed for the experts in the policy agencies, but would not be included in a report prepared for general public information. However, the availability of this level of detail on request is important to ensure that the evaluation can be scrutinised by those with expertise in the area.

Performance measurement reports should set out the indicators and report on each relative to the target. They may also provide an overall summary of achievement based on a scoring-type system, that aggregates up the performance. For example, management consulting has come up with a number of different ways to report performance measures, such as ‘balanced score cards’, ‘goal attainment scores’ and ‘traffic light’ approaches. However, such scoring systems should be applied with caution, particularly where the different components are ‘weighted’ to provide a single overall measure of performance (appendix I).

Process audits also need to describe the reform, but rather than impacts, they identify the processes that the reform was intended to follow. The report should assess the achievement of process objectives in a sensibly graduated way in order to move the evaluation beyond a check list approach.

The approach of the ANAO in making the results of its performance audits more meaningful to a wide variety of audiences is also useful to consider. While performance audits do not typically comment on the merits of government policy, they can comment on the impact of a policy measure. To improve the communication value of its reports the ANAO has:

- reduced the number of recommendations to focus only on more significant matters (less significant matters are referred to in the body of the report)
- endeavoured to answer the ‘so what’ question: ‘*So what do all these findings mean?*’. This is to draw out, where significant, messages of importance for all agencies, even though our audit may be directed to a single program. (McPhee 2010, p. 13)

5.3 Methods for quantifying the impacts of reform

This section sets out the strengths of quantification as part of the evaluation process, and some of the important features of quantitative evaluation. It focuses on four methods for quantifying different types of impacts (compliance cost accounting, partial equilibrium modelling, general equilibrium modelling and econometric analysis) (box 5.6). Some guidance on selecting the right method to evaluate a reform based on the nature of its impacts is also provided. (This section draws on a

more detailed discussion of the various methods and their strengths and weakness in appendix J.)

Box 5.6 Key methods for quantification

Compliance cost calculators

The Standard Cost Model (developed by the Netherlands Government) seeks to estimate the reduction in administrative compliance costs. These costs include paperwork costs, and the cost of time involved in completing the paperwork. More sophisticated versions of the cost accounting approach (such as the Business Cost Calculator provided by the Office of Best Practice Regulation) broaden the scope to include substantive costs such as investment in training and equipment required for compliance, and the costs of delay.

Econometric analysis

Econometrics is a set of statistical tools that can be used to determine whether there is a mathematical relationship between two (or more) measured variables, what effect the variables have on each other, and the robustness of the relationship. Econometrics provides a way to test whether theoretical models are supported by real world data. In the context of evaluating regulations and reforms, econometrics can be used to determine whether the changes affect individual variables of interest.

Empirical modelling

Models describe the theoretical relationships between variables. Empirical models use real world data to parameterise the model. While a simplification of reality, a good model will reflect the empirical relationships between the main variables of interest.

Partial equilibrium models describe the empirical relationships between the variables that change directly in response to the reform and the target variables. Economic partial equilibrium models might look at a specific industry to estimate the effect on investment and/or innovation that results from reforms. The models may then be used to estimate the effect of these changes on industry inputs, output and profitability over time.

General equilibrium (GE) models capture the main empirical relationships between inputs and outputs in an interconnected system when it is in a steady state. Economic GE models are used to estimate the flow-on effects to other sectors in the economy from changes at an industry level or to the availability and quality of the resources (labour, capital and land). Partial equilibrium models are generally used to estimate the 'shocks' that are fed into a GE model.

Source: Appendix J.

Why quantify?

Quantification can significantly enhance evaluations of regulations and reforms. It can add rigour, improve understanding of impacts, and enable estimation of the ‘net effects’ of such policy changes.

It should be noted that quantity measures do not necessarily have to be expressed in money terms, although this is the natural metric for most economic outcomes. For example, an increase in household income is most easily expressed in dollars, whereas the impacts of regulation to reduce pollution are quantified in terms of units of the various pollutants. The following discussion applies whether the metric used is dollars, (measuring both ‘value’ and ‘volume’) or other empirical quantity measures.

Quantitative approaches add rigour

Quantification in ex post evaluation adds rigour to the evaluation process because it imposes a discipline on the analyst to:

- measure change from clearly defined counterfactual
- seek evidence that changes have actually occurred
- identify who benefits and who loses from the reform
- draw some conclusions about the overall net benefits of a reform where there are both winners and losers.

Not all reforms lead to clear cut outcomes that can be easily and robustly quantified. Indeed some reforms may have only a small number of easily quantifiable outcomes (other than cost). One of the strengths of quantitative analysis is that the analyst has to quantify the effects that can be measured (including by using specialised approaches to measure non-market effects). They should also document the effects that cannot be measured where there is evidence that these outcomes have occurred. The alternative is to rely on impressions and opinions (Dee 2005).

Quantification improves understanding of the impacts of reforms

Quantifying outcomes (where there is sufficient evidence available to make an estimation with any degree of confidence) improves understanding of the impacts of the reform.

The process of choosing a quantitative approach should involve identifying the most important impacts of a reform. Quantifying the impacts of reforms can help to

identify the distributional effects of reforms (which groups benefit and which face costs) and the time profile of the impacts (when the costs and benefits arise).

While qualitative evaluation can shed light on the impacts of regulations and reforms, it may lack the objectivity that quantification can often provide. However, where only some impacts are quantified, care is needed to present the findings in a balanced way, along with qualitative evidence.

The costs and benefits can be weighed against each other

When the impacts of regulations and reforms are quantified, the costs and benefits can, in theory, be added up to determine if the net effect is positive (a net increase in wellbeing) or negative (a net reduction in wellbeing). Again, it is possible to consider the net effects of a reform using qualitative evidence, but it can be more difficult to weigh up the net effect than when quantitative evaluation is used.

Two challenges that arise in carrying out cost-benefit analysis are that it requires all impacts to be expressed in a common metric and discounting to convert the values to a common time period. Economic analysis has developed tools to do both (appendix J), but the appropriate use of non-market valuation techniques to put ‘prices’ on outcomes, and the choice of discount rate, remain areas of debate,

A further challenge is explaining the distributional effects — costs and benefits are generally expressed in aggregate terms, but the distribution of these costs and benefits is also often of interest to policy makers. This is particularly important where the impacts differentially affect disadvantaged households or regions.

Quantitative estimates of the impacts of a reform should be complemented with qualitative evidence to support the estimates. As discussed above, methods such as triangulation can improve the quality of qualitative evidence. Such methods are also important for improving the confidence in quantitative measures.

Important features of quantitative evaluation

Although based on empirical evidence, quantitative evaluation methods still need to make a number of assumptions, and rely on the availability of data. For quantification to be meaningful, the analyst must be aware of the assumptions that underpin the analytical approach. The methods can then be tested to see how robust the estimates are to variations in these underlying assumptions.

Reliable data are essential

The first assumption that affects all quantification is the quality of the data and whether it actually measures what it purports to measure. Issues that can arise include:

- do reliable data exist (or can they be collected easily)?
- is it reasonable to use estimates of the impacts of regulations and reforms on an ‘average business’ (or the ‘average household’ or ‘average consumer’)? In some cases, averages can mask important effects (for example, very large or very small businesses might face particular cost burdens that are hidden by averages)
- if proxy variables are used (as is often the case in econometric analysis), do they reflect the variables of interest?

Reforms should be evaluated against a realistic counterfactual

As stated in section 5.2, robust evaluations of the impacts of reforms should be evaluated against a clearly defined counterfactual. Quantification can assist in defining the counterfactual. In the case of business cost calculators, counterfactuals are often defined by surveying businesses about the current costs associated with each compliance activity. The reform savings are estimated based on the changes in activities required. The cost calculator provides a good estimate of savings if the marginal cost of the activity is similar to the estimated average cost. For example, the method assumes that the time spent reporting falls by 50 per cent if the number of times reports are required is halved. Modelling approaches adopt a more formal approach to defining a counterfactual. The issues associated with defining a counterfactual under each approach are discussed in greater detail in appendix J.

Testing the assumptions inherent in the approach

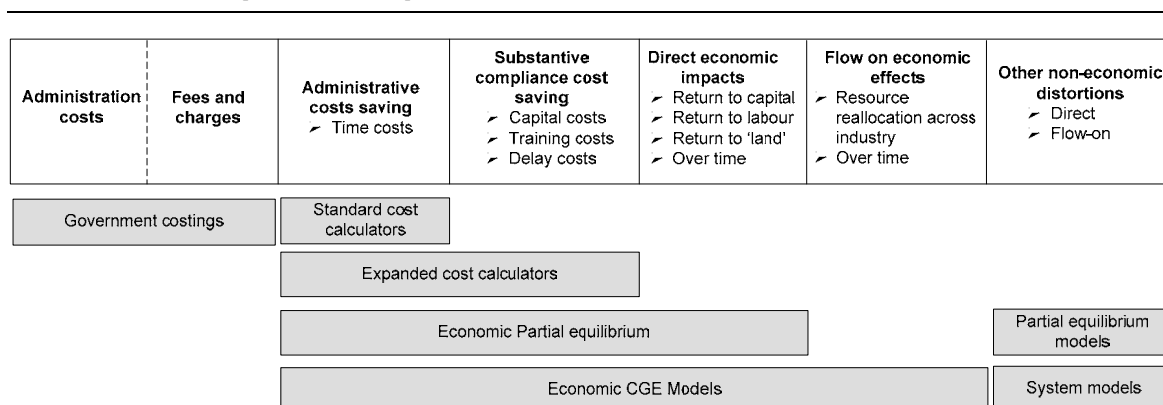
Quantitative methods are underpinned by assumptions. For example, many statistical techniques make assumptions about the distribution of empirical values, or that historical values reflect today’s behaviour. The quality of the evaluation will be influenced by how closely these assumptions relate to reality. One of the strengths of quantitative approaches is that the assumptions can be clearly identified and so can be tested (which is why models should be well documented and made available to other researchers). Sensitivity testing — using empirical methods to determine what effects the assumptions, including uncertainty in measurement, have on the final results should be routine part of an evaluation.

Choosing the right approach to quantification

As discussed in chapter 2 (and summarised in box 5.5), regulations and reforms can have a range of effects on businesses and the economy, the broader community and the environment. When choosing which approach to use to quantify the effects of a reform, the first step is to consider the types of benefits and costs the reform could have brought about. These could include administration and compliance cost reductions (or increases), broader flow-on and spillover impacts, and social, environmental and distributional impacts. The reform could have affected the probability of adverse or beneficial events, or the magnitude of the impacts of these events. If it is considered likely that a reform has brought about significant benefits or costs in any of these areas, it might be worthwhile to conduct a quantitative evaluation. Different quantitative approaches measure different types of impacts, and this can help guide the choice of which approach to use (figure 5.2).

- If the main effect of the reform was to change the compliance cost burden of a particular regulation, and the reform did not have the potential to introduce or remove broader distortions, the appropriate tool is probably a compliance cost calculator.
- If the goal of the evaluation is to understand the direct economic impacts of a reform (changes in particular variables in direct response to a reform including over time) econometrics or partial equilibrium modelling could be useful.
- In the case of reforms that have broad distributional effects, modelling (such as general equilibrium modelling) can be used to understand and measure the flow-on effects.

Figure 5.2 Matching the evaluation method to the nature of the expected impacts



For all of these approaches, the availability of relevant data is an important pre-requisite.

If a full cost-benefit analysis is needed, it may be necessary to use all of these tools to estimate the range of outcomes arising from the reform and to ‘add them up’. For example, the Business Cost Calculator might be applied to estimate the change in compliance costs (box 5.7). This might be complemented by the use of more sophisticated accounting tools to estimate other ‘first round’ changes in costs to firms. These could then be used as inputs to partial equilibrium models, to identify how firms in the industry respond to these changes in costs, and other changes resulting from the reforms such as increases in competition, removal of price distortions or market access restrictions. The industry level changes in supply or demand can then be used in a CGE model to estimate the effects on other industries. Some industries (and their workers and owners of capital) may benefit if they use the products or services of the industry. Others may find that they face a disadvantage; for example, from stronger competition for workers or for the consumer’s dollar.

For each of these approaches, an important part of the evaluation process is the interpretation and communication of the results. Numbers can be influential in policy debates, so care should be taken in presentation. This includes undertaking a sensitivity analysis that provides information on the degree of confidence in the results. Inevitably, the results of quantitative analysis reflect assumptions made in the evaluation process and are restricted by the availability of data. Any such limitations should be acknowledged, and the policy implications drawn out.

Box 5.7 Using the Business Cost Calculator to estimate changes in compliance costs: an example

The Allen Consulting Group (2009) used the Office of Best Practice Regulation's Business Cost Calculator to estimate the effects on industry compliance costs of a proposal to develop a National Construction Code (NCC). The NCC would consolidate existing building and plumbing standards into one code.

The first step in the Business Cost Calculator process was to identify the compliance costs that could arise from introducing a NCC. The costs that were identified were:

- transition costs for practitioners
- costs of technical change, where the NCC would set a different technical standard to existing standards
- costs of purchasing the NCC.

The Allen Consulting Group used ABS data to identify the number of practitioners (builders, plumbers, building surveyors and architects) that would incur the costs in each state and territory. The breakdown by state and territory was necessary because the transition costs were expected to differ by jurisdiction. Specifically, some jurisdictions already had performance-based plumbing codes, and plumbers in these jurisdictions would require less time to adjust to the (performance-based) NCC than plumbers in other jurisdictions (two hours compared to five).

The Allen Consulting Group assumed that not all professionals and trades people would incur the costs (60 per cent of builders and 80 per cent of architects and building surveyors). This assumption was based on responses to a survey about the proportion of professionals and trades people that used the existing building code.

To estimate the total transitional costs, the Allen Consulting group multiplied together the:

- number of professionals and trades people in each jurisdiction
- proportion that would need to become familiar with the NCC
- estimated average number of hours required to become familiar with the NCC in each jurisdiction
- average hourly wage in Australia (\$29.93 per hour — adult full time ordinary private sector earnings).

Based on this, the Allen Consulting Group estimated that moving to the NCC would cost around \$13 million in additional compliance costs.

Source: Allen Consulting Group (2009).

6 Strengthening the framework for regulation reform

Key points

- A suite of evaluation and review approaches is needed across the regulatory cycle, to ensure that regulations remain appropriate, effective and efficient.
- How well they are deployed depends on the framework of institutions and processes that constitute the regulatory 'system'.
 - It is important that there is effective coordination and oversight to ensure that there are no gaps in coverage and that the right tools are used at the right time.
- On-going assessment requirements for new regulation and 'management' activities by policy agencies and regulators are important in improving the stock of regulation. However, to go beyond this requires reforms to:
 - specific regulations and their implementation and administration
 - systems that better prioritise 'big reforms', and enhance the effective functioning of ongoing improvement activities.
- Australia's regulatory system has evolved over time and has recently been rated highly by the Organisation of Economic Cooperation and Development (OECD). The performance of the system could nevertheless be improved by:
 - greater attention to prioritisation and sequencing of reform and review efforts
 - ensuring proportionate reviews are undertaken, with subsequent monitoring and reporting on implementation of recommendations
 - better communication and consultation in relation to review priorities, processes and outcomes
 - enhancing systems to encourage and enable regulators to improve their performance
 - building evaluation capabilities within the Australian Government that are essential to developing and delivering better regulation.

It emerges that several approaches to reviewing and evaluating regulations have made — and should continue to make — a useful contribution to identifying areas and options for reform and thus to enhancing the regulatory stock. Chapter 4 identifies the important role played in Australia by public stocktakes, the National Competition Policy principles-based review, and in-depth reviews in particular. However no approach can be relied on to ‘do it all’. Each has its own niche, either in relation to the type of reforms targeted, or the point in the regulatory cycle at which the approach comes into play. Such approaches are most effective, therefore, when they complement each other such that there are no ‘gaps’ in coverage (and, equally, no doubling up), with all regulations reviewed in the most timely and appropriate way.

Given the limited resources available for review activities — particularly skilled analysts — it is also important that these resources are allocated such that the overall returns from the various approaches can be maximised. This depends in turn on the effectiveness of the wider system or framework in which the individual approaches are designed and managed. Reform to the regulatory system may be required to ensure that the system works efficiently and effectively to identify, develop and implement reforms to regulation and its administration.

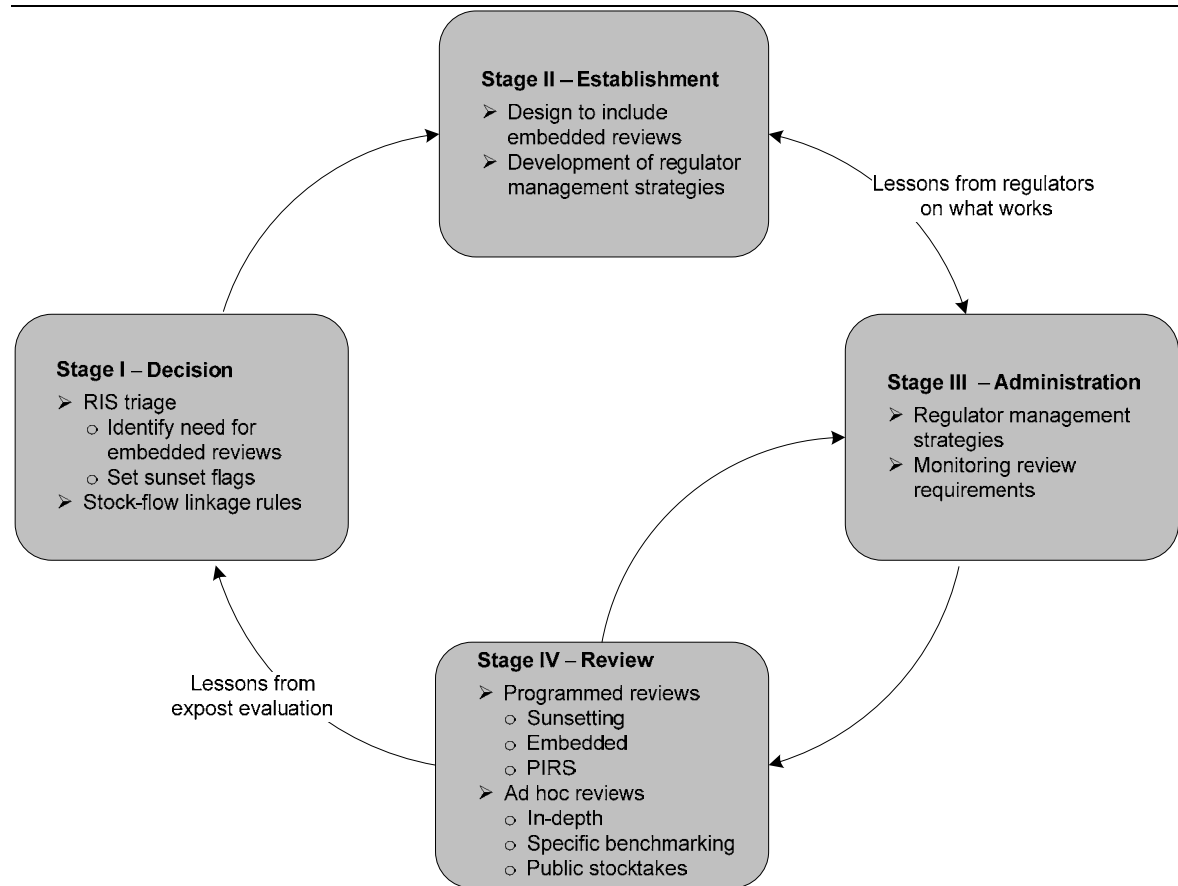
6.1 The regulatory system

A regulatory system comprises the set of institutions and processes that determine how and when regulations are made, administered and reviewed. In terms of ensuring that the current stock of regulation is performing well, and that poorly performing regulations are identified and remedied in a timely way, there are certain requirements that any system would need to discharge.

Managing over the ‘cycle’

These requirements are usefully considered in relation to the four stages of the ‘cycle’ that regulations commonly pass through. These involve: the initial problem identification and decision to employ a regulatory solution; the design of the regulations concerned and their implementation; the administration and enforcement of those regulations by the ‘regulator’; and, finally, evaluation and review. Following this last stage, a regulation may lapse, or be retained, modified or replaced, in which case the cycle recommences (figure 6.1).

Figure 6.1 Review approaches through the regulatory cycle



Each of these stages in the regulatory cycle requires tools and strategies for ‘quality control’.

At the first *decision* stage, regulatory proposals need to be assessed for their appropriateness and cost-effectiveness. Some discipline and transparency is brought to this by a requirement to prepare a regulation impact statement (RIS) for regulation with potentially significant impacts. At this point, before new regulations are added, an assessment of the adequacy of existing regulations also needs to be made. The scope to apply more light-handed or ‘market friendly’ options also need to be considered. Finally, as discussed in chapter 4, at this point the need for the selected regulatory option to be reviewed sometime after it has been implemented should also be considered. For regulations that have required a RIS, review of their performance should be scheduled within five years.

The second *establishment* stage involves the detailed design and making of regulation, including assignment of responsibilities and accountabilities. Object clauses and guidelines for regulators need to encourage cost-effective and risk-based approaches to administration and enforcement. The drafting should consider the desired scope for regulators to interpret the regulation. Greater flexibility may

be appropriate where the regulatory context is more fluid. Where embedded legislative reviews are to be provided for, their scope and governance, and data collection requirements need to be specified.

At the *administration* stage, oversight of regulator behaviour and strategies for managing regulation and reducing any unnecessary compliance costs come into play. Review requirements need to be monitored, data collected and preparations made for scheduled reviews.

The *review* stage itself will occur at different intervals for different regulations, depending on their significance and the circumstances of their initial formulation. As stressed in chapter 4, reviews need to be proportionate to the nature and significance of the regulations concerned, and be able to address the issues that are germane to their performance.

Institutional arrangements

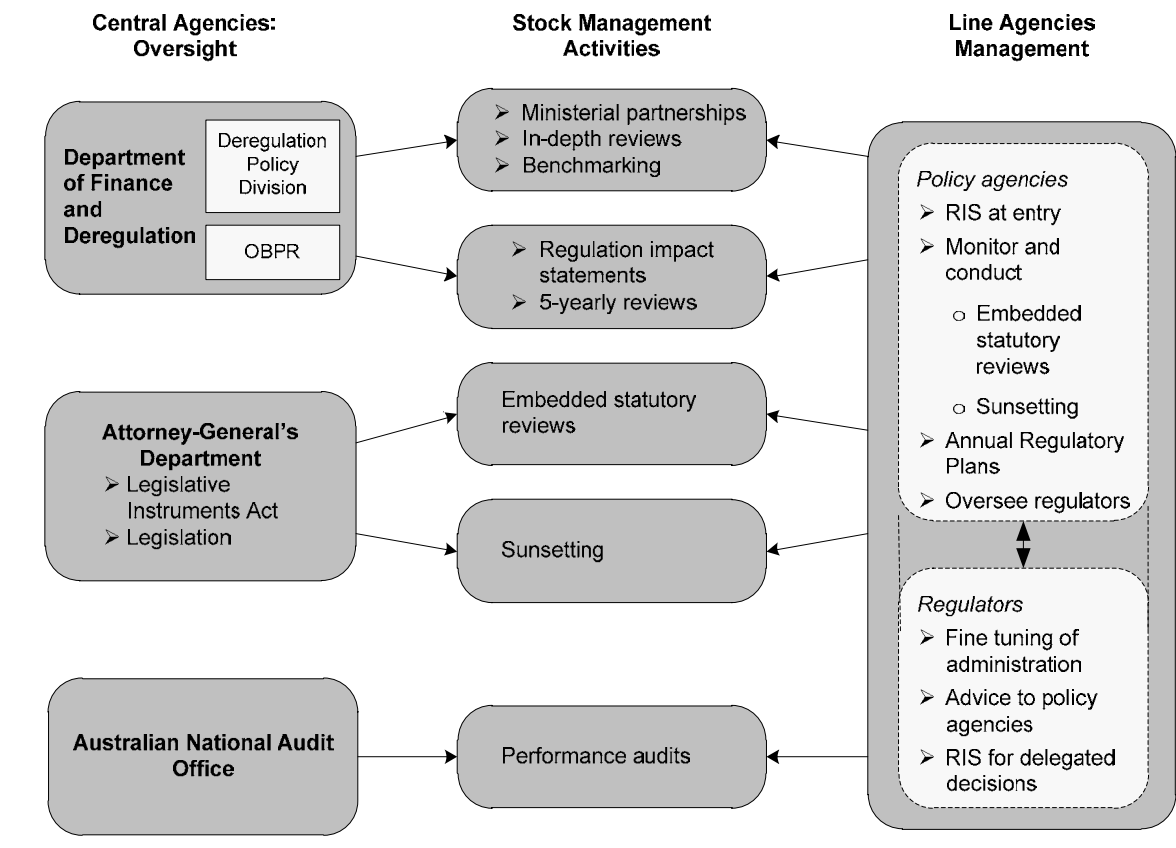
How well decisions at each stage of the regulatory cycle are made and implemented will depend on the institutional arrangements — the organisations and processes — that assign responsibilities, provide incentives, and ensure adequate capabilities. The Organisation for Economic Cooperation and Development (OECD) has emphasised the importance of regulatory governance to regulatory performance (OECD 2010f). While it has acknowledged that different institutional structures can work for different countries, it has identified the importance of having a ‘joined up’ system — containing clear roles, responsibilities and accountability. This requires what the OECD has dubbed the four ‘C’s’ — coordination, cooperation, consultation and communication. Delivering these requires strong leadership and oversight arrangements, as well as effective ‘gatekeeping’ and evaluation capabilities.

A number of changes have been made to Australia’s regulatory system over time, with the aim of strengthening its capacities at each stage of the regulatory cycle, as well as enabling better coordination and political oversight. Among the more important of these at the Commonwealth level (figure 6.2) are:

- the assignment of responsibility for good regulatory practice to a Cabinet-level Minister (the Minister for Finance and Deregulation) with departmental support (appendix K)
- the strengthening of procedures and analytical requirements for making regulation, and the expansion of Office of Best Practice Regulation (OBPR) responsibilities to provide advice to agencies, in addition to vetting and reporting compliance

- the institution of automatic review mechanisms for subordinate regulation (notably though sunseting) (appendix E)
- commissioning a range of in-depth reviews in key areas of regulation (appendix C).

Figure 6.2 The Australian Government regulatory system



Within the Council of Australian Governments (COAG), the establishment of the Business Regulation and Competition Working Group (BRCWG) has for the first time provided an on-going national forum for the consideration of reforms encompassing all jurisdictions — including to improve processes (for example, regulatory assessment) and particular areas of regulation (for example the 27 ‘seamless national economy’ items) (appendix D). Most recently, the BRCWG commenced consultations into a future COAG Regulatory Reform Agenda (box 6.1).

Box 6.1 The future COAG regulatory reform agenda

The Australian Government released a stakeholder consultation paper on 22 September 2011. The paper sets out 4 themes for the second round of regulation reform under the Seamless National Economy (SNE).

1. *Environmental regulation reform* — with a focus on greater use of regional planning and strategic approaches to environmental assessment and approvals. Reforms might include agreement on Commonwealth accreditation for matters of national environmental significance under the Environmental Protection and Biodiversity Conservation Act, and establishing national standards for environmental offsets.
2. *Enhanced workforce mobility and participation* — with further reforms proposed to national licensing, and a proposal for harmonisation of conduct requirements.
3. *Improving sectoral competitiveness* — with a range of suggestions such as on-line single portal business reporting for small and medium enterprises, and initiatives to improve the competitiveness of: the service sector; suppliers to the mining sector (national approach to explosives legislation); and competitiveness of primary production including food processing.
4. *Ensuring the benefits of national reform are maintained* — potential reform elements could include comprehensive post implementation assessment of net benefits from key reforms. This could include assessment of consistency by the COAG Review Council, greater use of model regulations, codes of practice and other tools to ensure consistency, examination by the Productivity Commission of the consistency of compliance and enforcement approaches when conducting more general sectoral reviews, and development of COAG national principles to guide the development of future regulatory proposals with national market implications.

Source: BRCWG (2011).

6.2 Can the operation of Australia's regulatory system be enhanced?

The OECD, in its recent review of regulation in Australia (OECD 2010d), endorsed the Australian Government arrangements, a number of which had responded to earlier recommendations of the Regulation Taskforce (2006). Recommendations by the OECD that accountability be strengthened were also accepted, including the introduction of 'sign-off' provisions in relation to regulation impact statements (Australian Government 2010a). The various elements required for a good regulatory system can now be said to be largely in place. However, in observing how the framework is operating in practice, the Commission has found scope for improvements in a number of areas.

Prioritisation and sequencing of reviews and reforms

The terms of reference for this study place emphasis on the need to identify regulatory reform priorities. Particularly for major reforms, there are limits to the ability of any government to pursue multiple reforms simultaneously. Developing, designing and drafting legislation is a resource-intensive process, as is putting in place the new requirements. Good regulatory processes for undertaking reviews and implementing reforms require consultation with businesses and other stakeholders, and the time they can devote to this is also limited. And, while reviews provide the analysis to guide reform, to be effective they need to feed into other reform processes.

Major reform programs have often prioritised reviews. For example, the Commonwealth applied a tiered screening process in the Legislative Review Program under the National Competition Policy (NCP), with a Council representing different community groups appointed for the purpose of determining those regulations needing detailed review (appendix D). Other approaches have informed future reform programs by identifying areas where reform is likely to have high returns, but the reform options still need to be assessed. For example, the Regulation Taskforce (2006), screened business input on burdens to assess the validity of the complaint and whether there were appropriate solutions — in some cases recommending an in-depth review (appendix B). Hence, priorities for review and priorities for reform are determined largely by the same factors.

One ready source of reform priorities that is often overlooked in the search for new areas, involves completion of the *current* reform agenda. This was seen as an imperative by a number of participants (ACCI, sub. 4; Accord, sub. 8) and in consultations with business groups.

Beyond that, the focus then has to be on selecting those other regulatory areas that offer the greatest potential return to further reform effort. This depends on the:

- *depth of the reform* — the size of the impacts on those affected by the reform. The magnitude of the impacts (benefits less costs) for those affected depends on the size of the problem and the extent to which regulation can address it
- *breadth of the reform* — the share of the community affected by the reform. This depends both on the share of the community currently experiencing detriment and hence who should benefit from the reforms, and on others who may be adversely affected by the changes. The distribution of the benefits and costs across the community also affects the return
- *costs of planning and implementing the reform* — these include the costs of undertaking reviews, developing regulatory proposals, drafting legislation,

establishing processes (and possibly institutions) to administer the regulation, as well as on-going administration and review. Associated with most of these activities is consultation with business and other stakeholders, which also involves costs. Finally there are adjustment costs in complying with the new regulation.

The depth and breadth of the impacts of a reform determine its potential value. However, the effort that goes into developing and implementing a reform greatly influence its impacts and ultimate success. (The difference between the potential and realised impact is reflected in the Commission's framework for the review of the COAG SNE (PC 2010b).)

FINDING 6.1

The net pay-off from a reform will depend on the depth and breadth of the reform's impacts. It will also depend on the cost of undertaking the reform. Making sure that this effort is cost-effective is central to good regulatory policy.

The questions applied in screening proposals for the SNE can usefully shed light on the potential impacts of reform (box 6.2). The missing question relates to the cost of successfully advancing the various reforms. While individually each reform may be worth pursuing, regard must be had for the resources available, and whether they are adequate for the combined task.

The net return to reform effort can therefore depend on the sequencing as well as prioritising of reforms. As noted, there is a limit to the number and combination of reforms that can be pursued at any one time. 'Congestion' has often meant that review efforts have not been proportionate to the relative significance of the different reform areas (PC 2005a). It is also important that reforms be sequenced where one provides the foundation for another. Sequencing is also important to ensure that related regulations are considered in a complementary way. Possibly just as important is the demonstration effect of successful reforms in building support for more.

Box 6.2 Selecting candidates for COAG’s ‘Seamless National Economy’ reform agenda

The Business Regulation and Competition Working Group (BRCWG) was tasked with identifying the first tranche of regulatory reform initiatives for the Council of Australian Governments (COAG) regulatory reform agenda and the Seamless National Economy.

The BRCWG considered the potential benefits to growth, productivity and workforce mobility from over 35 possible reform areas. These were drawn from a number of sources. They included issues with multi-jurisdictional implications that were suitable for reform, but had nonetheless proved resistant to reform in the past and were evaluated according to the following considerations:

- how *wide* is the reach of the regulation?
- how *deep* is the reach of the regulation? Does it have a significant effect on industries generating a large amount of GDP?
- how *large* are the costs to business and taxpayers of complying with the regulation?
- how *damaging* is the regulation to incentives for effort, risk-taking, entrepreneurship and innovation?
- how *large* are the impediments created by the regulation to workforce mobility and participation?

Each area was then categorised according to the desired level of regulatory change: mutual recognition; harmonisation; or a national system.

Source: Appendix D

This suggests a need for realistic prior assessment of the ‘capacity constraints’ in developing reform programs and scheduling reviews. In the case of the NCP, the original five year time frame for reviewing some 1800 regulations had to be extended by five years. Even then it proved logistically difficult, with the quality of some reviews suffering as a result. The SNE reform stream — expanded from the half dozen original ‘hot spots’ to ultimately comprise 27 items — has understandably required more time and effort than originally envisaged. Similar demands on government officials and other stakeholders are likely whether the regulatory area is large and important (occupational health and safety) or comparatively minor (wine labelling).

The SNE experience also illustrates the need to complete reviews and reforms that are in train before embarking on new ones. As noted, this can be important to the credibility of an ongoing reform process, affecting the willingness of business people and other community groups to provide input.

Information to identify areas for reform that would need to be examined in more depth can come from other review sources: public stocktakes; regulator feedback; and even red tape target and ‘offset’ programs. As discussed in chapter 4, sunseting can also act as a trigger for systemic review. Different agencies will have different sources that they can draw on to identify areas for reviews of related regulation, including enabling legislation. Testing proposed review priorities with business and the wider community (as is being done for the second round of SNE, see box 6.1) could assist both in screening and in building support for review.

FINDING 6.2

There are many sources of information that can be drawn on to inform priorities for more in-depth reviews and benchmarking studies. The current processes for identifying priorities for review and their sequencing could be more transparent. Business and community input and feedback are important ‘reality checks’.

RECOMMENDATION 6.1

In considering current and future regulatory reform activities, the Australian Government should apply the following principles:

- ***incremental improvements to regulatory arrangements (so called ‘good housekeeping’ measures) should be undertaken as a matter of course***
- ***reforms identified or underway should be completed before embarking on new reform agendas***
- ***in prioritising and sequencing reforms, in addition to the depth and breadth of the potential benefits, the human resource and other costs of achieving the reforms need to be explicitly taken into account***
- ***precedence in in-depth reviews and benchmarking, should be given to developing the most cost-effective options for achieving current reform commitments. In planning future reforms, such reviews should be prioritised based on an assessment of potential gains, including by drawing on information provided by public stocktakes and other stock management approaches.***

Monitoring and reporting on reviews and implementation of reforms

As discussed in chapter 4, the Australian Government’s *Best Practice Regulation Handbook*, (the Handbook) establishes that all regulatory proposals requiring a RIS should satisfy the requirement for a review. Recommendation 4.5 (chapter 4) seeks to strengthen this requirement to ensure that regulations assessed as having a major impact on business (typically around 5 per cent of those requiring a RIS, or 8 in

2009-10) are required to have a formal monitoring and evaluation plan, while the others must, in any case, be reviewed within five years. To give effect to this recommendation, the reviews proposed in the RIS (or their equivalent) should be monitored to ensure they are undertaken. Currently, there appears to be no systematic monitoring or follow-up of the commitment to review.

The OBPR would seem best placed to supervise these requirements, which essentially represent an extension of its current activities. Publication of a timetable for the reviews would also assist agencies, business organisations and others to better coordinate their consultation efforts (see below).

More generally, there is little reporting on governments' responses to recommendations made by reviews, particularly the implementation of recommendations. The Commission's activities have been an exception, in that the annual reports include a brief summary of the Australian Government's response to the recommendations of inquiries and studies. However, keeping track of when and how the accepted recommendations are implemented is challenging. For example, the Commission had difficulty tracking the response and subsequent actions in relation to the 178 recommendations made by the Regulation Taskforce (2006) (appendix B).

The Australian Government is not alone in failing to have systematic reporting. For example, a recent report by KPMG (2011) for the Minerals Council of Australia (Victorian Division) found that there was no evidence of implementation for 45 per cent of the recommendations of Victorian Government reviews affecting the minerals sector. The authors commented on the difficulty of locating this information.

The effectiveness of any consultation strategy depends on the expectation that it will improve the outcomes for those involved. This makes reporting on reform outcomes an important part of maintaining business interest in participating in consultation. Policy agencies too, need to know what has worked well and why (or why not), to improve their advice to government. Yet relatively little ex post evaluation of the impacts of the reforms appears to be undertaken in Australia (or overseas). Lack of transparency can breed cynicism in the community about whether real progress has occurred and a sense that contributing to such reviews is wasted effort.

Monitoring whether reviews of regulation are undertaken, and reporting on the outcomes, is important to provide confidence in the regulatory reform processes themselves. Ideally, information should be publicly available on:

- when reviews are scheduled to be undertaken

-
- the recommendations made and government's responses
 - implementation of those responses
 - ex post evaluations of major reforms.

Australia is one of few countries to have a complete database of all major government regulation in the Federal Register of Legislative Instruments on ComLaw website. ComLaw contains the full text of all recent Bills, Acts and legislative instruments and of their explanatory material, which must include the final version of any RIS that may have been prepared. (Final RIS documents are also published on the OBPR website, along with earlier versions of RISs and details of what if any post-implementation reviews may be required.)

Over 70 regulatory agencies are able to lodge material for registration and to track key processes such as tabling and disallowance. ComLaw is currently being expanded to cover sunseting processes and outcomes. It could also cover a variety of other review processes and outcomes, such as COAG processes, Parliamentary processes, Productivity Commission reports, and one-off exercises such as the recent Review of pre-2008 Subordinate Legislation. This would give ComLaw the potential to act as an organising platform to monitor such actions as: proposed reviews of regulation; the draft then final recommendations made by reviews; government response to the recommendations; and legislative changes that result.

RECOMMENDATION 6.2

The Australian Government should establish a system that:

- ***tracks reviews proposed to meet the RIS requirements to ensure they are undertaken***
- ***monitors the progress of reform recommendations from these and other commissioned reviews***
- ***makes this information available on a public website, with links to planned reviews, completed reviews, government responses, and a record of subsequent actions.***

The publicly accessible provision of such information would represent a significant advance in transparency. It would also promote greater accountability of government for its management of the regulatory system. However, as a passive database, its influence would be limited. There is a strong case for the information contained in it being made more 'active' through annual reporting by the Finance Department (or in the OBPR's annual *Best Practice Regulation Report*). This would enable data to be contextualised and be more useful to both government and stakeholders. While such annual reporting may reveal some gaps and delays, it will

also be able to document government's achievements (which are often not recognised).

RECOMMENDATION 6.3

The Department of Finance and Deregulation or the Office of Best Practice Regulation should report annually on reviews of regulation that have been undertaken, government responses to any recommendations and their implementation status.

Ultimately an effective regulatory system requires strong leadership within government. In the context of strengthening regulatory governance, the OECD (2011) has stated:

Political commitment to regulatory reform has been unanimously highlighted by country reviews as one of the main factors supporting regulatory quality. Effective regulatory policy should be adopted at the highest political level, and its importance should be adequately communicated to lower levels of the administration. Political commitment can be demonstrated in different ways. ... However, the creation of a central oversight body in charge of promoting regulatory quality may be the most important element. (p. 77)

As noted, these conditions have been broadly met at the Commonwealth level in Australia, with responsibility assigned to the Minister for Finance and Deregulation. Because budgetary and regulatory activities are often complementary or interactive, having oversight of both combined in the one portfolio is logical. The Finance Minister serves as a champion for good regulation and has been instrumental in forging 'Partnerships' with other Ministers, providing top-down reform impetus in targeted areas. A question arises as to whether these responsibilities could benefit from greater institutional support within the Parliament. The Senate Standing Committee on Regulations and Ordinances plays an important role in providing technical scrutiny of all delegated legislation to ensure their compliance with principles of parliamentary propriety. Whether there may be a role for a Committee with a wider focus on 'good regulation' is worthy of further consideration. Such a forum could strengthen political leadership in this area and help promote a better understanding of regulatory effectiveness.

FINDING 6.3

Political leadership is essential to an effective regulatory system, including compliance with good regulatory processes. Assigning responsibility to the Minister for Finance and Deregulation has been a significant advance at the Commonwealth level. There may be scope for further institutional initiatives to strengthen political involvement in achieving good regulation.

Better consultation

Consultation with business and other stakeholders is fundamental when developing regulations, both in relation to the options being considered and at the detailed design and implementation stage. Once regulations are in place, good two-way communication can be crucial to the effective administration of regulations and to identifying ongoing refinements. At the review stage, such communication is essential to the performance of regulators, particularly with respect to minimising compliance costs.

Agencies consult widely on a range of issues, not least new regulation. Indeed, concerns were raised during consultations for this study that the requirements for consultation may at times exceed the capacity of agencies to undertake them effectively. Businesses too report review fatigue. Agencies have reported duplication of consultation effort, and difficulties in engaging business when they have recently participated in consultations for other agencies, or even different areas in the same agency.

One important element that appears to be missing is the information to support efforts by agencies to coordinate consultations. Agencies have reported duplication of consultation effort, and difficulties in engaging business when they have recently participated in other consultations. In part this is an information problem, as agencies do not have easy access to timetables for reviews and consultations in other agencies, or possibly even in the same agency.

Australian Government agencies publish annual regulatory plans that can be accessed through the OBPR website. Examination of the site revealed that not all agencies have provided a plan; the plans are sometimes incomplete, as they do not include reviews which are required to be undertaken over the next financial year, and they are not user-friendly. The plans need to be linked so that key word searches, tags for email alerts, and tag clouds could be applied. The ComLaw site, discussed above, may have the capability to provide a platform for this kind of service as well.

The Department of Innovation, Industry and Science has a business support website that provides some information on reviews of regulation and their calls for submissions and other consultation activities. This site can provide email updates to registered clients. However, there is no obligation on agencies to post the reviews that they are undertaking, and as relatively few agencies appear to utilise the service, the information is partial at best.

FINDING 6.4

The reporting requirements set out above could be used to more effectively provide advance notice of reviews, alerting stakeholders to matters of importance and enabling them to contribute more proactively.

‘Whole-of-government’ principles for consultation have been developed (box 6.3), but arguably could be better utilised. Business continues to complain about token consultation efforts and lack of consultation at critical stages, such as when different regulatory and other options are initially being considered and when the ‘details’ of the approach to be adopted are being finalised. While on-going forums for communications have been instituted in some cases (see below), more in-depth and focussed consultations are needed when developing or reviewing specific regulations.

In particular, this study has reaffirmed the crucial role of draft reports or other vehicles for exposing preliminary findings and recommendations to public scrutiny. Draft reports enable options to be tested in a way that can lead to improved design and avoid unintended consequences. They also provide an opportunity for learning by governments about stakeholders views on specific options, which can facilitate subsequent implementation. The experience of regulatory policy with and without such opportunities for feedback underlines the need to entrench them as integral to good regulatory process.

RECOMMENDATION 6.4

Any review of a significant area of regulation should make provision for the public to see and provide feedback on its preliminary findings and recommendations, with further consultation at the more detailed implementation stage.

Box 6.3 ‘Whole of government’ principles for consultation

Following a recommendation of the Regulation Taskforce (2006), the Government’s *Best Practice Regulation Handbook* contains the following best practice consultation principles, which are to be met by all agencies when developing regulation.

Continuity — Consultation should be continuous, and start early in the policy development process.

Targeting — Consultation should be widely based to ensure it captures the diversity of stakeholders affected by the proposed changes. This includes state, territory and local governments, as appropriate, and relevant Australian Government agencies.

Timeliness — Consultation should start when policy objectives and options are being identified. Throughout the consultation process, stakeholders should be given sufficient time to provide considered responses.

Accessibility — Stakeholder groups should be informed of proposed consultation and be provided with information about proposals through a range of means appropriate to these groups. Agencies should be aware of the opportunities to consult jointly with other agencies to minimise the burden on stakeholders.

Transparency — Policy agencies need to explain clearly the objectives of the consultation process and the regulation *policy framework within which consultations will take place, and provide feedback on how they have taken consultation responses into consideration.*

Consistency and flexibility — Consistent consultation procedures can make it easier for stakeholders to participate. However, this must be balanced with the need for consultation arrangements to be designed to suit the circumstances of the particular proposal under consideration.

Evaluation and review — Policy agencies should evaluate consultation processes and continue to examine ways of making them more effective. (p. 44)

Source: Australian Government (2010b).

Increasing the focus on regulators

As noted in chapter 4, the problem of regulators’ own practices adding unduly to regulatory burdens has been a frequent complaint of business. The Commission received similar comments again during this study.

It is becoming recognised that regulation reform agendas to date have focused primarily on the stock and flow of regulation, with less attention being paid to the practices of those who administer the regulation, and institutional arrangements and mechanisms for guiding them. As was noted recently in the Victorian context:

For many years, the Victorian Government has been active in improving the first stage of the regulatory process — designing regulation — and has become increasingly engaged in the third stage, of reviewing and evaluating regulation. It has paid less systematic attention to administration and enforcement although there have been recent developments, particularly at the portfolio level. (VCEC 2010, p. 2)

This mirrors concerns raised by the OECD (2010b).

Regulator practices depend both on the framework in which regulators operate — including legislative requirements, regulators’ powers and any oversight arrangements — and the processes and strategies that regulators adopt within that framework. Available (skilled) resources are also relevant. Any comprehensive attempts to ensure efficient regulator performance may need to address all these areas.

Best practice for regulators

A growing body of research has examined regulator practices, and several agencies have released reports or guides on the elements of good practice (appendix H). Through its benchmarking studies, public inquiries and other work, the Commission has also sought to identify ‘leading practices’ for regulators in particular fields and, as part of its more in-depth studies, has recommended improved practices where appropriate. Of course, many regulators themselves have a wealth of knowledge about what works in their own field from a regulator’s perspective, and some regulators actively seek to learn from each other. A current example is the forum of Victorian Primary Industries Regulators, which aims to enable the sharing of best practice in their field.

There is increasing agreement on what constitutes ‘best practice’ regulatory administration and enforcement, and conditions that may ensure it emerges. While it is also recognised that some of the practices regulators adopt will need to vary at a more detailed level, a number of common elements can be identified. They include: streamlined reporting requirements on business; risk-based monitoring and enforcement strategies; mechanisms to address consistency in legislative interpretation; graduated responses for addressing regulatory breaches; clear and timely communication with business; and guidance on, and accountability for, performance in these respects.

Notwithstanding this work, governments are yet to agree on and formally endorse ‘best practice’ for the administration and enforcement of regulation in Australia. This stands in contrast to the *development* of regulation, for which there is a broad consensus across Australia and indeed internationally on what constitutes best practice — even if it is not always followed. As the Victorian Competition and Efficiency Commission (2011b) has observed, the lack of a whole-of-government guidance on implementing regulation can make it harder to ensure that implementation practices are optimal.

The Australian Industry Group (2011) recently contended that there would be merit in Australian governments adopting the best practice guide compiled by the Australian National Audit Office (ANAO 2007). It also called for the initiation of regular ‘health checks’ for regulators to ensure that they are efficiently implementing regulations and not imposing additional and unnecessary burdens on business.

Even with agreed guidelines, however, there can be difficulties in translating principles into practice. This is partly because some practices will rightly vary from situation to situation, as appropriate actions can be contingent on matters including the nature of the risk being regulated and the institutional arrangements under which a regulator operates, as well as a range of firm- and industry-specific considerations. A further potential limitation of principles is that sometimes they can be too abstract to readily ‘operationalise’. To help deal with such problems, some guides have used case studies and some have sought to ‘unpack’ their best practice principles for regulators with a series of detailed prompts and questions (appendix H).

Against this background, the Commission considers that further work into regulator practices and associated principles in Australia would be valuable, and could help inform the merits of developing a common set of best practice standards, requirements or guidelines for regulators for possible adoption by Australian governments.

Incentives and oversight mechanisms for regulators

Alongside the matter of determining best practice for regulators is the issue of whether regulator management policies and oversight mechanisms are appropriate. Such policies and mechanisms seek to enable or restrict the types of approaches that regulators are able to adopt, to better align their approach with agreed good practice. In particular, such policies aim to achieve the right balance between the costs of achieving compliance and the risks of non-compliance.

As noted in chapter 4, the Regulation Taskforce recommended several oversight mechanisms. The recommendations covered the areas of: clarifying policy intent; accountability; transparency; and communication and interaction with business.

While the recommendations were accepted by the government and there have been some developments in line with them, there is uncertainty as to how extensively and effectively they have been implemented. For example, as discussed in appendix H, while the Taskforce had intended that Ministerial ‘Statements of Expectation’ for regulators provide direction on what balance is required in addressing trade-offs in policy objectives, such as minimising risks and compliance costs, not all regulators

appear to have been provided with Statements containing such guidance. At the same time, some regulators continue to have to deal with multiple (and potentially conflicting) objectives in the relevant legislation. And while there has been some move towards more formal consultation mechanisms, including the use of standing committees, as recommended by the Taskforce, feedback from the Australian Industry Group 2011 survey of CEO attitudes (AIG 2011) suggests that problems with consultation practices may remain.

A difficulty in assessing the scope for, and potential gains from, further reform in this area is that implementation of the Taskforce's recommendations has not been systematically monitored; nor has their effectiveness been evaluated. This suggests there would be merit in a more detailed examination of: the implementation and effectiveness of the measures recommended by the Taskforce; which approaches to complying with them have been most beneficial; and whether other mechanisms are warranted.

Matters for review

Reforms that set in train continuous improvement in regulatory practices require significant effort to establish, but once in place can continue to deliver benefits in improved quality of regulation and its administration. In developing reforms to this part of the regulatory system, it is important to fully understand the incentives and constraints facing individual regulators as well as those more common across the range of regulators.

In considering what constitutes 'best practice' and the matters covered by the Taskforce's recommendations, there is a range of considerations that potentially warrant scrutiny. These include:

- the appropriate institutional setting for regulators — for example, the value of combining policy development and enforcement functions in one agency rather than separating these functions
- whether there is scope to amalgamate some regulators to provide a less complex system for business
- other mechanisms to promote coordination and the sharing of information between regulators, such as Memorandums of Understanding.
- the range of tools (including different classes of legal sanction, and the discretion provided in using the different sanctions) that are available to regulators for enforcement purposes

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- the appropriate mechanisms to obtain feedback on regulator performance, including stakeholder surveys, business panels and social media
 - whether resourcing for regulators is appropriate.

While some of these matters are best addressed as part of in-depth reviews of particular fields of regulation, there would seem to be value in a more over-arching initial study focusing on general best practice principles and requirements, and the scope for oversight mechanisms to provide appropriate guidance and incentives for their adoption by regulators.

RECOMMENDATION 6.5

The Australian Government should commission a study into regulator practices and means of managing regulator performance, to enhance the administration and enforcement of regulation. Acknowledging that approaches adopted by regulators may be constrained and that the best approach may vary from field to field, such a study should:

- *identify the range of tools, processes and strategies currently employed by regulators, and examine their impacts on regulatory outcomes and associated costs and benefits*
- *identify existing oversight and other means of managing regulator performance and examine their effectiveness*
- *inform the merits of developing a common set of best practice guidelines and common requirements for ensuring compliance with them.*

Building capacities in evaluation

The reviews necessary to identify and implement regulatory reforms require people who are at least as skilled as those responsible for developing the regulations in the first place. The limited availability of the right people (and their opportunity costs) are important reasons for prioritising and sequencing their efforts. However, given the relatively large gains to be had from well-targeted reforms, there is a good case for devoting additional resources to the reform task, and to regulatory reviews in particular. This applies both to the institutions overseeing and vetting new regulation, as well as to those monitoring and evaluating existing regulations.

There has been some attempt to build skills in ex ante evaluation to support the RIS process, with OBPR providing training. But this (half-day) training is related more to the steps required in undertaking a RIS than how to analyse regulatory options and their impacts. However, the OBPR's charter includes it providing technical assistance on cost-benefit analysis, which could usefully be expanded, resources

permitting. It has been expanding its ‘consultancy’ role in assisting agencies to prepare RISs. However, there may be some tension or potential conflict in this role, as the OBPR is also the ‘gatekeeper’ tasked with assessing compliance with the same RIS requirements.

There are a number of ways of building evaluation skills in an agency, from recruitment, to formal training, to learning by doing arrangements. The 2009 Commission Roundtable on evidence based policy (PC 2010c) canvassed a number of other ways of enhancing the capabilities of policy agencies, including the establishment of ‘evaluation clubs’. The Commission study on the not-for-profit sector (PC 2010e) recommended that the Australian Government establish a ‘Centre for Community Service Effectiveness’ that would, in addition to providing a portal to lodge and disseminate evaluations of government funded service programs, provide support and guidance on undertaking these evaluations.

While these approaches are useful to support those undertaking analysis, general analytical skills, combined with subject knowledge is essential. These skills are needed across the whole regulatory cycle, from the development of proposals to the assessment of the regulation’s efficiency, effectiveness and appropriateness. In some countries that have sought to expand the use of evaluation (such as the UK), a similar skill shortage has been detected and programs to build evaluation skills and support evaluation activities have been implemented (box 6.3).

The Public Service Commissioner, Steve Sedgwick (2011) noted in a recent speech discussing the role of evaluation in the APS:

Ahead of the Game (Advisory Group on Reform of Australian Government Administration, 2010) is quite critical of elements of the APS’ collective performance and [the Secretary of the Department of Finance and Deregulation] sees a clear need to build and embed a stronger evaluation and review culture, noting a possibly lower investment in evaluation in Australia in comparison to other countries. He also noted that while ‘some agencies maintain a best practice, coherent and well coordinated evaluation function, with well developed and stable internal evaluation capability and partnerships with external expert consultants, others appear to be less focussed and there can be questions about usefulness, objectivity, transparency and openness.’ A point backed up by some ANAO reports. (p. 2)

With the running down of internal evaluation capacities, agencies have come to rely more heavily on consultants, though some appear also to lack the ability to ‘quality control’ this external work (Banks 2009).

Box 6.4 Building skills in evaluation: some examples

Canada

Recognising that the ex post evaluation requirements in the *Cabinet Directive on Streamlining Regulation* were likely to prove challenging for many departments, the Regulatory Affairs Sector (the impact assessment review body) initiated a number of measures to assist in building evaluation skills. These included:

- the development of a core curriculum by the Canada School of Public Service (CSPS)
- creation of the Centre of Regulatory Expertise (CORE), which is responsible for:
 - providing specialist level analytical expertise to departments in areas of risk assessment, cost benefit analysis, performance measurement and evaluation
 - cost sharing of external expertise when it is unable to provide the service
 - developing and promoting best practice, capacity building, and learning opportunities in collaboration with CSPS and CFR.
- maintaining dialogue and learning through specific training events and conferences

European Union

Two examples of capacity building in the European Commission (EC) are:

- Central support and coordination — the Directorate General (DG) Budget provides guidance, training, workshops, seminars, overviews of the EC's evaluation activities and evaluation results, and promotes, monitors and reports on good evaluation practice.
- Evaluation Network — DG Budget coordinates an Evaluation Network to spread best practice. It meets around 6 times a year and there are a number of working groups which focus on specific issues and there is an annual work program.

Source: Appendix K.

FINDING 6.5

A lack of skills limits the potential for good ex post evaluations. Unless there is a demand for quality evaluation there is little incentive to build the necessary skills. Countries that have recently implemented programs to improve ex post evaluation of regulation are also investing in the development of evaluation skills.

The specification of review needs when regulation is being developed should make provision for their resourcing where this is likely to be necessary to ensure adequate evaluation. Agencies should also ensure that they have the skills in evaluation required to conduct in-house reviews and to manage consultancies if reviews are contracted out.

RECOMMENDATION 6.6

The Australian Government should commit to building skills in evaluating and reviewing regulation, and examine options to achieve this.

A Submissions and Consultations

This appendix outlines the study process and lists the organisations and individuals that have participated.

Following receipt of the terms of reference on 24 May 2011, an issues paper was released in June to assist study participants in preparing their submissions. The Commission received 9 submissions before releasing the discussion draft in September 2011. A further 3 submissions were received subsequent to the discussion draft. Those who made submissions are listed in table A.1

The Commission held informal discussions with a variety of organisations and government departments and agencies. It conducted a total of 17 meetings (table A.2) and two Roundtables (table A.3).

Table A.1 Submissions received

<i>Individual or Organisation</i>	<i>Submission no.</i>
WSP Group	1
Australian National Retailers Association	2
CropLife Australia	3
Australian Chamber of Commerce and Industry	4
National Transport Commission	5
Department of Innovation, Industry, Science and Research	6
Property Council of Australia	7
Accord Australasia Ltd	8
Australian Services Roundtable	9
Business SA	DR10
Department of Finance and Deregulation	DR11
Department of Agriculture, Fisheries and Forestry	DR12

Table A.2 Consultations and meetings

Interested Parties

New South Wales

Better Regulation Office, NSW Department of Premier & Cabinet

COAG Reform Council

Equal Opportunity for Women in the Workplace

IPART

NSW Treasury

Canberra

Attorney General's Department

Australian Chamber of Commerce and Industry

Australian National Audit Office

Department of Agriculture, Fisheries and Forestry

Department of Broadband, Communications and the Digital Economy

Department of Finance and Deregulation

Department of Sustainability, Environment, Water, Population and Communities

Office of the Registrar of Indigenous Corporation

National Transport Commission

Office of Best Practice Regulation

Office of Legislative Drafting and Publishing

The Treasury

Tasmania

Tasmanian Treasury

Western Australia

Western Australian Treasury

Queensland

Queensland Office for Regulatory Efficiency, Queensland Treasury

Victoria

Australian Industry Group

Victorian Department of Treasury and Finance

International

OECD

Table A.3 Business and Government Roundtables

Interested Parties

Business — 14 November 2011

Australian Chamber of Commerce and Industry
Australian Services Roundtable
Council of Small Business of Australia
Housing Industry Association Queensland
Minerals Council of Australia
Property Council of Australia
Restaurant and Catering Queensland

Government — 15 November 2011

Attorney-General's Department
Department of Finance and Deregulation
Department of Innovation, Industry, Science and Research
Office of Best Practice Regulation
Queensland Treasury
The Treasury
Victorian Competition and Efficiency Commission

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B Public stocktake reviews

Key points

- Public stocktakes are generally consultative reviews that invite businesses to provide information on the burdens imposed by regulation. They tend to be broad, covering all industries or a sector.
 - The complaints-driven approach usually employed in stocktake reviews promotes the identification of reforms that are a priority to business. This helps improve business buy-in to the reform process and can be a good way to identify areas of regulation that may not have previously been recognised as needing attention.
 - Stocktake reviews can help generate momentum for regulation reform that lasts longer than the lifetime of the review. A strength of stocktakes is that they often identify areas of regulation that need more in-depth review and create pressure for further reform.
- Since stocktake reviews tend to take policy objectives as given, and focus on the unnecessary burden of regulations, regulations that may have low compliance costs but large economic costs may not be picked up. Stocktake reviews are accordingly most effective when complemented by other approaches.
- Given the costs involved and the need for political support and business input, an economy wide stocktake every ten years seems to work well.
 - Frequent reviews can lead to ‘review fatigue’ among businesses, particularly where there are overlapping reviews or business perceives few tangible results from previous reviews.
- Businesses can find it difficult to identify discrete costs that can be attributed to a particular regulation or set of regulations and often do not think about regulation the same way as reviewers.
 - For stocktakes to work well, the problems raised by business need to be vetted by reviewers and tested with the relevant agencies, including to determine whether there are alternative approaches that can reduce the burden without detracting from the policy objective.
- The breadth of stocktake reviews means that complex issues typically cannot receive detailed attention.

The structure of this appendix is as follows:

- section B.1 describes the main features of stocktake reviews
- section B.2 provides examples of stocktake reviews to highlight how they are usually commissioned (the triggers), the methods used to identify the areas for reform, the assessment of alternatives to the regulation in place, and the governance arrangements of the reviews
- section B.3 considers how effective (or not) stocktake reviews have been in promoting successful reforms to the stock of regulation
- section B.4 draws out the lessons, making an assessment of the usefulness of stocktake reviews in: identifying areas of regulation that need reform (discovery); alternatives that would improve outcomes (solutions); promoting reform action (influence); and the overall return on the review effort (cost-effectiveness).

These lessons are brought together with those from the other appendixes in chapters 3 and 4 of the final report.

B.1 What are stocktake reviews?

Public stocktake reviews generally take a complaints-driven (or bottom-up) approach to investigating regulations requiring reform. They start by asking businesses and others about the regulations they are affected by and the impacts of these regulations.

Stocktakes accordingly usually involve widespread consultation with industry (businesses and not-for-profit organisations (NFPs)), consumer groups and experts, in the relevant areas of regulation. Where the case for excess burden is established, these groups may then be consulted in developing alternatives. The agency or taskforce undertaking the stocktake would also apply additional screening processes (for example with relevant policy departments) and evaluation in their assessment of the validity of the complaints and in identifying opportunities for reform.

Stocktakes are used mainly to identify unnecessary burdens — those costs seen as excess to meeting the objectives of the regulation. The objectives of the regulation are generally taken as given, and the focus of the reviews is on cost-effectiveness. Stocktake reviews are by definition generally broad in scope across industries or sectors.

The term ‘red tape’ review tends to apply where the focus is limited to the unnecessary administrative and compliance costs. Although a subset of the possible unnecessary burdens, they are the most readily identified and measured if given a review.

The scope and depth of stocktake reviews can depend on who conducts them. Where the department or regulators, tasked with conducting a regulation stocktake, focus on their regulated population these are usually conducted as sector-specific stocktakes. An example is the Queensland Office for Regulatory Efficiency, with their program of reducing red tape, which is run by departments and therefore focused on regulations at the industry sector level. A similar approach has been applied in the January 2011 Executive Order by President Obama (2011a) which requires all federal agencies to review their existing regulation for excess burden.

This appendix focuses on public stocktakes which are undertaken via consultation and could be contrasted with internal stocktakes of regulation that might be conducted by a department or a regulator. An example of a wide-ranging internal stocktake is the review of pre-2008 regulation undertaken by the Department of Finance and Deregulation in 2011 (appendix G).

B.2 How have stocktake reviews been used?

This section draws on examples to discuss how the reviews are usually initiated, what methods are used to identify problematic regulations and how the options for change are assessed. In addition, governance arrangements such as the independence and transparency of the review process, the opportunity for stakeholders to engage, and any requirements for governments to respond to recommendations, are considered. The final issue considered in this section is how much stocktake reviews cost to conduct.

How are stocktake reviews usually initiated?

The triggers for stocktake reviews tend to be ad hoc, contrasting for example with the routine use of stock management tools. Government may commission reviews in response to pressure from business and consumer lobbies, election commitments and crises.

Pressure for stocktake reviews often increases following periods of substantial regulatory change, particularly where the regulations concerned have large or widespread impacts on business (for example, financial, tax or labour regulation).

The stocktake conducted by the Regulation Taskforce (2006) (box B.1) was prompted by a backlash from business following major changes to tax and financial regulation (BCA 2005). The report was seen as a way to raise productivity and reduce costs by flagging areas of greatest reform potential and nominating some simple reforms that could be used as a starting point. The previous broad stocktake review, undertaken in 1996, was driven more strongly by small business concerns (Small Business Deregulation Task Force 1996).

Whether the result of a particular event, or the build-up of pressures for reform, the pressure typically comes from stakeholders. This links into the complaints-based mechanism that stocktakes use — to learn more through consultation in order to address concerns.

Box B.1 The Regulatory Taskforce’s criteria for filtering proposals for regulatory reform

The Regulation Taskforce (2006) used a number of criteria to filter reform proposals.

- Consistent with the terms of reference, regulation should be the responsibility of the Australian Government, or a State or Territory regulation that overlaps or interacts with Australian Government regulation.
- Regulation should be unnecessarily burdensome, complex, redundant or duplicative. The Taskforce focused on regulations where the compliance burden appeared unnecessarily high and therefore where there was an avoidable burden on business, and a likely net benefit from reform.
- Reforms to the regulation would not raise fundamental policy issues. The Taskforce’s brief was to identify practical options for alleviating the compliance burden on business — rather than addressing underlying policy matters.
- A regulatory reform was likely to have an impact on a large number of businesses or industries or have a potentially significant impact on the productivity of business across the economy. An early indicator was the extent to which a regulatory issue was raised across submissions.
- Practical reform options were readily apparent, with associated complications or uncertainties not obvious or insurmountable. Where a reform need was clear, but the best way forward was not, the Taskforce advocated a more in-depth examination.
- Regulations that were recently enacted or yet to be effectively implemented were generally not considered.
- The regulation was not the subject of a recently completed review for which the relevant recommendations were being considered by government or had recently been acted on.

Source: Regulation Taskforce (2006).

What methods are used to identify regulations needing reform?

Various processes are followed to get information about regulatory burdens from stakeholders. These include:

- general perceptions surveys (VCEC 2011)
- specific surveys of regulators, business, consumers (PC 2004, review of building regulation perceptions survey of building surveyors)
- complaints portals and suggestion boxes (VCEC 2011, while it did not use a complaints portal for the study, it recommended one be created)
- ‘passive’ consultation (public calls for responses and submissions through advertising) (Regulation Taskforce 2006; PC annual regulation stocktakes (PC 2007c; PC 2008d, PC 2009d; PC 2010i))
- ‘active’ consultation (direct contact with representative groups) (Regulation Taskforce 2006; PC annual regulation stocktakes)
- roundtables and workshops (Regulation Taskforce 2006; PC annual regulation stocktakes).

Such methods have also been used in other countries. For example, the United Kingdom (UK) Government has launched the Red Tape Challenge website (Cabinet Office (UK) 2011), which is designed to seek feedback on which laws and regulations should be abolished. The website has received a large number of suggestions. In early 2011 the newly created Canadian Red Tape Reduction Commission commenced consultations with business and identified a number of regulatory ‘irritants’ (appendix J).

Stocktake reviews can require a substantial effort by the reviewers in screening and assessing areas for reform.

How are reform options assessed?

The disparate and varying quality of reform options identified through the complaints-based approach used in stocktake reviews means that effective assessment is essential to the success of the review. The key first stage of analysis in a stocktake involves assessing whether the complaint is valid and falls within the scope of the review. The second stage is developing options for reform and whether burdens can be lowered while still achieving the purpose of the regulation. Simplification is one of the main principles applied in assessing options to reduce red tape. Where the stocktake review lacks the resources to adequately consider the full range of options, or where it is considered that the objectives of the regulation should be re-examined, an in-depth review will be recommended.

Stocktake reviews typically employ a number of common criteria in screening reform proposals, including whether the regulation falls within the scope of the study (whether jurisdictional and sectoral), the nature and magnitude of the burdens imposed, whether practical reform options are readily apparent, and whether the proposal is the subject of a current or recent review.

For example, to ensure its final recommendations were credible and implementable, the Regulation Taskforce (2006) adopted a staged vetting process to sort through the large number of potential reform options generated as part of the review process.

- *First*, proposals were subjected to initial assessment against certain criteria (box B.1).
- *Second*, surviving proposals were submitted to the responsible policy department or regulatory agency for comment. Agencies that objected to a proposal were asked to explain their reasons — in particular why it would not be practicable or yield a net benefit.
- *Third*, proposals that faced objections were re-examined by the Taskforce to consider whether these were warranted.
- *Fourth*, in making final assessments, the views of expert ‘third parties’ were sometimes sought as ‘referees’ (Banks 2007b).

Given the broad coverage of regulation stocktakes and their limited scope to drill down into specific reform options, a degree of judgement and pragmatism is needed for such processes to work well. For example, in its study into regulatory burdens in New South Wales, the Independent Pricing and Regulatory Tribunal (IPART) (2006) noted that it adopted a pragmatic approach to examining the issues raised in submissions. In doing so, IPART (2006) sought to assess:

- the extent to which each ‘burden’ identified by stakeholders is ‘unnecessary’
- the impact of the burden on different stakeholders
- relevant recent or current reviews or reforms likely to affect the burden
- whether there was a good prospect that regulatory reform could reduce the burden (including the ‘significance’ and ‘immediacy’ of potential gains from reforms)
- whether such reform would simplify transfer costs (for example, from business to government or other sections of the community), or was capable of generating a net benefit to the community as a whole. (p. 37)

In its recent inquiry into Victoria’s regulatory framework, Victorian Competition and Efficiency Commission’s (VCEC) (2011) employed a range of methods to collect information, including a perceptions survey (box B.2). The reform proposals/issues identified were then passed through a set of filters.

Box B.2 Victorian Competition and Efficiency Commission regulation stocktake

The Victorian Competition and Efficiency Commission (VCEC) was asked to undertake an inquiry into Victoria's regulatory framework in June 2010. In early 2011 VCEC released a two-part draft report.

- *Part 1 — Strengthening Foundations for the Next Decade* outlined VCEC's proposals to improve the operation of Victoria's regulatory management system.
- *Part 2 — Priorities for Regulatory Reform* identified specific areas of Victoria's regulation that are unnecessarily burdensome, complex, redundant or duplicative.

VCEC identified five areas of regulation that should be reformed or reduced as a matter of priority, using a systematic approach to identifying these 'hotspots'. First, a list of potential issues was developed through a range of sources, including: input from Government and inquiry participants (mainly consultation and submissions); a perceptions survey; and other sources available, such as recent reviews. This initial list of regulations and issues was then subjected to filtering criteria. Those which passed the criteria were further analysed for reform options and payoff.

The filtering criteria was regulation that:

- is imposed by the Victorian Government
- is unnecessarily burdensome, complex, redundant or duplicative
- could be readily changed to reduce burden and/or where reform would affect a large number of businesses, NFPs or individuals
- has not been the subject of recent reforms — unless there is evidence of substantial burdens on businesses, NFPs or the wider community that have arisen from or not been addressed by those reforms.

In the draft VCEC called for further contributions from business. The final report was submitted to the Victorian Government in April 2011.

Source: VCEC (2011).

What are the governance arrangements?

The governance arrangements — who conducts the review, the resources available for review, the transparency of the process, and the response to the review findings — vary with the type of stocktake. Some of the more common approaches are discussed below.

Independence of the review team

Stocktake reviews have typically been conducted at arms length from government. For stocktakes to be effective mechanisms for identifying areas for reform they need to engage widely and effectively with businesses. An independent panel which includes credible and expert business representation helps inspire business confidence in the process, increasing business participation.

Another method of achieving independence while incorporating expert knowledge is for the review secretariat to include members from across industry departments and central agencies. *Rethinking Regulation* seconded members from across government (Regulation Taskforce 2006) but was physically located in the Productivity Commission offices. It was important to establish quickly a sense of belonging and of commitment to the exercise, over and above the particular interests of home departments.

The Regulation Taskforce also included prominent business representatives, which helped to overcome business scepticism of what could be achieved. Appointees to the Taskforce comprised Richard Humphrey (former CEO of the Stock Exchange), Rod Halstead (Corporate Lawyer) and Angela MacRae (tax and small business specialist), as well as its chair, Gary Banks, Chairman of the Productivity Commission.

Similarly, a key to the apparent success of the small business sector stocktakes undertaken in New South Wales was the diversity and credibility of the panels. These stocktakes were undertaken by a secretariat from the Department of State and Regional Development and were run by a Taskforce chaired by the director general of that department, and with three government, three business and two to five industry sector representatives, depending on the industry being considered (Small Business Regulation Review Taskforce 2006a; 2006b; 2007). This collaborative process enabled the stocktake to get into the detail of how the regulatory system worked, and delivered some significant reforms at relatively low cost.

In general, special purpose review bodies are more likely to have the expertise and resources needed to undertake this kind of project.

Consultation processes and transparency

Given the dependence of stocktake on business input, effective consultation is important, as is the opportunity for wider scrutiny. Stocktakes may include all or most of the following:

- release of an issues paper

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- a call for submissions
 - interaction with stakeholders through submissions, face-to-face meetings and sometimes surveys
 - release of a draft report or exposure of preliminary findings for comment (often followed by a second round of consultation).

For example, in Western Australia, the final report of the Red Tape Reduction Group, released in February 2010, contains 107 recommendations, 16 specific reform chapters across a broad spectrum of government activity. In undertaking its functions, the Red Tape Reduction Group consulted widely around the State with business (including small and medium-sized businesses), industry groups and local governments. The consultation process included face-to-face consultations (including 62 face-to-face consultations with a wide variety of stakeholders in 12 regional centres and 6 metropolitan regions) and a written submission process (with 64 written submissions received) (Red Tape Reduction Group 2010).

In-house reviews or reviews by non-expert bodies may be less transparent or engaged due to limited resources.

Requirements for government to respond

Where established organisations are used for the stocktake, reporting requirements tend to be set out in their legislation. For example, Productivity Commission reports must be released within 25 sitting days¹ and VCEC inquiries must be released by the government within six months.²

There is no formal requirement, unless included in terms of reference, for the Australian government to respond to Productivity Commission reports. However, the convention is that the government usually sets out its response to all recommendations, which has been the case for its various sectoral stocktakes (PC 2009c; PC 2010h).

Where an ad hoc body is established for the purposes of the review, specific reporting requirements may also be established.

¹ *Productivity Commission Act 1998*, s12. There are approximately 64 sitting days in a year.

² State Owned Enterprises (State body — VCEC) Order 2004, s4(6).

How much do stocktake reviews cost?

Costs vary substantially depending on a range of factors, including how many are involved in the review, the scope of the review, data requirements, and the quality of information provided by business (and hence how much additional effort is required by the review team to confirm the problem and identify worthwhile reforms).

While overall review costs can be large, costs per identified reform will still be low when the review works well. For example, while the Regulation Taskforce (2006) resource commitment was large (some \$2 million), the review took only three months and strong stakeholder engagement saw the review identify a large number of reforms.

A paucity of consistent data on the costs of previous stocktakes makes it difficult to provide an assessment. However, the Commission publishes data on the costs of its projects, including its sectoral stocktake reviews. Each of these projects ran for around 12 months, with costs (largely wages and associated ‘on-costs’) amounting to around \$1 million per stocktake (PC 2009c; PC 2010h).

In addition to the direct costs to government (costs of the review team and the time spent by regulators/government interacting with them) there are costs to business. As the stocktake reviews are complaints-based, the aggregate costs to business can be significant, including through preparing submission, fees to consultants etc. The Regulation Taskforce (2006), for example, received around 150 submissions, many being substantial documents. Businesses, regulators and government departments also gave their time in attending roundtables and face-to-face meetings and in reading and responding to proposals.

B.3 How effective have stocktake reviews been in promoting regulation reform?

Effective stocktake reviews would not only identify beneficial reforms, but also have a good ‘strike rate’ in implementation.

The Regulation Taskforce (2006) made 178 recommendations, of which 160 were initially accepted in whole or in part by the Australian Government following the release of the report. According to the Department of Finance and Deregulation, 111 of these have now been completed, 41 are in progress and eight are not proceeding (table B.1). In addition, 11 of 14 regulatory areas identified as priorities for further, more detailed review have since been completed (box B.3.).

Table B.1 Implementation status of the Regulation Taskforce's recommendations

<i>Portfolio</i>	<i>Total</i>	<i>Completed</i>	<i>In progress</i>	<i>Not proceeding</i>
Attorney-General	5	1	2	2
Agriculture, Fisheries & Forestry	5	3	2	0
Broadband, Communications & the Digital Economy	3	3	0	0
Education, Employment & Workplace Relations	14	1	11	2
Health & Ageing	24	15	9	0
Immigration & Citizenship	1	1	0	0
Innovation, Industry, Science & Research	5	5	0	0
Families, Housing, Community Services & Indigenous Affairs	1	0	0	1
Finance and Deregulation	16	16	0	0
Prime Minister & Cabinet	3	0	3	0
Resources, Energy & Tourism	1	1	0	0
Treasury	56	45	8	3
Sustainability, Environment, Water, Population & Communities	16	13	3	0
Climate Change & Energy Efficiency	1	1	0	0
Cross-portfolio	9	6	3	0
Total — agreed recommendations^a	160	111	41	8

^a One additional recommendation (ministerial responsibility for overseeing the Government's regulatory processes and reform program should be elevated to Cabinet level) has also been implemented by the Government.

Source: Department of Finance and Deregulation (pers. comm., 7 September 2011).

Box B.3 The '*Rethinking Regulation*' report

Rethinking Regulation was the work of a specially commissioned 'Regulation Taskforce' comprising key business figures and chaired by Productivity Commission Chairman Gary Banks. It was supported by a secretariat drawn from across Government. The Taskforce was given three months to complete its work and published its report in 2006. The terms of reference required that it identify problem areas and solutions from across the entire spectrum of Commonwealth regulation in Australia, including areas of overlap with State and Territory regulation.

An issues paper and call for submissions was sent out early in the review, followed by extensive business engagement including 60 consultation visits, three round tables and two discussion forums. Regulations raised by business as overly burdensome were tested against certain criteria (box B.1) and, if they seemed reasonable, the relevant Government department was asked to show why the change should not be recommended.

The taskforce was proactive in its consultations and in promoting its work. The support it gained from business was important to its success.

Prioritisation

The report included 178 recommendations, including 66 priority reforms. These were based on an assessment, often calling for judgement, of the prospective gains of the reform (in terms of breadth and depth of impact), the ease of implementation, and logistical considerations — for example, the need to avoid overloading COAG or particular portfolio areas.

Priorities implemented included:

- raising the threshold for compulsory GST registration from \$50 000 to \$75 000
- increasing the fringe benefits tax minor benefits threshold from \$100 to \$300
- significantly increasing the \$6 million threshold which determines the public works that must be referred to the Parliamentary Standing Committee on Public Works
- raising the thresholds for the definition of a large proprietary company.

Priorities not implemented included:

- increasing the PAYG withholding threshold for quarterly remitters from \$25 000 to \$40 000
- raising the superannuation guarantee exemption threshold to \$800 per month, and periodically reviewing the threshold.

(continued on next page)

Box B.3 (continued)

Priority reviews

In addition, 14 regulatory areas were indicated as priorities for review, 11 of which have since been commissioned and completed.

- Superannuation tax provisions — Super System Review Panel (2010).
- Anti-dumping regulations — Australia's Anti-dumping and Countervailing System (PC 2009d).
- Wheat export ('single desk') arrangements — Wheat Export Marketing Arrangements (PC 2010f).
- Childcare accreditation and regulation — Early Childhood Education and Care Quality Reforms (Early Childhood Development Steering Committee 2009).
- Privacy laws — ALRC (2008).
- Food regulation — PC (2009b).
- Chemicals and plastics regulation — PC (2008c).
- Consumer protection policy and administration — PC (2008d).
- National trade measurement — 2006 review commissioned by the Ministerial Council on Consumer Affairs.
- Implementation of procurement policies — Department of Finance and Deregulation (2008).
- Health technology assessment — Department of Health and Ageing (2009).

Reviews yet to be concluded include the following.

- Energy efficiency standards for premises — the CSIRO has been tasked with the review and it is scheduled to be completed by the end of 2012.
- Private health insurance regulations — no review is required following a package of important changes to private health insurance arrangements in April 2006.
- Directors' liability provisions under the Corporations Act — Treasury released an issues paper in 2007.

Sources: Banks (2007b); Regulation Taskforce (2006).

New South Wales also conducted a stocktake review in 2006 (IPART 2006), which was successful in reforming the stock of regulation, both in terms of specific recommendations and recommendations for further review, and in driving reform of the regulatory process (box B.4).

Box B.4 IPART Investigation into the Burden of Regulation in NSW and Improving Regulatory Efficiency

In 2006 the Independent Pricing and Regulatory Tribunal (IPART) conducted a review of regulation in New South Wales. It was divided into three parts:

- state-wide stocktake of specific regulations identified in submissions as potential sources of unnecessary burden
- cross jurisdictional inconsistency where there was potential for harmonisation
- the regulation development process.

The review had a high profile and received considerable input from business. Many specific recommendations for changes to regulations were implemented. The review of cross-jurisdictional inconsistencies identified areas such as occupational health and safety and workers' compensation, which were subsequently included in the COAG harmonisation processes. Finally, the report found that current RIS process guidelines were not being followed and recommended significant changes. These recommendations led to the creation of the Better Regulation Office in early 2007.

Source: IPART (2006).

Sector-specific stocktakes

Stocktake reviews can also be an effective way of promoting regulation reform focussed on particular sectors. But, as with economy-wide stocktake reviews, results have varied. The Commission's annual regulation stocktake reviews that followed the more comprehensive Regulation Taskforce (2006) have had mixed success in identifying significant regulation reforms (box B.5 and table B.2).

Smaller, more targeted industry stocktakes can also be beneficial. For example, in New South Wales, the Small Business Regulation Review was a rolling review of regulations in targeted industry sectors to reduce the burden of regulatory compliance on small business. Reviews included: motor vehicle retailing and services sector (July 2006); accommodation, food and beverage services sector (October 2006); and manufacturing (fabricated metal products, machinery and equipment, and furniture) sector (October 2007). The Taskforce used the consultation process to identify and explore specific regulatory requirements that were duplicative, unnecessary, unreasonable, excessively costly or time-consuming. Feedback provided to the Commission in consultations indicated that these reviews were seen as valuable exercises, in part because they were able to examine regulations for the particular sectors in sufficient detail to identify concrete problems (Small Business Regulation Review Taskforce 2006a; 2006b; 2007).

Box B.5 Productivity Commission annual reviews of regulation by sector

The Productivity Commission has conducted a series of stocktake reviews on the regulatory burdens on business in specific sectors. These followed the broader one by the Regulation Taskforce, based on a Council of Australian Governments (COAG) agreement for all Australian governments to undertake reviews of existing regulation to identify areas where regulatory reform would provide significant net benefits to business and the community (PC 2007c, p. iv).

The stocktake reviews included: Primary Sector (2007); Manufacturing and Distributive Trades (2008); Social and Economic Infrastructure Services (2009); and Business and Consumer Services (2010). Reviews each ran for 12 months.

The Government's response to recommendations has been positive, with most recommendations accepted (table B.2). While the underlying policy objectives of the regulation of the business and consumer services sector were largely beyond the scope of these reviews, recommendations were made that some policy issues or particular industries be considered in more detail. For example, following a detailed research study by the Commission (PC 2008f), the 2009 stocktake review pointed to aged care as one such sector, which was subsequently the subject of a public inquiry (PC 2011a).

Sources: PC (2007c); PC (2008d); PC (2009d); PC (2010i).

Table B.2 Government responses to the Productivity Commission's sectoral 'burdens' reviews

	<i>Cost of review \$'000</i>	<i>No. of recommend- ations/ options</i>	<i>Supported in full</i>	<i>Supported in part/for further consideration</i>	<i>Supported in principle</i>	<i>Not supported</i>
Primary Sector (Report completed November 2007)	1 572	61	36	4	13	8
Manufacturing Sector and the Distributive Trades (Report completed August 2008)	1 580	23	4	2	15	2
Social and Economic Infrastructure Services (Report completed August 2009)	1 199	42	21	12	5	4
Business and Consumer Services (Report completed August 2010)	935	18	5	0	5	8
Total (percentage)		100	46	13	26	15

Sources: Australian Government (2008; 2009a; 2009b; 2011b).

B.4 What makes stocktake reviews work well or not?

Priorities for reform are those areas that are currently imposing high costs for which there are better alternatives (which may be repealing, amending, or integrating the regulation). However, in seeking to promote reform, governments are also mindful of the costs of achieving change — both in terms of political capital spent pushing reforms through and the funding of the review processes. In addition, there are some pitfalls to avoid. The conclusions are summarised in table B.3.

How well does the approach identify areas needing reform?

Given their origins, public stocktakes largely involve a complaints-driven approach to identifying priority areas for reform — and consequently the reviews consult widely with business. This promotes the identification of reforms that are a priority to business (improving business buy-in to the reform process), as well as identifying areas of regulation that may not have been recognised as needing attention, some of which were then reviewed and reformed separately. Overall, public stocktakes have proven highly effective in identifying areas in greatest need of reform.

However, there are also a number of challenges associated with such complaints-based approaches. They depend on the cooperative efforts of businesses and other stakeholders. But, this can be difficult to achieve if there is scepticism about the likelihood or effectiveness of reform.

Even when businesses are engaged, identifying reform priorities can be challenging. In undertaking its annual regulation stocktake reviews the Commission found that business often had trouble identifying discrete costs that could be attributed to a particular regulation or set of regulations. Few could separate out the ‘unnecessary’ part of the burden. Business also often had difficulty in separating the responsibilities of the different tiers of government.

Hence, substantial scrutiny by reviewers is needed to determine if issues raised are significant and to tease out underlying regulatory issues. Following some initial screening, complaints and reform options need to be tested with policy departments and regulators, as was done in *Rethinking Regulation* (Banks 2007b).

Stocktakes generally take the objectives of the regulation as given. If the focus is on compliance costs, the review may miss the main sources of cost of poor regulation, such as those from distortions to investment, production and other decisions, or grant market power to incumbents. Hence, stocktake reviews are most effective when complemented by a broader system of regulatory reviews. And they can be

valuable in identifying, if not assessing in detail, such issues requiring more in-depth treatment.

How well does the approach identify better alternatives?

When businesses are able to provide a clear idea of the problem that needs to be addressed, identification of solutions is easier. Identifying reform solutions is also made easier when it is possible to test solutions and seek suggestions from industry and regulators as part of the stocktake. Overall, industry stocktakes offer better scope to test options with business and regulators than with a broad stocktake.

Key stakeholders may not agree on significant facts and there can be different interpretations of evidence. For example, this was particularly apparent in the Commission's *Annual Review of Regulatory Burdens on Business: Business and Consumer Services* (PC 2010i), in relation to the disagreement between the Law Council of Australia and the Department of Immigration and Citizenship on the advantages and disadvantages of the regulation of immigration lawyers under the Migration Agents Registration Scheme.

Hence, skills are needed within the review body to weigh up competing claims, assess whether solutions identified by business are appropriate and whether there are alternative approaches. The limited scope to address the policy intent of regulations, as well as the shortage of time, means that it may not be possible to identify solutions to complex problems. But, as noted, this can lead to more detailed subsequent reviews.

How influential is the approach in promoting reform?

Stocktake reviews can be highly influential in promoting reform, both through recommending immediate changes and in directing priorities for further review. However, the often disparate concerns raised by participants can result in a list of disconnected findings/recommendations. While it is unavoidable that stocktake reviews will result in some ad hoc recommendations, they tend to be more influential where reviewers are able to draw out common themes and priorities, as did the Regulation Taskforce.

Overall, the degree of influence of stocktake reviews depends on how they are managed. In particular, good process is crucial in building awareness and a constituency for change.

The Regulation Taskforce benefited from high level political sponsorship and, as noted earlier, it was well resourced (Banks 2007b). While the Commission's subsequent annual stocktake reviews of key sectors of the economy were also well received, they were arguably less influential, in part because some key issues had already been addressed and because they had a lower public profile.

To avoid 'review fatigue', stocktakes should not occur too frequently, with about every ten years for a general stocktake looking about right (the period between the Bell Review (Small Business Deregulation Task Force 1996) and Regulation Taskforce (2006) stocktake exercises). For industries that are experiencing rapid change, or where there are a large number of new regulations, intermediate reviews could be useful. It is important, however, that the recommendations from past stocktakes are — and be seen to be — dealt with before embarking on a new one. This point has been emphasised recently by business representatives during consultations undertaken as part of this study, who naturally look to past performance in assessing how much effort to put in.

Finally, while identification of areas for further review is a strength of the stocktake approach, there needs to be a balance between calls for additional reviews and specific reforms. A stocktake review with few concrete reform proposals may again lead to cynicism among stakeholders about the value of the process, leading to lower industry participation and ultimately a less influential review.

What is the return on the review effort?

When managed well, broad-based stocktake reviews can be a cost-effective mechanism for identifying regulations that are unnecessarily burdensome. Although the broad nature of stocktakes means that they cannot consider specific issues in depth, they can identify reforms that are obvious and straightforward but may not otherwise have been considered. As for more complex issues, stocktakes are particularly well suited to identifying these as areas for further review — potentially triggering a wave of high quality and well-directed reform.

Factors bearing on the costs of stocktake reviews include: the breadth of the review; the volume of regulation that falls within the scope of the review; and the quality of information provided by participants. Stocktakes rely on businesses nominating specific problematic regulations and providing information to identify and quantify the associated costs. The extent and quality of this information affects the degree of effort the review team needs to expend assessing complaints to determine whether and to what extent they constitute regulatory burdens. Costs are also affected by the complexity of the regulatory area examined and hence the amount of reviewer effort

and time that needs to be invested. Review costs are lower — and success more likely — where businesses are also able to identify more cost effective ways of achieving the regulatory objective.

While the complaints-driven nature of public stocktakes helps to ensure the results are relevant to participants, it can often be difficult to predict the areas of concern in advance and plan and manage review resources accordingly. Hence, an experienced, adaptable and well managed review team is important.

This ability to identify areas of concern that were not apparent to regulators or policy agencies is a key strength of this approach. Often these consequences of regulation were unintended, resulting from design or administrative flaws that were not recognised when the regulation was enacted, and can be relatively easy to correct.

Table B.3 Strengths and weaknesses of public stocktakes

Economy-wide and sectoral stocktakes

Discovery — How well does the approach identify areas needing reform?

- | | |
|------------|--|
| Strengths | <ul style="list-style-type: none">· Business raise issues that may not otherwise be easily identified (such as where regulations interact)· Can identify regulation in need of more in-depth review |
| Weaknesses | <ul style="list-style-type: none">· Shallow rather than deep analysis and focuses on compliance costs, so can miss some areas with large economic costs other or deficiencies· Business may have difficulty identifying discrete costs from regulation and may not understand ‘unnecessary’ burdens |

Solutions — How well does the approach identify better alternatives?

- | | |
|------------|---|
| Strengths | <ul style="list-style-type: none">· Effective in identifying possible solutions through consultation· Can test solutions and seek suggestions from industry and regulators, particularly for sector-level stocktakes |
| Weaknesses | <ul style="list-style-type: none">· Need in-house skills and agency advice to determine or check if solutions are optimal so not relying solely on what business has asked for |

Influence — How influential is the approach in promoting reform?

- | | |
|------------|---|
| Strengths | <ul style="list-style-type: none">· Often strong political support/government commitment to process· Good process (consultation, submissions, draft) builds awareness and a constituency for change· Likely to lead to reform of some specific regulations and may promote further significant reform by identifying the need for more in-depth reviews |
| Weaknesses | <ul style="list-style-type: none">· Too frequent reviews, or failure to implement past reform recommendations can lead to ‘review fatigue’ among business· Findings may be ignored unless strong government commitment to respond |

Cost-effectiveness — What is the return on the review effort?

- | | |
|------------|---|
| Strengths | <ul style="list-style-type: none">· Picks up the major complaints of industry and can generate high returns by recommending the minor changes that are likely to deliver the greatest benefits· Can identify the broad areas most in need of further review and reform, and be the start of a wave of high quality and well directed reform if timed right |
| Weaknesses | <ul style="list-style-type: none">· Need suitable business engagement to work effectively |
-

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C In-depth reviews

Key points

- In-depth reviews combine a close focus with the opportunity for intensive analysis.
 - They generally take a regulation or set of regulations impacting on an industry or activity and consider in detail their appropriateness, effectiveness and efficiency. They can also propose alternatives to the existing regulatory approach.
 - The reviews may encompass both regulatory, expenditure and other policy elements.
- Independence of the reviewer can be crucial to the efficacy and influence of in-depth reviews. Key governance elements that promote independence include:
 - the review being conducted at arm's length from the policy area, with no conflicting interests
 - ensuring an appropriate mix of skills of those involved in the review
 - separate arrangements for funding and support (for example, via secretariats)
 - public consultation that is broad and takes place over an extended period.
- The scope or mandate of the review is also very important. If too narrow, this can restrict the ability to examine the full impacts of the current approach, and hence to fully identify the need for reform.
- High quality in-depth reviews provide a robust analysis of the current system and demonstrate the advantages (net benefits) of the changes they recommend. As such they can help build a constituency for reform.
- The use of broad and extended consultation, together with the depth of analysis contained in these reviews, has contributed to their effectiveness.
 - Public consultation processes involving a draft reporting stage have been an important contributor to the success of many of these reviews.
- Where stakeholder support is forthcoming, these reviews have been an important driver of regulatory reform.
- Prioritising the commissioning of in-depth regulatory reviews in Australia is important given their resource intensiveness.
- Adequate follow up on the implementation of review recommendations is also essential.

The structure of this appendix is as follows:

- section C.1 — briefly describes the main features of in-depth reviews
- section C.2 — uses examples of in-depth reviews to highlight how they are usually commissioned (the triggers), the methods used in such reviews to assess alternatives to the regulation in place, and the governance arrangements of the reviews
- section C.3 — considers how effective in-depth reviews have been in promoting regulatory reform
- section C.4 — considers what makes in-depth reviews work well. It assesses the main features of effective reviews in: identifying areas of regulation that need reform (discovery) and alternatives that would improve outcomes (solutions); promoting reform action (influence); and providing a positive overall return on the review effort (cost-effectiveness).

C.1 What are in-depth reviews?

In-depth reviews tend to differ considerably from other types of regulatory reviews in terms of their focus, depth of analysis, duration and approach to consultation.

Key features

Reviews of this type generally focus on specific areas of regulation or activity. They look at the impact of a regulation or discrete group of regulations on an industry or particular aspects of an industry. Unlike comprehensive regulatory stocktakes, for example, these reviews tend to be far more targeted.

Reflecting their mandate, in-depth reviews have a more comprehensive approach to analysing the impacts of the current regulation affecting the area under review. They often examine the objectives of the regulation to assess whether it is appropriate, as well as its cost-effectiveness. They usually have the capacity to look at the interaction between regulations, in some cases across the different regulatory jurisdictions.

These reviews involve more research and analysis, and are developed over a longer time frame, than many other review types. They tend to draw on a mix of methodologies in their analysis, including empirical analysis of the impacts of current regulations (ex post evaluation). They also analyse the alternatives (ex ante evaluation) in making recommendations for reform and test the recommendations with stakeholders.

Broad consultation has been a key feature of the more successful reviews. Consultation with industry, consumer groups and experts is used in identifying burdensome and inappropriate aspects of the regulation under review, and in developing alternatives. In many such reviews this consultation is repeated and spread across time, so that stakeholders have an opportunity to provide input and feedback at key stages of the review process.

Such reviews are typically directed at achieving ‘appropriate’ regulation to meet some broadly agreed objective. This may lead them to recommend new regulation in some cases, as well as amendments to or removal of existing regulation. Also such reviews may look at non-regulatory instruments in combination with, or as an alternative to, regulation.

Some examples

State and territory governments regularly commission reviews into specific areas of regulation. In Victoria, for example, the Victorian Competition and Efficiency Commission (VCEC) has conducted inquiries into regulatory impediments in the financial services sector (2010); environmental regulation in Victoria (2010); food regulation in Victoria (2008); the Labour and Industry Act (2007); housing construction (2006); and regional economic development (2005). These have all involved broad consultation and detailed analysis.

Examples of Productivity Commission reviews that have used this approach when looking at regulations or topics with a strong regulatory focus are shown in box C.1. These reviews have tended to: involve long time frames (9–12 months); focus on specific regulations and industries; consider regulatory, quasi-regulatory and non-regulatory alternatives; and wide consultation. They also consider the costs and benefits to Australia as a whole, rather than to a particular interest group or region.

A number of current and past reviews conducted by taskforces, typically led by eminent former business people or public servants, have also (to varying degrees) used aspects of this approach in considering regulations or issues with a strong

regulatory dimension. Examples include the current Victorian Taxi Industry Inquiry; the 2011 transparency review of the Therapeutic Goods Administration (box C.2); the 2008-10 Australia's Future Tax System (Henry) Review; the 2009-10 (Cooper) Review of Australia's Superannuation System; the 2008 (Beale) Review of Quarantine and Biosecurity (box C.3); and the 2008 (Hawke) Review of the *Environment Protection and Biodiversity Conservation Act 1999*. Earlier examples of past reviews using aspects of this approach include the 2005 taskforce review of Australia's export infrastructure; the 1993 (Hilmer) Review of Competition Policy; and the Wallis (1996-97) and Campbell (1979) inquiries into the Australian financial system.

Box C.1 Examples of Productivity Commission inquiries and studies with a regulatory focus

<i>Price Regulation of Airport Services</i> (current Inquiry)	<i>Caring for Older Australians</i> (2011 Inquiry)
<i>Gambling</i> (2010 Inquiry)	<i>Wheat Export Marketing Arrangements</i> (2010 Inquiry)
<i>Executive Remuneration in Australia</i> (2010 Inquiry)	<i>Review of Australia's Consumer Policy Framework</i> (2010 Inquiry)
<i>Contribution of the Not for Profit Sector</i> (2010 Study)	<i>Restrictions on the Parallel Importation of Books</i> (2009 Study)
<i>Australia's Anti-dumping and Countervailing System</i> (2009 Inquiry)	<i>Review of Regulatory Burdens on the Upstream Petroleum (Oil and Gas) Sector</i> (2009 Study)
<i>Chemicals and Plastics Regulation</i> (2008 Study)	<i>Review of Australian Consumer Product Safety System</i> (2006 Study)
<i>Reform of Building Regulation</i> (2004 Study)	<i>Review of the Disability Discrimination Act 1992</i> (2004 Inquiry)
<i>Impacts of Native Vegetation and Biodiversity Regulations</i> (2004 Inquiry)	<i>National Workers' Compensation and Occupational Health and Safety Frameworks</i> (2004 Inquiry)
<i>Economic Regulation of Harbour Towing and Related Services</i> (2003 Inquiry)	<i>Review of Section 2D of the Trade Practices Act 1974: Local Government Exemptions</i> (2002 Inquiry)
<i>Review of the National Access Regime</i> (2002 Inquiry)	<i>Review of the Superannuation Industry (Supervision) Act 1993 and Certain Other Superannuation Legislation</i> (2002 Inquiry)
<i>Telecommunications Competition Regulation</i> (2001 Inquiry)	<i>Review of Legislation Regulating the Architectural Profession</i> (2000 Inquiry)

Box C.2 The transparency review of the Therapeutic Goods Administration

On 16 November 2010, the Parliamentary Secretary for Health and Ageing, the Hon. Catherine King MP, announced a review to improve the transparency of the Therapeutic Goods Administration (TGA). The Parliamentary Secretary advised that a review panel of consumer, health practitioners and therapeutic goods industry representatives was being established under the Chairmanship of Emeritus Professor Dennis Pearce AO.

The Panel of 13 members broadly represented the main stakeholder groups of: consumers (four representatives); health practitioners (three representatives); the rural health sector (one representative); and the therapeutic goods industry (five representatives). The five representatives of the therapeutic goods industry represent the following sectors: prescription medicines; generic prescription medicines; over-the-counter medicines — for example, pain relief, cold and flu preparations; complementary medicines — also known as 'traditional' or 'alternative' medicines, including vitamin, mineral, herbal, aromatherapy and homeopathic products; and medical devices — for example, bandages and dressings, replacement hips, heart valves etc.

The 13 member Review Panel was asked to comprehensively review the way in which the TGA communicates its regulatory processes and decisions, and to report against the terms of reference.

The Review adopted a strong focus on communication, consultation and engagement, and sought input through submissions and conducting public meetings. The public consultation phase of the Review encouraged individuals and organisations to put their views forward through written submissions, and /or attendance at either a public meeting, or a meeting organised for a specialist group, for example, with officials of state and territory health departments, or other regulatory bodies. All submissions to the Review, notes of the public meetings, and summaries of the Panel meetings were published on the TGA website so that progress on the Review could be monitored by interested parties. A final report was released publicly in June 2011.

Source: TGA (2011).

Box C.3 The Beale Review of Quarantine and Biosecurity

The 2008 *Review of Quarantine and Biosecurity*, headed by Roger Beale AO, was announced in February 2008 and provided its final report to government in September 2008.

The review had broad-ranging terms of reference, and was required to consider the appropriateness, effectiveness, and efficiency of:

- current arrangements to achieve Australia's Appropriate Level of Protection
- public communication, consultation, and research and review processes
- resourcing levels and systems and their alignment with risk in delivering requisite services
- governance and institutional arrangements to deliver biosecurity, quarantine, and export certification services.

In looking at regulation in this area, the Review (Beale et al. 2008) found that the primary legislation, the *Quarantine Act 1908*, was no longer fit for purpose. The Review stated:

The core of the *Quarantine Act 1908* was drafted a century ago. Since that time, biosecurity risks have changed significantly as have Australia's international trade interests and treaty obligations. The Act has been progressively amended to cater for these changes, leading to overlapping provisions and powers. In some cases, activities are now supported by more than one source of authority, while in others, apparently similar provisions require specific steps to be followed if the actions taken are to be lawful. (p. 130)

Beale et al. (2008) recommended that the Act be replaced with a new Biosecurity Act which would be based on a 'broad set of Commonwealth Constitutional powers to move from a narrow 'quarantine' focus to the management of biosecurity risks in a modern trading environment.' (p. 131)

Source: Beale et al. (2008).

In-depth reviews are also undertaken in the context of wider reviews of government expenditure programs. Often there is a regulatory component to the program that sets out eligibility and governs the provision of services. Examples include the 1998 (West) and 2008 (Bradley) reviews of higher education; the 2004 (Hogan) Aged Care Review; the 2009 National Health and Hospitals Reform Commission; and the recent reviews of aged care and disability care and support conducted by the Commission (PC 2011a and 2011b). A feature of these reviews is that they are not wholly focussed on regulation and, as such, have tended to consider the interaction between regulation, access, service provision, funding arrangements, and outcomes. They have also considered changes in the 'mix' of regulation as a result of this broader frame of reference.

Increasingly, governments are also choosing to deliver services via contracted entities, both for-profit and not-for-profit organisations. Many such contracting arrangements impose significant regulatory requirements upon the contracted parties. These contractual requirements can impose considerable compliance costs on the service delivery organisation, and have been dubbed by some ‘regulation by stealth’ (PC 2010e). In-depth reviews of broader government service delivery can therefore also have a strong regulatory or quasi-regulatory dimension.

Parliamentary Committee inquiries into current or prospective regulations also have some (if not all) of the characteristics of in-depth reviews. These inquiries tend to share a strong focus on public consultation via submissions and hearings. One main point of difference, however, is that the conclusions of Committee review reports may be split along party lines, with dissenting or minority reports possible in some cases. Committee reviews also tend to be more lightly resourced than those conducted by standing bodies, panels and taskforces.

International examples

In-depth reviews of regulations, or of issues with a strong regulatory dimension, have also been undertaken in a number of other countries.

In the United Kingdom (UK), for example, the current review of health and safety legislation (the Löfstedt Review) is being conducted with an independent panel of experts from a range of backgrounds. The Review has a broad reference, and is required to:

... consider the scope for combining, simplifying or reducing the – approximately 200 – statutory instruments owned by HSE and primarily enforced by HSE and Local Authorities, and the associated Approved Codes of Practice (ACoP) which provide advice, with special legal status, on compliance with health and safety law. (Department for Work and Pensions (UK) 2011, p. 2)

The review is to be conducted over a longer timeframe (approximately nine months) with extensive consultation requirements.

Canada has also conducted a number of in-depth reviews in the past, often as offshoots of broader reviews of the entire regulatory system. For example, as part of the 1992 Canadian Government review of its regulatory system, a number of departmental reviews were conducted that had many of the features of in-depth reviews. In commenting on these reviews, the Organisation for Economic Cooperation and Development (OECD 2002) stated:

The Departmental reviews culminated in each case in a report to the responsible Minister which identified regulatory programs in respect of which the costs exceeded

the benefits, with proposed dates for their elimination or modification; regulations in respect of which efficiency and effectiveness could be improved; and means by which the department could ensure its regulatory programs remain responsive to Canada's changing circumstances. The processes employed included public consultation with input from a wide range of stakeholders. Several departments used advisory panels with broadly based representation. At the end of the review (complete by June 1993), 835 out of a total of about 2800 regulations then listed in the Consolidated Index of Statutory Instruments were identified for revocation, revision or further review. (p. 48)

Commenting more generally on the Canadian experience, the OECD (2002) observed that, while some useful reviews had been undertaken, a clearer commitment to regular reviews was required.

C.2 How have in-depth reviews been used?

In-depth reviews are often used when detailed consideration is required, not only of the costs imposed by regulations, but also the benefits, and whether there are better alternatives. The first task is an ex-post evaluation to assess whether the costs are warranted by the benefits. The second is an important feature of in-depth reviews as they consider alternatives in order to make recommendations for reform.

An in-depth review will generally need to follow a sequence of steps that mirror the requirements of a RIS, in that it assesses:

- the magnitude of the problem
- the cost effectiveness of the options in addressing the problem
- the appropriateness of the most cost effective option – whether the benefits exceed the costs.

It can also look at related regulation and opportunities to streamline, combine or otherwise reduce the burden and/or improve effectiveness. Hence a good in-depth review can provide strong foundations for regulatory reform in a broader policy context.

How are in-depth reviews usually initiated?

In-depth reviews can have a number of origins, ranging from ad-hoc response to issues or crises, through to a more programmed approach.

Often a set of issues specific to an area of economic activity and regulation will emerge that lead to demands for a thorough review. These may be due to a range of more ad-hoc 'trigger' factors, including rising cost imposts, a change in the

effectiveness of regulation, or a change in broader economic and political circumstances. For example, the Commission's recent inquiries into the retail industry (PC 2011c) and gambling (PC 2010i) arose from situations where stakeholder pressure following significant changes in circumstances created the impetus for an in-depth reconsideration of these areas.

In some cases, an in-depth review can help government resist pressure for a 'knee-jerk' regulatory response to an 'issue' of the day, and can inform a more considered regulatory or other response with less risk of unintended consequences. The Commission's recent review of executive remuneration is an example (PC 2010).

In-depth reviews can also arise where new solutions to long-standing problems appear worthy of consideration. For example, the Victorian Government's current inquiry into the taxi industry arose in part because of concern that the existing regulatory structure, which had remained unchanged for many years, was no longer suitable. In this context, the initial paper for the review (State Government of Victoria 2011) stated:

The issues to be considered by the inquiry are complex and long standing, and are compounded by an absence of verifiable data on many fronts, particularly relating to demand for services. They will require thorough examination and openness to all ideas and perspectives. (p. 5)

The Beale et al. (2008) review of quarantine and biosecurity (box C.3) is another example where a review took place in part because regulation had become outdated and no longer fit for purpose.

Policy changes in an area that have (often) unforeseen but significant impacts on regulatory effectiveness can also trigger in-depth reviews. For example, the Commission's 2000 inquiry into broadcasting arose in part because a range of policy changes, many with cultural and social objectives, had impacted upon the transparency and effectiveness of the regulatory regime (PC 2000).

In-depth reviews can also be part of a more planned approach to developing a reform agenda. Many such reviews have arisen out of earlier stocktake exercises where the issues are identified as important but cannot be resolved as part of a broadbrush review. For example, the Cooper review of superannuation and the Commission's reviews of regulation in chemicals and plastics and upstream petroleum (PC 2009a) arose out of recommendations from the Regulation Taskforce (2006).

The commissioning of a series of in-depth reviews has also formed part of a broader regulatory review program. In Australia, the program of legislative reviews undertaken as part of National Competition Policy, many with a regulatory focus,

are a prominent example in this regard (albeit with variations in the quality of reviews undertaken) (see appendix D). Currently the Commission is engaged in a series of reviews of the education workforce, where regulatory constraints are part of a set of broader considerations (PC 2011f).

How are they conducted?

While there are variations in how in-depth reviews are conducted, they share a similar approach, which includes:

- *consultation*, which tends to be broad to ensure the full range of issues and perspectives is understood
- *the search for evidence*, which can be wide-ranging and consider qualitative and quantitative information in assessing the impact of current regulations
- *the analysis of alternatives*, which can be broad and may draw on the use of principles such as a screening criteria, statistical analysis, expert judgement and the testing of options with stakeholders.

Stakeholder engagement is an important part of review processes. For example, the recent (Cooper) Review of Australia's Superannuation System undertook a three-part consultation process, involving roundtables, visits and international consultations. It also used several stages of submissions to engage with stakeholders and seek their views:

At the start of each phase, the Panel published an issues paper with a view to helping stakeholders frame their submissions at the appropriate conceptual level. Interested parties had a period of approximately eight to ten weeks to make submissions in response to the themes and issues raised in each issues paper. The Panel then released one or more preliminary report(s) in response to each phase. (Super System Review 2010, p. 67)

The use of several stages of reporting and submissions was subsequently identified by the Panel in its final report as an important mechanism by which to identify reform options, test preliminary proposals and gauge stakeholder reaction more broadly (Super System Review 2010).

The Commission's process for review consultation and conduct also relies on extensive stakeholder engagement. Draft reports are an important component which are used to 'road test' positions and recommendations (box C.4). The Commission's experience is that a multi-stage review process is a very effective way to engage stakeholders and to test ideas. In particular, the release of a draft report, with rounds of public submissions both before and after the draft, has assisted these types of reviews greatly (Banks 2007a).

Box C.4 The Productivity Commission's review process

The Assistant Treasurer sends a Reference to the Commission

-

The Commission advertises the inquiry and calls for parties to register their interest

-

The Commission visits interested parties, distributes an issues paper to focus attention and invites written submissions

-

Public hearings or other consultative forums may be held

-

The Commission publishes a draft report or position paper

-

Hearings and roundtables are held on this preliminary report

-

A final report is sent to the Assistant Treasurer

-

Departmental consultations are held and the report is considered by relevant Ministers

-

The report is tabled in Parliament and the Government may announce its decision at that time or at a later date

What are the governance arrangements?

Appropriate governance is needed for in-depth reviews of regulatory issues to find the 'right answers'. Good governance also underpins public confidence and engagement in the process, and builds support for reform.

Governance arrangements that have been central to the effectiveness of in-depth reviews include: independent leadership; adequate resourcing; transparent and consultative processes; and effective channels for government to respond.

Many of the appropriate structures for governance of in-depth reviews apply equally to other review modes, including stocktake reviews (as discussed in Appendix B) and broader, non-regulatory reviews (box C.5).

Box C.5 Views on governance from the Australian Law Reform Commission's 'review of reviews'

In 2009 the Australian Law Reform Commission appointed a commission of inquiry to review the *Royal Commission Act 1902* and related issues. The review's final report, *Making Inquiries: A New Statutory Framework*, contained a large number of detailed recommendations on the conduct and remit of future executive inquiries. While the review was confined to looking at Royal Commissions and other executive government inquiries, and excluded other forms of inquiry conducted by standing bodies such as the Productivity Commission and the Australian Crimes Commission, it nevertheless provides some parallel lessons of interest.

One main theme running through the recommendations is that proper governance is fundamental to the success of reviews. The inquiry made several recommendations designed to strengthen governance and other aspects of future executive reviews. These included that:

- an *Inquiries Handbook* be published containing information (for those responsible for establishing inquiries, inquiry members, inquiry participants and members of the general public) on governance matters including the establishment of inquiries; appointment of inquiry members; administration of inquiries; and powers, protections and procedural aspects
- the *Handbook* would address when it is appropriate to establish a Royal Commission or Official Inquiry, via consideration of the level of public importance; whether powers are required and at what level; whether recommendations will facilitate government policy making; and whether these or other means of inquiry are the most appropriate form of review
- the *Handbook* would also provide detailed guidance on the appointment of members, involving a consideration of such things as skills, knowledge and experience
- the Australian Government should be required to publish an update on the implementation of recommendations from inquiries that it accepts; one year after tabling and periodically thereafter.

Source: ALRC (2009).

In practice, governance arrangements for in-depth reviews have met the requirements to varying degrees.

The degree of independence of reviews is one key area where approaches have differed. Some reviews have been led by eminent people from outside government (Hogan, Wallis, Cooper). Others have been headed by senior public servants (Shergold, Henry, Beale). And the secretariats for both types of reviews have had different origins. For example, the Henry and Hogan reviews used secretariats located in the relevant policy departments (respectively, Treasury and the

Department of Health and Ageing). Other reviews have used secretariats that are separate from departments or agencies, or used secondees from across the public service.

Reviews headed by eminent persons or groups of experts can raise the credibility of the review and its processes, as long as these people are seen to be free from vested interests. Several such reviews have provided high quality reports which have led to major policy changes. (For example, the ‘Campbell Inquiry’ into financial market regulation in the 1980s.) Critically, however, these reviews have not only been characterised by eminent and expert leadership, but have also been well-resourced, with ‘neutral’ secretariats and adequate time frames.

Several agencies have a standing function to conduct regular in-depth reviews, including VCEC and the Productivity Commission. These agencies have relied on administrative, legislative and budgeting arrangements to underpin and strengthen their independence. For example, the Productivity Commission, which is established under its own Act, has governance arrangements in place to ensure the independence of review conduct and advice.

How much do in-depth reviews cost?

In-depth reviews are typically more costly per specific area of regulation than other stock management approaches, such as regulatory stocktakes. By definition, these reviews require more analytical resources, and tend to be conducted over a longer time frame, than other approaches. The extensive consultation that is a hallmark of such reviews can also be a significant contributor to cost.

While detailed cost information is often hard to obtain, cost estimates are available for some past in-depth reviews (table C.1).

Clearly, comparisons of total cost need to be balanced with broader considerations of quality and effectiveness. These issues are discussed further in section C.3 below.

Table C.1 Total cost of selected in-depth reviews of regulation

Costs in current year prices

<i>Review</i>	<i>Review body</i>	<i>Total cost \$m</i>	<i>Source of cost estimate</i>
Australia's Future Tax System (Henry) Review	Review taskforce	10.00 (2008-10)	Media
Contribution of the not-for-profit sector	Productivity Commission	1.57 (2009-10) ^b	PC Annual Report 2009-10
(Beale) Review of Quarantine and Biosecurity	Review taskforce	1.74 (2008-09)	Departmental estimate
(Cooper) Review of Australia's Superannuation System	Review taskforce	2.43 (2010-11)	Departmental estimate
(Hogan) Aged Care Review	Review taskforce	7.20 (2002-03)	Departmental estimate
Chemicals and plastics regulation	Productivity Commission	1.67 (2008-09) ^b	PC Annual Report 2009-10
Food Regulation in Victoria	Victorian Competition and Efficiency Commission	1.51 (2008-09) ^a	VCEC Annual Report, 2008-09
Review of Regulatory Burdens on the Upstream Petroleum (Oil and Gas) Sector	Productivity Commission	1.16 (2008-09) ^b	PC Annual Report 2008-09
Review of Environmental Regulation	Victorian Competition and Efficiency Commission	1.29 (2008-09) ^a	VCEC Annual Report, 2008-09
Labour and Industry Act	Victorian Competition and Efficiency Commission	0.18 (2008-09) ^a	VCEC Annual Report, 2008-09
<i>Review of the Disability Discrimination Act 1992 (2004 Inquiry)</i>	Productivity Commission	2.06 (2003-04) ^b	PC Annual Report 2003-04

^a VCEC cost figures only include salary costs. ^b Includes salaries and estimated overheads.

C.3 How effective have in-depth reviews been in promoting regulation reform?

In considering the effectiveness of in-depth reviews, key questions are:

- whether the areas chosen for review were priorities
- the quality of review processes and reports
- whether reviews have driven required and effective reforms within the areas looked at.

Taken as a group, in-depth reviews have been very effective in promoting regulatory reform. There appears to be no substitute when the issues are complex and sensitive, with multiple stakeholders. When done well, and notwithstanding political sensitivities, in-depth reviews have usually resulted in most of their recommendations being accepted by governments (although the pace of implementation has sometimes been slower than desired). For example, past reviews of regulation undertaken by the VCEC for the Victorian Government have been generally successful in having their recommendations accepted (table C.2). And reviews with strong regulatory dimensions conducted by the Productivity Commission have also been largely successful in having their recommendations accepted by Government (table C.3). In some cases, rejected recommendations have been accepted some time later under a change of government.

Table C.2 Victorian Government responses to selected (regulatory) VCEC inquiry recommendations

	<i>No. of recommendations /options</i>	<i>Supported in full</i>	<i>Supported in part/for further consideration</i>	<i>Supported in principle</i>	<i>Not supported</i>
Regulation and regional Victoria	41	27	-	13	1
Housing regulation in Victoria	47	34	2	8	3
Food Regulation in Victoria	37	22	4	9	2
Review of the Labour and Industry Act	1	1	-	-	-
Review of Environmental Regulation	53	29	8	15	1
Total (percentage)	100	63	8	25	4

Source: VCEC (2009).

Table C.3 Government responses to recommendations of selected past reviews by the Productivity Commission

	<i>No. of recommendations /options</i>	<i>Supported in full</i>	<i>Supported in part/for further consideration</i>	<i>Supported in principle</i>	<i>Not supported</i>
Executive Remuneration in Australia (2010 Inquiry)	17	7	5	4	1
Australia's Anti-dumping and Countervailing System (2009 Inquiry)	20	11	3	1	5
Review of Regulatory Burdens on the Upstream Petroleum (Oil and Gas) Sector (2009 Study)	30	25	5	-	-
Restrictions on the Parallel Importation of Books (2009 Study)	3	-	2	-	1
Review of the Disability Discrimination Act 1992 (2004 Inquiry)	32	13	4	9	6
Impacts of Native Vegetation and Biodiversity Regulations (2004 Inquiry)	10	10	-	-	-
Total (percentage)	100	60	17	12	11

Source: PC (2008e).

The importance of independence and transparency

Past examples suggest that, as discussed, governance matters. To work well, in-depth reviews should be independent, with transparent processes. They also require adequate resources in terms of both staff capability and the time and resources to undertake effective consultation.

Less constrained terms of reference, that allow consideration of interactions with other regulations, including regulation in other jurisdictions, also appear to improve the value of a review. A wide scope appears critical for in-depth reviews to be

valuable as they have to be able to identify, and address in the recommendations, the specific regulations that are problematic.

A further key contributor to the influence of in-depth reviews is the effectiveness of their consultative processes. As the OECD (2010a) has observed:

... reform requires, first and foremost, public understanding of the need for it. For complex issues ... the messages have to be complex enough not to misrepresent the issue, and simple enough to be widely comprehensible. The other prime considerations in communications in support of reform are transparency (the messages and measures must be clearly related to the purpose of the reform) and consistency (the messages and measures must be seen to be complementary and mutually supportive). (p. 152)

Stakeholders may feel misunderstood or misrepresented if the review body makes recommendations that are theoretical, impractical, or do not sufficiently consider industry-specific conditions. But there are significant safeguards built into in-depth reviews that make this less likely to occur. For example, the ‘testing’ of preliminary recommendations via a draft reporting process can be very useful in testing recommended reforms. Indeed, the issuing of draft reports has been a key feature of successful reviews.

C.4 What makes in-depth reviews work well or not?

There are several general conclusions that emerge from a consideration of the effectiveness of in-depth reviews (table C.4).

How well does the approach identify areas needing reform?

In-depth reviews have often arisen out of earlier reviews which identified the need for a more detailed examination of particular regulatory issues. For example, the Commission’s 2006 review of consumer product safety regulation was the culmination of a series of earlier reviews, several of which found that existing regulatory and administrative arrangements contained a number of deficiencies (PC 2006a). A number of reviews have also come out of recommendations by the Regulation Taskforce (2006), as discussed previously.

The track record of commissioning such reviews via a thorough process of discovery and prioritisation has been uneven. A more systematic approach to collecting this information and prioritising in-depth reviews could include consideration of:

- identification of the area in public stocktakes through other review processes, or if revealed through benchmarking or principles-based screening

-
- the length of time since review of an area was undertaken, and the extent of change in the area
 - the potential return to reform in the area and the cost of undertaking the review and subsequent reforms.

How well does the approach identify better alternatives?

In-depth reviews generally perform well in identifying better alternatives and further areas needing reform. Indeed, what distinguishes an in-depth review from an ex-post evaluation is that the review is forward as well as backward looking. A well-designed in-depth review will canvass regulatory alternatives, examine alternatives to regulation, and consider the need for the removal of regulation. Moreover, reviews commonly have scope to look at interactions and rationales so can propose reforms to a number of regulations.

An example in this regard is the Commission's (2009a) study of regulation in the upstream petroleum (oil and gas) sector. The study was asked to take a broad approach, and to:

... identify ways to reduce *unnecessary* regulatory burdens on the sector — those burdens that could be reduced without sacrificing achievement of the policy intent of the regulation. It was also asked to consider options for a national regulatory authority to manage all regulatory approvals for the upstream petroleum sector, to address issues of regulatory duplication and inconsistency. (p. XXI)

In examining these issues, the Commission's approach was deliberately broad, and considered both existing arrangements and possible alternatives.

The wide consultation and extensive front-end research used in in-depth reviews contribute to their effectiveness in canvassing a range of alternatives.

How influential is the approach in promoting reform?

In-depth reviews in Australia have generally been very effective in promoting regulatory reform. Where these reviews have combined key elements of good governance, including extensive consultation, genuine transparency and independence, they have tended to be successful in providing a detailed evidence base to drive reform.

Ex-post follow up of review outcomes and the responses to recommendations is particularly important if reviews are to result in effective reform action. This can encompass requirements for tabling of review reports by governments in a minimum period of time (to ensure all reports see the light of day). It can also involve a systematic following up of actions. Where this is absent, as shown for example by a recent KPMG study into reform implementation in mining regulation (KPMG 2011), reviews can result in limited action and in significant stakeholder disenchantment with the review process.

The overall response to the findings and recommendations of in-depth reviews can also depend on the politics at the time. For example, the Commission's 2009 study of regulation in the upstream petroleum (oil and gas) sector (PC 2009a) observed that:

Many of the recommendations for 'best practice' regulation in this report repeat recommendations made by previous, yet for the most part, unimplemented, reviews. This simply reinforces that strong political will and leadership will be essential if meaningful improvement in the way this sector is regulated across multiple jurisdictions is to be successfully implemented, and sustained. (p. xx)

In seeking to promote reform, governments are also mindful of the costs of achieving change — both in terms of political capital for pushing through reforms and in terms of the cost of the review and reform processes. In addition, governments want to avoid pitfalls that can arise from setting in train review processes. Lack of immediate action following an in-depth review does not necessarily indicate that it 'failed'.

There are a number of examples of reports having a long 'shelf life.' They can contribute to building momentum for hard to achieve but important reform. Hence in-depth reviews into 'hard' areas should not be avoided on the grounds that the constituency for reform has yet to form.

What is the return on review effort?

As discussed previously, in-depth reviews can be relatively costly to undertake. Given the scope of in-depth reviews, the benefits of reforms they propose can be widely dispersed, and difficult to quantify when compared to the costs. Hence the evidence built by a review on the net benefits from reform are an important feature.

If prioritisation of reviews is done well, the costs of review will usually be justified by potential reform benefits. For example, the Commission's 2008 review of

Australia's consumer policy framework (PC 2008d) estimated potential reform benefits were between \$1.5 billion and \$4.5 billion (PC 2008d).

Given that in-depth reviews may be relatively costly to undertake, prioritisation is important. Most of the other approaches discussed in this report provide information that should be drawn on in setting priorities for in-depth reviews. These include:

- public stocktakes, which will likely remain an important mechanism for flagging priority areas for in-depth review
- the sunset process, which could also flag the need for an in-depth review of sunseting regulation or trigger a systemic review in preparation for sunseting
- embedded statutory reviews, which may identify major concerns that they are not able to address where such reviews are limited in scope
- feedback from regulators
- policy agencies, who may be well placed to flag problems with the current regulation, especially where they have mechanisms to monitor and assess the performance of their regulations and regulators.

Table C.4 Strengths and weaknesses of in-depth reviews

Discovery — How well do in-depth reviews identify areas of regulation that are imposing high costs and distortions that need reform?

- | | |
|------------|---|
| Strengths | <ul style="list-style-type: none"> · Partly dependent on prioritising mechanisms, but in most cases past reviews were warranted. · Usually able to consider the whole regulatory context which can be effective in identifying particular problem areas, including interactions of regulations. |
| Weaknesses | <ul style="list-style-type: none"> · Some scope for improving the mechanisms for commissioning such reviews. A focus on what previous reviews may have recommended would assist in prioritising future reviews. |

Solutions — How well do in-depth reviews identify alternatives (removing or amending regulation) that would significantly improve outcomes?

- | | |
|------------|--|
| Strengths | <ul style="list-style-type: none"> · An area of key strength. · More scope to consider a range of solutions based on consultation and further research. · Less likely to generate narrowly based or impractical solutions. Scope to ensure complementarities with other policy instruments. |
| Weaknesses | <ul style="list-style-type: none"> · To the extent that such reviews have more limited terms of reference and/or less extensive consultation, performance in this area can be weakened. |

Influence — How influential are in-depth reviews in promoting reform?

- | | |
|------------|---|
| Strengths | <ul style="list-style-type: none"> · Most likely of approaches to build the case for reform. Where utilised, good process (consultations, submissions, draft reports) builds awareness and a constituency for change. |
| Weaknesses | <ul style="list-style-type: none"> · Influence can vary with the quality of commissioning mechanisms, governance and process. · Findings can prove threatening to agencies that have designed and/or enforced the regulations. · Poor follow up on implementation can limit effectiveness. |

Cost-effectiveness — What is the return on the review effort?

- | | |
|------------|--|
| Strengths | <ul style="list-style-type: none"> · Expected net returns can be high. · Avoids the unintended consequences from ‘knee jerk’ regulatory responses. |
| Weaknesses | <ul style="list-style-type: none"> · Extended length of review and broad consultations can add to cost. This means there is a premium on getting the commissioning process right. |

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D Principles-based reviews

Key points

- Principles-based reviews apply a common principle as a screening mechanism to identify the need to review a regulation. The most generally applied principle is that restrictions on competition would need to be justified by other benefits to be retained. Other principles relate to national and international ‘coherence’.
- In Australia, National Competition Policy (NCP) which applied over the period 1995-2005 has been held up as a model for other countries.
 - It included the screening of all legislation across Australia for anti-competitive effects and the subsequent review of some 1800 acts. This led to extensive reforms.
- Australia also has met with some success in efforts to promote greater national coherence across state and territory regulations.
 - Assessments of reforms need to balance the benefits of a national approach against the costs.
 - Some reforms can take time, due to complexity and multiple stakeholders, and therefore not too many should be attempted at once.
 - It is also important to avoid ‘lowest common denominator’ outcomes.
- International agreements may also drive regulation reform. International obligations can often involve an increase rather than a decrease in regulation. But some areas — such as commitments to removing barriers to trade and investment and adoption of international standards — may be an impetus for regulation reform and, importantly, help prevent backsliding on reforms already achieved.
- Review programs generally work well when there is: effective political leadership; specification of commitments in advance and prioritisation of the reform task; and independent and transparent processes.
- Care is needed not to stretch resources too thinly and to ensure that application of the principle does not preclude further review that might be needed.

The structure of this appendix is as follows:

- section D.1 — describes the main features of principles-based reviews
- section D.2 — provides examples of principles-based reviews to highlight how they are usually commissioned (the triggers), the methods used to identify the areas for reform, the assessment of alternatives to the regulation in place, and the governance arrangements of the reviews
- section D.3 — considers how effective (or not) principles-based reviews have been in promoting successful reforms to the stock of regulation
- section D.4 — draws out the lessons, making an assessment of the usefulness of principles-based reviews in: identifying areas of regulation that need reform (discovery); alternatives that would improve outcomes (solutions); promoting reform action (influence); and the overall return on the review effort (cost-effectiveness).

These lessons are brought together with those from the other appendixes in chapters 3 and 4 of the final report.

D.1 What are principles-based reviews?

Some reviews have established a set of principles which work as filters for reviewing regulation within a program of regulation review. Regulations are initially screened, with more detailed analysis for those regulations that fail against the principle. While they can have similar breadth, stocktakes and principle-based reviews differ in that the former are complaints-based, while principles-based reviews adopt an analytical screening approach.

The principle that has been most widely applied in screening both new and existing regulation relates to the costs of restrictions on competition. Such restrictions allow businesses (including government-owned businesses) to pass on higher costs to customers. Where this involves inputs into other economic activities (as with utilities and transport) these higher costs have a ripple effect on costs and productivity across the economy. Moreover, there is evidence that competition generally stimulates innovation, improving dynamic efficiency and the diversity of goods and services available in an economy (PC 2008e). For these reasons, the ‘principle’ that there should be no regulatory barriers to competition, unless the benefits are shown to exceed the costs, has wide acceptance.

Under the National Competition Policy (NCP) Legislation Review Program (LRP) regulation was first screened for whether it restricted competition (box D.1). If it was found to do so, the restriction then had to be demonstrated to be in the public interest (a net benefit test) to be maintained. A number of other countries have applied the principle that any restriction to competition must be justified, and the Organisation for Economic Cooperation and Development (OECD) has undertaken competition reviews in many member countries (OECD 2011b). The competition principle is also now applied as part of the assessment of new regulation in all Australian jurisdictions.

Another principle behind regulatory reform programs has been national harmonisation of regulation across jurisdictions where this is shown to be nationally beneficial. It is generally accepted that enterprises should not face additional regulatory costs in conducting their activities across jurisdictions unless the regulatory differences are in the interests of the wider community. The scope to reduce the costs stemming from inconsistencies, overlap and duplication in regulation across jurisdictions is a primary motivation for the Council of Australian Governments (COAG) National Reform Agenda (NRA) Seamless National Economy (SNE) program of reforms. As changing regulations is not costless, and will often affect more businesses and NFPs than those trading across jurisdictions, the net benefit test must also be applied — but in this case without reversing its onus. That is, do the benefits of harmonisation, standardisation, or other approaches to improving national coherence, exceed the costs of change and the cost of no change.

Another related source of reviews derive from international agreements. These can cover a range of areas including trade and investment, labour market regulation, and environmental regulation. For emerging economies, for example, achieving accession to the World Trade Organization (WTO) can provide a powerful trigger for the review and reform of domestic regulation (Evenett and Braga 2005). The potential for international agreements to drive domestic review and reform for countries with open trade and capital markets such as Australia, are less strong. For many international obligations, a removal of unnecessary regulatory burdens on business is not a focus and they can involve an increase rather than a decrease in regulation. Others, such as reciprocal commitments to removing barriers to trade and investment, may be an impetus for regulation reform and, importantly, can help prevent backsliding on reforms already achieved.

Box D.1 Australia's NCP legislation review program

In April 1995, the Australian and state and territory governments committed to the implementation of a wide-ranging National Competition Policy (NCP) by signing the Competition Principles Agreement (CPA). An important element of the CPA was a commitment by governments to a Legislation Review Program (LRP) under which all jurisdictions reviewed their regulation in regard to the impact it had on competition. This was the first time there had been a comprehensive and coordinated review of existing legislation at the federal, state and territory levels in Australia.

The CPA required each party to develop, by June 1996, a four year timetable (subsequently extended by six years) for the review and, where appropriate, reform of all existing legislation that restricted competition. Significant incentive payments were made by the Commonwealth to the States and Territories based on their performance. The National Competition Council (NCC) was created as an independent body with responsibility to oversee and report on the performance of the review and to advise the Federal Treasurer regarding eligibility for the incentive payments.

Overall, the LRP resulted in the identification of around 1800 laws regulating areas of economic activity for review under the NCP. The legislation was separated into priority and non-priority areas, to identify legislation most likely to have significant restrictions on competition. Reviews were undertaken by each jurisdiction according to agreed assessment and review criteria. In aggregate, governments reviewed and where appropriate reformed around 85 per cent of their nominated legislation. For priority legislation, the rate of compliance was around 78 per cent (NCC 2010).

A Productivity Commission review in 2005 found that the LRP had played an important role in winding back barriers to competition and efficiency across a wide range of economic activities as diverse as the professions and occupations through to transport and communications. It also found that most of the NCP reforms were in place and that overall NCP had yielded substantial benefits to the Australian community. Reforms outstanding at the time of the Commission review varied by jurisdiction but included pharmacies, taxis, agricultural marketing arrangements and liquor licensing — though there has been some incremental reform since, for example in agricultural marketing restrictions.

NCP was completed in 2005 and was succeeded by COAG's National Reform Agenda with its own regulatory reform stream. The competition principle remains an important part of Australian regulatory policy, and is applied as part of the assessment of new regulation in all Australian jurisdictions.

Sources: NCC (2005; 2010); PC (2005b).

D.2 How have principles-based reviews been used?

This section draws on examples to discuss how principles-based reviews are usually initiated, what methods are used to identify problematic regulations, how the options for change are assessed, and the governance arrangements commonly used by principles-based reviews. The latter includes the independence and transparency of the review process, the opportunity for stakeholders to engage, and any requirements for governments to respond to recommendations. The final issue considered in this section is the cost of conducting principles-based reviews.

How are principles-based reviews usually initiated?

The triggers for establishing a principles-based regulation review program most often arise from a growing recognition of the emergence of a particular set of regulatory problems rather than one-off events, such as regulatory crises. Of course, specific events such as highly publicised instances of regulatory failure or the release of an influential report may provide the final impetus or tipping point for the launching of a review, though such reviews are not usually principles-based. The recognition that a broad-based regulatory problem exists usually arises as a result of a growing weight of evidence from a range of sources, including both in-depth analytical reviews and broader reviews that identify cross-cutting issues (or themes) across different industries or types of regulation.

For example, Australia's NCP initiative stemmed from a growing recognition that, as Australia's broader reform program in product and labour markets initiated in the early 1980s gathered pace, aspects of Australia's wider competition policy framework were impeding performance across the economy and constraining the scope to create national markets for infrastructure and other services (PC 2005b). Pressures for reform came from a number of sources. For example, the Business Council of Australia urged governments to give more attention to the impacts on competitiveness of business regulation in *Liberating Enterprise to Improve Competitiveness* (BCA 1992).

Other factors that contributed included:

- public inquiries and other research that increased awareness of the high costs of regulation imposed on the community
- emerging competition between the states to reduce red tape to obtain competitive advantage

-
- a recognition by governments of the benefits from greater economic integration with the passing of Mutual Recognition legislation (Holmes et al. 1996).

In April 1995, the Australian and state and territory governments committed to the implementation of a wide-ranging National Competition Policy (NCP). This drew on the blueprint established by the Hilmer review (Independent Committee of Inquiry 1993) that was commissioned to investigate these issues. The Commission (PC 2005b) noted that, in effect, NCP represented the ‘consolidation and natural extension of the reforms of the preceding decade’.

COAG’s National Reform Agenda SNE stream, aimed at reducing the regulatory burden in ‘hot spots’ (where overlapping and inconsistent regulatory regimes were impeding economic activity), represented a natural follow up to the NCP reforms. The concerns underlying this initiative were not new, with a considerable number of earlier reviews and reform initiatives addressing these concerns (PC 2007d). Some impetus was gained though the work of the Regulation Taskforce (2006). Strong growth in the number of businesses operating across state and territory boundaries (an increase of more than 70 per cent in the five years to 2007 (ABS 2007)) reemphasised the need for regulatory reform to remove barriers to the operation of a national economy.

In the case of reviews aimed at improving international flows of goods and services, the triggers have ranged from multilateral initiatives (such as World Trade Organization (WTO) processes), regional and bilateral trade agreements, and industry or sector specific agreements on internationally comparable standards. Australia is party to a wide range of international commitments and standards (box D.2). The principles to be applied are determined by the particular agreement. For example, the Australia New Zealand Closer Economic Agreement, which came into effect in 1983, aims to eliminate barriers to trade and foster closer economic integration between the two countries.

What methods are used to identify regulations needing reform?

Principles-based reviews take a top down approach to identify specific areas for reform. The principle is effectively a screen or filter to pick out areas for reform from the larger set of regulations that are potentially within the scope of the reform.

These approaches can have wide applications. For example, applications of the ‘no undue restriction on competition’ principle have ranged from screening regulation due to sunset for further attention, as well as being part of a regulation impact statement (RIS) of proposed regulation.

Box D.2 Multilateral institutions affecting trade and investment

The World Trade Organization (WTO) is the primary global forum for sovereign nations to negotiate and enforce agreements on the conduct of international trade and related matters. The WTO oversees approximately 60 agreements, which, in broad terms require all member governments to apply their trade rules in a consistent, transparent and, with some important exceptions, non-discriminatory way.

A range of other multilateral institutions have roles that either directly or indirectly influence trade and investment. The International Organization for Standardization (ISO) develops and promulgates standards across the economy, including in health, manufacturing, electronics, clothing, agriculture, food, construction, business organisation and services. In addition, specialist United Nations (UN) agencies develop and promulgate international standards and agreements in particular fields:

- The World Intellectual Property Organization (WIPO) oversees a range of international treaties dealing with the protection and enforcement of various forms of intellectual property.
- The *Codex Alimentarius* Commission sets internationally recognised standards, codes of practice and other guidelines concerning food safety and food production.
- The International Labour Organization (ILO) develops and promotes international labour standards. An ILO standard, once adopted by the organisation and ratified by a member country, has the force of international law. However, ratification is voluntary, and the ILO has no mechanism for enforcing compliance with its standards.
- The International Telecommunications Union (ITU) administers a binding global framework for international telecommunications regulation, covering radio and telecommunications standards.

While not established by a formal treaty, the Bank of International Settlements — through the Basel Capital Accords — specifies voluntary capital adequacy requirements for banks, as well as best practice guidelines for financial and banking supervision and regulation.

A number of multilateral environmental protection treaties also influence trade and investment. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) includes bans on trade in some species, and a permit system for trade in others. In addition, the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal bans the shipment of waste from member countries to non-member countries. While the majority of multilateral environmental agreements do not entail trade restrictions, they do influence signatories' domestic environmental standards, which in turn affects trade and investment.

Source: PC (2010d).

The OECD has conducted a series of country reviews of national competition laws and policies (see the OECD Journal of Competition Law and Policy). These reviews assess how each country deals with competition and regulatory issues, from the soundness of competition law to the structure and effectiveness of competition institutions.

OECD countries have adopted a mix of approaches to competition policy. Some governments have implemented a form of competition assessment focused exclusively on new policies, while other OECD countries subject both new and existing regulation to a competition assessment. The OECD (2010h) notes that the latter approach is the most effective way to broadly improve the competitive environment, but it requires substantial political will.

The competition principle has also been used effectively to progress regulation reform in developing countries. For developing countries embarking on their first program of regulation reform, the task can be particularly daunting. The ‘regulatory guillotine’ is a process developed to assist these countries to undertake a rapid assessment of their body of regulation to identify the areas for reform. It draws on the competition principle as a first screen, and has similarities with competition policy in Australia whereby the onus of proof is reversed so that regulators need to demonstrate that regulation that impedes competition has net benefits (box D.3).

There are many challenges in assessing the existing stock of regulation against the competition principle. The sheer volume of regulation means that prioritising which regulations should be reviewed first is critical. The OECD commonly cites Australia’s experience with competition policy in the 1990s, in particular the introduction of the LRP, as an example of a successful approach.

The LRP assessed whether regulatory restrictions on competition were in the public interest, and if not, what changes were required. This required all jurisdictions to review their regulation in regard to the impacts on competition. In a novel approach, the onus of proof was placed on those wishing to retain the regulation (business or government) to demonstrate that the regulation had a net public benefit that could not be achieved in a less restrictive way. The LRP resulted in the identification of around 1800 laws that needed review. Legislation was reviewed at a national and state and territory level, with most reviews being completed by 2001.

Commonwealth processes for identifying regulations needing reform under the NCP LRP are outlined in box D.4.

Box D.3 The ‘regulatory guillotine’

The regulatory guillotine’ is a trademarked name for a process for reviewing, removing and amending a set of legislation. It is designed to allow the rapid review of a large number of regulations, and eliminating those that are no longer needed. Drawing on specially designed software, reviewers are able to count the regulations that exist, and then review them against clear criteria, using a transparent process built on extensive stakeholder input.

The key steps in using the guillotine are:

- the government defines precisely the kinds of regulatory instruments to be included and the regulatory bodies
- the government adopts a legal instrument — usually a law or decree — that sets out the process, schedule, and institutions
- the government creates a unit at the centre of government that manages the whole reform and carries out independent reviews
- each regulation must be justified as meeting basic criteria. That is, as with Australia’s NCP, the burden of proof is *on the regulator* to defend why the regulation should be kept. Three typical criteria are: *Is the regulation legal? Is the regulation necessary for future policy needs? Is the regulation business-friendly?*
- the regulation passes through three levels of review — by ministries themselves, by stakeholders, and by the central unit, which makes the final recommendations. In each review, unnecessary, outdated, complex, and illegal rules are identified
- the final recommendations are sent by the central unit to the Government or to Parliament for adoption as a single package
- surviving regulations are placed into a comprehensive electronic registry that improves legal security and transparency as it is maintained in the future.

This approach appears to have worked well in transition economies. A study of reviews in Kenya, Moldova, and the Ukraine by the proponents found that these reviews resulted in substantial numbers of regulations being eliminated, including a number of important regulations with substantial cost and rent-seeking implications.

Source: Jacobs & Associates (2011).

Box D.4 Commonwealth processes for undertaking the NCP Legislation Review Program

The Commonwealth Legislation Review Program (LRP) was conducted in accordance with the Competition Principles Agreement (CPA). The Commonwealth program identified and reviewed 101 pieces of primary legislation. The Commonwealth LRP was broader than that required by the CPA and included legislation that imposed costs or conferred benefits on business as well as those that restricted competition.

A Council on Business Regulation (COBR) was established to help the Commonwealth Government identify priority areas of regulation for review and, once regulation had been reviewed, provide advice on reform options. The Council was chaired by the Chairman of the Industry Commission and included a broad cross section of social and enterprise interests. The COBR, with the advice of its secretariat (Commonwealth Office of Regulation Review (ORR)) had an important advisory role in the determination of overall review priorities. It applied a number of criteria in determining which legislation warranted review, including that:

- the legislation had been the subject of complaints
- it had not been reviewed for some time (seven years)
- it had been identified by past inquiries as requiring review
- it had objectives which were no longer be relevant
- it had been difficult to administer or involved high compliance costs.

Overall rankings were determined by the Council and the ORR based on a consideration of the scope and impact (direct and indirect) of the legislation. This approach had the advantage of increasing independence of the process and ensuring that consistent criteria were applied in the determination of relative priorities.

The ORR provided guidance to departments and regulatory agencies on appropriate terms of reference and the composition of review bodies in relation to reviews under the Commonwealth LRP. In doing so the ORR developed a template terms of reference designed to be adapted by departments to fit the specific requirements of each review. The template had an extensive list of factors that the review body should take into account in reviewing legislation and associated regulations. This included whether the legislation/regulation restricted competition; the need to promote consistency between regulatory regimes; and compliance costs and paperwork burden. The Government required the ORR to advise the Minister for Financial Services and Regulation and the responsible portfolio Minister as to whether terms of reference met the CPA requirements and the Commonwealth's legislation review requirements. In addition, while the ORR did not have a formal clearance role on the composition of review bodies, it was often consulted by departments.

Source: ORR Annual Reports (various years).

In 2005, a review of the NCP was conducted by the Productivity Commission. The Commission was also asked to consider areas for future reforms. Those areas identified included some key areas for national coordination, improvements in competition, and reform of human services. This laid the ground work, in part, for the development of the COAG's NRA, which includes the SNE reform stream (box D.5).

Box D.5 COAG's 27 national reform priorities

COAG agreed in 2008 to a *National Partnership to Deliver a Seamless National Economy* (SNE) to progress national regulatory reform. The Business Regulation and Competition Working Group (BRCWG) implementation plan included an expanded business regulation and competition agenda to cover 27 deregulation priorities including the acceleration of some 'hotspots' that had been previously identified by COAG as priorities for reform.

- The original 10 COAG 'hotspots' comprise: rail safety regulation; occupational health and safety; national system of trade measurement; chemicals and plastics; development assessment arrangements; national construction code/building regulation; environmental assessment and approvals processes; registering business names, Australian Business Number and related business registration processes; personal property securities; and product safety.
- The remaining 17 deregulation priorities comprise: payroll tax harmonisation; licences of trades-people; health workforce agreement; consumer policy framework; national regulation of trustee corporations; national regulation of mortgage broking; national regulation of margin lending; national regulation of non-deposit taking institutions; standard business reporting; food regulation; national mine safety framework; national electronic conveyancing system; oil and gas regulation; maritime safety regulation; wine labelling; directors' liability; and a national system for remaining areas of consumer credit.

Source: BRCWG (2008).

COAG's NRA is developed and supported by a number of COAG working groups. COAG also established the COAG Reform Council (CRC) to report annually on progress in implementing the NRA. For the regulatory reform stream, oversight of the reform process, including identifying and agreeing on priority areas, is undertaken by the Business Regulation and Competition Working Group (BRCWG). The process followed for nominating the 'hot spots', or priorities for reform, is set out in box D.6.

Box D.6 Identifying priorities for COAG's Seamless National Economy reform agenda

The Business Regulation and Competition Working Group (BRCWG) was tasked with identifying the first tranche of regulatory reform initiatives for the COAG regulatory reform agenda and the Seamless National Economy (SNE). The BRCWG considered the potential benefits to growth, productivity and workforce mobility and growth benefits from over 35 possible reform areas. These were drawn from a number of sources including issues with multi-jurisdictional implications that were suitable for reform, but had nonetheless proved resistant to reform in the past, as well as a number of areas that had been identified in reviews by the Productivity Commission.

These were evaluated according to the following factors:

- how *wide* is the reach of the regulation?
- how *deep* is the reach of the regulation? Does it have a significant effect on industries generating a large amount of GDP?
- how *large* are the costs to business and taxpayers of complying with the regulation?
- how *damaging* is the regulation to incentives for effort, risk-taking, entrepreneurship and innovation?
- how *large* are the impediments created by the regulation to workforce mobility and participation?

Each area was then categorised according to the desired level of regulatory change; mutual recognition, harmonisation or a national system. Following this, COAG agreed in March 2008 to an implementation plan prepared by the BRCWG that expanded the business regulation and competition agenda to 27 deregulation priorities including some previously identified 'hot spots'. In July 2008 the 27 priority areas, and a further eight competition reforms were reflected in a plan to develop the *National Partnership Agreement to Deliver a Seamless National Economy*. The Agreement was signed by states and territories in December 2008 and by the Prime Minister in February 2009.

Source: BRCWG (2008).

Most recently, the Australian Government (BRCWG 2011) commenced consultations into a Future COAG Regulatory Reform Agenda (box D.7).

Box D.7 Future COAG Regulatory Reform Agenda

The Australian Government released a stakeholder consultation paper on 22 September 2011. The paper set out 4 themes for the second round under the Seamless National Economy.

1. Environmental regulation reform — with a focus on greater use of regional planning and strategic approaches to environmental assessment and approvals. Reforms might include agreement on Commonwealth accreditation for matters of national environmental significance under the Environmental Protection and Biodiversity Conservation Act, and establishing national standards for environmental offsets.
2. Enhanced workforce mobility and participation — with further reforms proposed to national licensing, and a proposal for harmonisation of conduct requirements.
3. Improving sectoral competitiveness — with a range of suggestions such as on-line single portal business reporting for small and medium enterprises, and initiatives to improve the competitiveness of: the service sector; suppliers to the mining sector (national approach to explosives legislation); and competitiveness of primary production including food processing.
4. Ensuring the benefits of national reform are maintained — through promoting comprehensive post implementation assessment of net benefits from key reforms. This could include assessment of consistency by the COAG Review Council, greater use of model regulations, codes of practice and other tools to ensure consistency, examination by the Productivity Commission of the consistency of compliance and enforcement approaches when conducting more general sectoral reviews, and development of COAG national principles to guide the development of future regulatory proposals with national market implications.

Source: BRCWG (2011).

How are reform options assessed?

Assessing reform options for principles-based reviews can be undertaken in a number of different ways. Analytical frameworks for assessing the options for reform will vary depending on the principles used.

For example, guidance on the analytical framework for NCP reviews was provided in the Competition Principles Agreement, which required that a review should:

- clarify the objectives of the legislation
- identify the nature of the restriction on competition
- analyse the likely effect of the restriction on competition and on the economy generally
- assess and balance the costs and benefits of the restriction

-
- consider alternative means for achieving the same result, including non-legislative approaches (COAG 1995).

The extent of analysis undertaken varied, with substantially more analysis for the regulatory areas with high impacts (see appendix C for some discussion of in-depth reviews undertaken by the Commission for the LRP).

Weighing up the costs and benefits of national approaches

In assessing reform options for improving regulatory harmonisation across jurisdictions, whether national or international, a wide range of factors need to be considered including:

- the number of businesses operating across multiple jurisdictions
- the likely extent of reduction in the compliance costs associated with the reform
- whether the optimal form of regulation is dependent upon the particular economic and institutional structure of the economy of the jurisdiction
- whether the costs and benefits are symmetric across jurisdictions.

Some potentially important benefits arises from state level regulation. They include the ability to attune interventions to local circumstances. Local innovation, learning from other jurisdictions, and the gradual elimination of undesirable features that limit effectiveness and unduly restrict business, can lead to better outcomes over time and avoid the costs of uniformity. States and territories may also be able to respond more rapidly and effectively to the needs and circumstances of their constituents than could a national government, particularly with regard to the administration and enforcement of regulatory powers.

It is these features that underpin the principle of subsidiarity — that regulation should be made and applied at the level of government closest to those being regulated (unless there is a good reason why this should not be the case). Nevertheless, such flexibility, and indeed, subsidiarity, is not incompatible with national policy coordination (PC 2009g).

Given these considerations and the costs/time involved in achieving improved regulatory harmonisation across jurisdictions, a careful weighing up of the likely costs and benefits is essential (box D.8). In practice, developing national approaches to regulation has proven time consuming. Negotiations tend to be extensive and protracted, and even with the best intentions, there is often no guarantee that the agreed approach will be implemented consistently and hence lead to an improvement over the status quo. The likely net benefits, therefore, need to be material to warrant embarking on such reforms (PC 2009g).

Box D.8 The need for a nationally consistent approach to regulatory policy

Nationally consistent approaches to regulatory policy can offer significant benefits, particularly where areas of common interest are readily identifiable. However, while the promotion of a national approach might appear *prima facie* to be a desirable policy objective, the benefits need to be weighed up against the costs.

Questions to consider in weighing up possible benefits of reform options include:

- are there large economies of scale arising from centralised provision or organisation (or alternatively, a reduction in regulatory duplication which can reduce real resource costs of policy making)?
- will the reform lead to reductions in transaction/compliance costs for business operating across multiple jurisdictions?
- what is the potential for the reform to open and integrate economies, enhancing trade and investment and economic welfare?
- will it lead to the elimination of negative externalities/inter-jurisdictional spillovers on other jurisdictions (for example, intellectual property)?
- does the mobility of capital and labour across jurisdictions have the potential to undermine the fiscal strength of the sub-national level of government (for example, differences in tax bases of welfare entitlements)?

Questions to consider in weighing up possible costs of reform options include:

- will it lead to inefficiencies by imposing (harmonised) laws that are inappropriate for the unique conditions of a particular jurisdiction's economy? (In other words, is the reform likely to lead to harmonised but inefficient laws?)
- is there a likelihood of a loss of regulatory competition?
- what are the likely resource costs for government, such as reviewing existing regulations and negotiating agreement on a more coherent regulatory framework?
- what are the likely transition costs for market participants — such as costs incurred in changing internal processes and documentation to comply with new laws?
- is there likely to be dilution of jurisdictional policy participation?
- is there likely to be a loss of domestic policy flexibility (where jurisdictions cannot respond as quickly to changing market circumstances? (Though this may also bring benefits if it limits growth in poor quality regulation.)

Sources: Banks (2006); (PC 2009g).

What are the governance arrangements?

The governance arrangements that set out who conducts the review, the resources available for review, the transparency of the process, and the response to the review findings vary with the type of principles-based review. Where the scope of the review program is broad and there are a range of different regulators and agencies involved, as is the case for whole-of-government processes, governance arrangements need to be quite formal. This formality can include clear specification of the roles and responsibilities of different parties, penalties and rewards, key milestones, and minimum standards for the conduct of reviews.

The Australian Government Department of Innovation, Industry, Science and Research (sub. 6) emphasised the importance of sound governance arrangements to facilitate cross-jurisdictional cooperation, drawing on the example of building regulation reform:

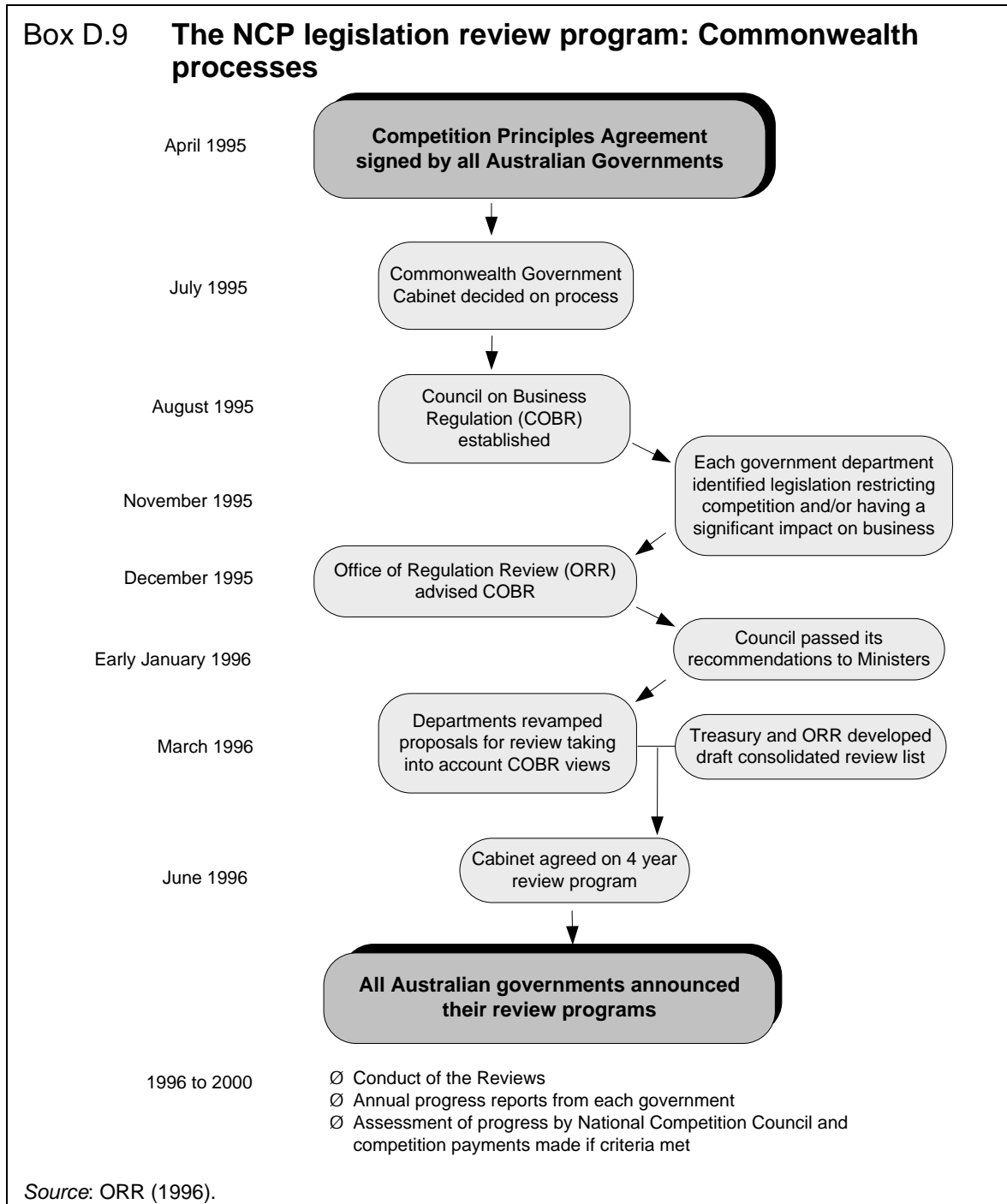
In recent years building regulation has become more complex as societal objectives are integrated into reform initiatives, increasingly instigated at the COAG level. The structure of the Building Ministers' Forum and the Australian Building Codes Board has been integral to facilitating the reform initiatives in the built environment. (p. 11)

For NCP, the Commonwealth provided incentive payments based on progress in reviewing anti-competitive regulation and associated reform. An independent body, the National Competition Council (NCC), determined jurisdictions' compliance in meeting agreed Competition Principles Agreement (CPA) obligations. In making these assessments, the NCC (2010) noted that it looked for 'transparent, robust and objective reviews, because these increase the likelihood of policy outcomes that are in the public interest' (p. 3).

There was, however, considerable flexibility in the process by which reviews were undertaken, with the CPA noting that each jurisdiction was free to determine its own agenda for the resulting reforms of legislation. All states and territory governments published their own guidance for their respective portfolio departments on undertaking legislative reviews which addressed analytical and methodological issues as well as appropriate process (Corden 2009). At the Commonwealth level, choices of the appropriate review body could be made from a list ranging from independent bodies to intra-department reviews. It was acknowledged that it would not be cost effective to expect the same standard of review for all legislation. As the Office of Regulation Review (ORR) noted (1997):

In choosing from this range, the view was taken that while it is generally preferable for regulators not to review their own regulation, this is not always cost effective or practicable. Selections therefore struck a balance — independent reviews for major and/or high priority legislation and in-house reviews for less significant or highly specialised legislation. (p. 3)

A timeline setting out on Commonwealth governance arrangements for undertaking the LRP is outlined in box D.9.



Each jurisdiction was required to submit annual reports outlining progress in removing unnecessary restrictions on competition. At the outset, the NCC stated its intention to focus on on-time delivery of reform commitments and prioritising areas where there would be large gains. The NCC also stated that in assessing whether satisfactory progress had been made it would assess whether legislative reviews involved an examination in good faith of the community costs and benefits of reform by jurisdictions, and whether subsequent reform action was consistent with review outcomes (NCC 1996).

Incentive payments are also a feature of the current COAG SNE reforms. Under the National Partnerships Agreement (NPA), the Commonwealth Government agreed to provide the states and territories with reward payments of up to \$450 million over 2011-12 and 2012-13, subject to satisfactory progress in advancing the 27 specified reforms against the agreed implementation plan. Payments are contingent on ‘an assessment by the Commonwealth of the overall level of progress’ based on the advice of the CRC that the jurisdiction has successfully achieved the reform milestones. Hence, the CRC has a role analogous to the NCC’s role in NCP. Where a reward is withheld because of underperformance by a jurisdiction it could be made available again in the following year subject to improved performance.

The CRC provides independent assessments to COAG each year on whether reform milestones are being achieved. Its latest report was provided in December 2010 (table D.1).

Table D.1 COAG Reform Council's summary of progress for deregulation priorities, 2008-09 to 2009-10

<i>Reform priority area</i>	<i>Reforms fully or largely complete^a</i>	<i>Reforms having substantial progress^b</i>	<i>Reforms with implementation issues or risks^c</i>
Occupational health and safety			✓
Health workforce	✓		
Trade measurement	✓		
Rail safety regulation	✓		
Consumer policy framework		✓	
Product safety regulation		✓	
Regulation of trustee corporations	✓		
Regulation of mortgage broking		✓	
Regulation of margin lending		✓	
Regulation of non-deposit taking institutions		✓	
Development assessment			✓
National Construction Code		✓	
Personal property securities			✓
Standard business reporting	✓		
Food regulation			✓
Wine labelling	✓		
Environmental assessment	✓		
Trade licensing system		✓	
Trustee corporations	✓		
Chemicals and plastics			✓
Business names			✓
Mine safety		Assessed but not rated	
Electronic conveyancing		✓	
Oil and gas			✓
Maritime safety			✓
Director's liability			✓
Payroll tax		Assessed but not rated	

^a All milestones have been fully or largely completed. ^b Substantial progress has been made on milestones and the reform objectives are on track to be achieved. ^c There are implementation issues or risks that the overall intended output or objective of the reform may not be on track.

Source: CRC (2010).

How much do principles-based reviews cost?

The aggregate cost of broad principles-based review programs can be high, particularly where the principle is applied across a wide range of regulations, and where large numbers of regulations are subsequently identified for review. The LRP program, for example, encompassed over 1800 reviews. Initially intended to be

completed in four years, the program took over more than a decade and required a substantial commitment by governments across Australia (NCC 2005).

There is a paucity of data on the costs of the competition reviews. This makes it difficult to provide either an overall assessment of costs for these types of reviews or an estimate of the average costs per review. The Productivity Commission publishes data on the costs of its reviews, including LRP national reviews it has undertaken, in its annual reports. Costs per review varied substantially, ranging from \$165,000 – \$2.1 million (table D.2) depending on their scale. Coverage for these reviews varied depending on the terms of reference. In many cases the Commission’s reviews had substantially broader coverage and more comprehensive analysis than was required as part of the NCP legislation review program.

Costs associated with in-house reviews are likely to be lower than independently commissioned reviews, particularly in cases where monitoring, data collection and evaluation are already being undertaken as part of the ongoing activities of the regulator or policy agency. For example, the ORR (1996) noted:

[I]t clearly would not be cost-effective to expect the same standard of review for regulations considered to be having a minor effect as for those where the issues are more substantive. Trade-offs must be made in relation to appropriate review bodies, the extent of public consultation, quantitative versus qualitative assessments and the time allocated for the review.

Reviews conducted in-house by departments are likely to have certain advantages. Departments have the most detailed knowledge of the regulations they administer and internal reviews may be able to be conducted in a short time frame and at low cost. In addition, recommendations are more likely to have departmental and Ministerial support which is important when reforms are being implemented. (p. 25)

The ORR cautioned, however, that past evidence had shown that there were risks that internal reviews would not be conducted with the same impartiality, openness and transparency as independent reviews (ORR 1996).

As noted above, jurisdictions were not always required to conduct full public reviews before reforming restrictions on competition. In some instances Governments repealed redundant legislation after preliminary scrutiny showed that the legislation provided no public benefit (NCC 2005).

In addition to the costs for individual reviews, there are also the overhead costs associated with the management/governance of the wider review program — although there are likely to be some economies of scale which may yield cost savings for individual reviews.

Table D.2 Costs of Productivity Commission reviews as part of the NCP legislation review program

<i>Name of legislation</i>	<i>Government-commissioned review</i>	<i>Year completed</i>	<i>Cost^a (\$'000)</i>
<i>National Health Act 1953, Health Insurance Act 1973</i>	Private health insurance ^b	1996-97	701
International Air Service Agreements	International air services	1998-99	1 114
<i>Broadcasting Services Act 1992</i>	Broadcasting	1999-00	1 786
<i>Trade Practices Act 1974, Part X</i>	International liner cargo shipping	1999-00	524
Architects Act (various years)	Architects	2000-01	516
<i>Radiocommunications Act 1992 and related Acts</i>	Radiocommunications	2001-02	1 484
<i>Prices Surveillance Act 1983</i>	Review of the PSA 1983	2001-02	1 153
<i>Trade Practices Act 1974 (including exemptions) – Part IIIA</i>	Review of the national access regime	2001-02	850
<i>Trade Practices Act 1974 (fees charged)</i>	Cost recovery by gov't agencies	2001-02	853
<i>Superannuation Industry (Supervision) Act 1993 and other related Acts</i>	Review of certain superannuation legislation	2001-02	774
<i>Customs Tariff Act 1995 – Automotive Industry Arrangements</i>	Review of automotive assistance	2002-03	890
<i>Trade Practices Act 1974 – 2D exemptions (local government activities)</i>	Review of section 2D of the TPA	2002-03	165
<i>Trans-Tasman Mutual Recognition Act 1997, Mutual Recognition Act 1992</i>	Evaluation of mutual recognition schemes	2003-04	599
<i>Customs Tariff Act 1995 – Textiles Clothing and Footwear Arrangements</i>	Review of TCF assistance	2003-04	1 009
<i>Disability Discrimination Act 1992</i>	Review of the DDA	2003-04	2 058

^a All data are current prices and include all costs incurred by the Commission in undertaking the reviews including staff salaries, direct administrative expenses and an allocation for corporate overheads. Variations in the administrative cost of Commission reviews arise from the extent and nature of public consultation, the number of participants, the complexity and breadth of issues, the need for on-site consultations with participants and the States and Territories, the costs of any consultancies (including those arising from statutory requirements relating to the use of economic models), printing costs and the duration of the inquiry or project. ^bThe inquiry into private health insurance was conducted by the Industry Commission, a predecessor to the Productivity Commission.

Sources: NCC (2010); PC annual reports (various years).

An added issue that needs to be considered for broader review programs is the cost of imposing uniform review obligations across jurisdictions of varying sizes with varying capabilities. Given the costs of undertaking reviews is unlikely to vary appreciably between jurisdictions, the burdens on smaller jurisdictions can be substantial. For example, the Northern Territory observed that in respect of the LRP it had the 'highest per capita review burden of all jurisdictions' (PC 2005b, p. 133). Discussions with officials from state and territory governments as part of the consultation for this study confirmed that the LRP process was at times very taxing due to the limited availability of the skilled resources needed.

The costs associated with LRP reviews highlights the importance of effective initial screening. For the Commonwealth, this role was performed by the Council on Business Regulation (COBR). Consistent with the LRP criteria, Commonwealth departments prepared full lists of legislation within their responsibilities. The COBR provided advice to Government as to whether reviews of certain legislation would be cost effective or necessary, thus allowing minor or trivial matters, or legislation which had only recently been reviewed, to be excluded from the initial review process. Revised departmental lists were consolidated by the Treasury (with the advice of the ORR) and, together with the four-year timetable recommended by COBR, were submitted by the Treasurer for Australian Government consideration (see box D.8).

International experience confirms the cost-effectiveness of early screening. The OECD (2010h) notes that the resources necessary for an effective competition assessment program can be relatively small. For example, when the United Kingdom (UK) implemented its competition assessment program, two staff members from the UK Office of Fair Trading played a very active role, and only a small percentage of the roughly 400 regulations reviewed per year received detailed scrutiny. The remaining regulations were assessed by means of a competition filter, similar to the OECD Competition Checklist (box D.10), which permitted officials to quickly assess whether there was a significant likelihood of competition problems.

Costs of review and reform efforts aimed at improving inter-jurisdictional coherence can be high due to several factors including: the additional complexity associated with understanding and analysing multiple and overlapping regulatory frameworks; the time taken in consultation with affected parties across all jurisdictions; and the time taken in negotiations or discussions in reaching an agreed outcome.

For example, an SNE performance report for 2009-10 (CRC 2010) found that for nine of the 27 deregulation priorities there were implementation issues or risks that the overall intended output or objective of the reform may not be on track (table D.1).

Achieving international agreements can be even more time consuming due to the greater number of jurisdictions and the fundamental differences in institutions. In its review of bilateral and regional trade agreements, for example, the Commission noted that negotiations for comprehensive agreements could be lengthy and difficult and that (PC 2010d):

Some negotiations have run on for several years with few signs that a worthwhile outcome is close. The resources devoted to different negotiations are not made public. (p. XXIX).

Box D.10 OECD Competition Assessment Toolkit assessment criteria

The OECD Competition Assessment Toolkit recommends countries apply a range of assessment criteria as an early screening device to determine when proposed laws or regulations may have significant potential to harm competition.

It recommends further competition assessment is to be conducted if a regulation or policy has any of the following effects:

1. limits the number or range of suppliers
2. limits the ability of suppliers to compete
3. reduces the incentive of suppliers to compete
4. limits the choices and information available to customers.

Source: OECD (2010h).

D.3 How effective have principles-based reviews been in promoting regulation reform?

Australia has had considerable, though not unequivocal, success with principles-based reviews in promoting regulation reform in recent decades. This is discussed below, drawing on examples from the principles of ‘no-undue restrictions on competition’, ‘national coherence’ and ‘international harmonisation/market openness’.

The ‘no undue restrictions on competition’ principle

A Commission review of NCP in 2005 found that the LRP had been a valuable process for testing whether a plethora of anti-competitive regulation was in the public interest and had led to extensive reforms.

However, the Commission found that the efficacy of the review processes and outcomes in several areas was questionable. In particular, some legislation reviews did not have the level of independence required and the conduct of reviews and the basis for the outcomes had not always been transparent. The Commission (PC 2005b) observed:

[T]he transactions costs of undertaking some of the more minor LRP reviews may have largely offset or even outweighed the benefits of change. Accordingly, it sees a strong case for focussing a future review schedule on areas where reform of anti-competitive regulation offers the prospect of a significant pay-off for the community. (p. 250)

Model-based projections by the Industry Commission undertaken prior to the completion of NCP suggested it could generate an ‘outer envelope’ net benefit equivalent to 5.5 per cent of gross domestic product (GDP) (IC 1995). While controversial at the time, this was consistent with the subsequent record (PC 2005b). This analysis did not specifically model the impacts of regulatory reform through the NCP legislation review program — which included areas not covered by the Commission’s modelling. A broad indication of the potential scale of benefits associated with regulation reform is provided by the fact that while all the modelled NCP reforms had some regulatory component — once infrastructure reforms were excluded, around half of the estimated benefits can be thought of having a substantial regulation reform component.

More selective analysis, undertaken for the Commission’s 2005 inquiry into NCP, indicates that the productivity and price changes actually observed in key infrastructure sectors in the 1990s — to which NCP and related reforms have directly contributed — served to increase Australia’s GDP by 2.5 per cent (PC 2005b). These results, however, do not include the estimated gains from the LRP, some of which are outlined in box D.11.

The NCP was not an unqualified success. There was failure to undertake some reviews and to adopt some recommendations. These included those related to relaxing ownership and other anti-competitive restrictions on pharmacies, and removing the single desk for export wheat marketing. However, the latter recommendation was adopted in 2007. This points to the time it can take to implement reforms, and the importance of analysis that can stand the test of time for eventual success.

Overall, governments identified some 1800 laws regulating areas of economic activity for review under the NCP. In aggregate, governments reviewed and, where appropriate, reformed around 85 per cent of their nominated legislation. For priority legislation, the rate of compliance was around 78 per cent (box D.1). The NCC (2006) noted:

The legislation review program was pivotal in removing unwarranted barriers to competition across activities as diverse as the professions and occupations through to transport and communications. In some sectors, such as agricultural marketing and shopping hours regulation, the program has resulted in the substantial removal of unwarranted restrictions. (p. 60)

Box D.11 **Some outcomes of LRP reforms of anti-competitive regulation**

In addition to the reforms to statutory monopoly agricultural marketing schemes, there was a wide range of other reforms to regulation that were assessed as unnecessarily hindering competition. Examples of reforms include the following.

- *Drinking milk prices fell* following national reform of the dairy industry.
- *Shop trading hours were deregulated* by the Tasmanian Government in 2002.
- *Bakeries were deregulated.* The NCP Review of the New South Wales (NSW) *Bread Act 1969* concluded that there was no net public benefit to restricting times for the baking and delivery of bread. The Act was repealed.
- *Choice of foot treatment increased* following the NCP Review of the NSW *Podiatrists Act 1989*. People now have the option of obtaining certain foot treatments from nurses and medical practitioners, instead of exclusively from podiatrists.
- *Veterinary services monopoly by the veterinary profession was removed* in NSW and replaced with a specific list of veterinary practices that, on health, welfare and trade grounds need to be restricted to licenced practitioners, enabling a wider range of animal health care services to be provided by both vets and non-vets.
- *Taxi services.* This was an area where the NCC found many jurisdictions non-compliant, although there was some progress compared to the recent past. For example, the WA Government released new taxi licences following the NCP review. While the numbers were modest, these were the first licences released in 14 years.
- *Liquor licensing controls relaxed.* As a result of an NCP review, the Tasmanian Government removed a requirement that a minimum of 9 litres of wine be purchased in a single sale from specialist wine retailers, which had previously protected hotel bottle shops. NSW removed an anti-competitive ‘needs test’ that hindered the opening of new outlets.

Sources: Corden (2009); NCC (2005); PC (2005b).

As noted, the LRP was based on governments’ initial screening of their legislation for competition restrictions. The NCC notes that this proved to be limiting in some cases because it did not necessarily account for legislation that impinges on efficiency, or involves excessive ‘red tape’, without restricting competition. Other sources of burden were not formally addressed under the NCP (NCC 2006). While not a weakness of the competition principle, this highlights the importance of taking a more holistic approach to regulatory policy to ensure all sources of regulatory burden are picked up (discussed in chapter 6).

An issue that arose as the NCP reforms gathered momentum was a concern that it had generally been much less beneficial to residents in non-metropolitan areas than those living in the major cities. Allied to this was the perception that particular rural regions had been experienced significant economic and social costs as a result of competition reforms. The Commission dealt specifically with the impacts of NCP on rural and regional Australia in a separate inquiry in 1999. The Commission found that while there were inevitably costs associated with implementing a reform program of this kind, it would bring net benefits to the nation over the medium term, including to rural and regional Australia as a whole. However, the Commission also acknowledged that the early effects appeared to have favoured metropolitan areas more than rural and regional areas, and that there was likely to be more variation in the incidence of benefits and costs of NCP among country regions than in metropolitan areas (PC 1999).

The Commission found that NCP had delivered substantial benefits to the Australian community which, overall, had greatly outweighed the costs. The Commission (PC 2005b) noted:

A variety of anecdotal and case study evidence suggests that, in many areas, the legislative reforms which have resulted from the process have delivered significant benefits to the community including (but not limited to): increased consumer choice; improved access to services; lower prices; new business, employment and occupational opportunities; a reduction in 'red tape'; greater certainty for market participants and improved national consistency across a range of regulatory activities. (p. 250)

Australia's NCP reform program has been described by the OECD as a successful innovation in nationally coordinated reform noting: 'Australia's reform programme is a model for embodying policy choices and methods in institutional structures' (2010h, p 6).

Prioritisation of reviews

The Commission (PC 2005b) noted the implementation of parts of the LRP had been hampered by lack of prioritisation. In particular the ambitious nature of the initial timetables for NCP reforms placed a premium on clear specification of reform commitments and priorities.

Under the LRP, the initial target date for completion of the 1800 or so items of legislation listed for review was June 2000 (PC 2005b). Individual jurisdictions were left to determine their priorities for the reviews. The Commission noted that the absence of clear guidelines in relation to coverage and priority setting appeared to have given rise to some anomalies.

[D]ivergences across States in the approach taken to listing legislation for review arose from differences in the cut-off points for recently reviewed legislation, as well as from variations in assessments about whether legislation included anticompetitive restrictions. (pp. 131–32)

The opportunity for jurisdictions to amend their lists over time, and for the NCC to review these lists in consultation with jurisdictions, helped to address some coverage anomalies.

A key lesson from Australia's LRP experience is the importance of ensuring that the task is kept manageable through both the prioritising and sequencing of review efforts. Undertaking a review for a relatively minor issue can often require the same level of resource commitment as a review for an issue with much larger impacts on business and the community. Therefore, more effort devoted to the development and application of effective screening processes to identify priorities in the early stages of the LRP would have improved its cost effectiveness as well as increased the overall benefits from the reform program.

National reviews

Where particular NCP LRP reviews concerned more than one jurisdiction (for example, occupational health and safety regulation, agricultural marketing arrangements etc) the CPA allowed for national reviews. An economy-wide review, undertaken or overseen by an independent review body, helped ensure that national interests were given due weight and also provided some economies of scale in resources and expertise. The COAG Committee on Regulatory Reform facilitated identification of national reviews and agreement by jurisdictions on review arrangements (NCC 2010). The Commonwealth ORR provided comments on the terms of reference for national reviews where the Commonwealth was involved, to ensure that they reflected the guidance provided by the CPA (ORR 1997).

The NCC (2010) noted that the conduct of national reviews was sometimes unsatisfactory, with protracted intergovernmental consultation slowing the finalisation of reviews and the implementation of reforms. Further, a substantial share of the legislation for which review and reform progress that was assessed as incomplete by the NCC in 2005 was subject to national processes. The NCC noted that outcomes appeared to depend on two main considerations: (1) who conducted the national review; and (2) the relative costs and benefits of national consistency versus competition policy. The NCC (2006) stated:

Ideally, independent agencies should conduct national reviews, such as occurred in the case of the Productivity Commission's national review of architects. Where reviews were not sufficiently independent, there was a substantial risk that outcomes would

settle on a ‘consensus’ or least common denominator reforms that all the parties could achieve leading to very little benefit in some jurisdictions. (p. 61)

Improving national and international ‘coherence’ of regulation

Australia has met with some success in efforts to promote greater regulatory ‘coherence’ nationally. However, while the principle has strong intuitive appeal, with potentially large benefits, achieving results has generally proven difficult and time consuming.

An analysis by the Commission of the *Potential Benefits of the National Reform Agenda* (PC 2006c) found that reforms aimed at improving productivity and efficiency in energy, transport and related infrastructure and reducing the regulatory burden on business, if fully implemented, could increase GDP in time by up to around \$17 billion or nearly 2 per cent. Regulatory reforms accounted for almost half of this. The Commission estimated that the compliance costs of regulation could amount to as much as 4 per cent of GDP, and if a 20 per cent reduction were to be achieved through full implementation of NRA-consistent reforms, this could result in a direct saving to activities and industries of as much as \$8 billion in 2006-07 dollars (this estimate excluded dynamic benefits). At the time of this estimate, the number of deregulation ‘hotspots’ was around ten. The number of deregulation priorities has since grown to 27 (box D.5).

The COAG SNE reform is currently being evaluated by the Commission, which has been asked to estimate realised and prospective impacts and benefits of reforms. As noted, reports of performance indicators by the CRC suggest a number of the reforms have had implementation issues or risks (table D.1).

The Commission’s review of Australia’s Mutual Recognition Agreement and the Trans-Tasman Mutual Recognition Arrangement (PC 2003) found they had been effective overall in achieving their objectives of assisting the integration of the Australian and New Zealand economies and promoting competitiveness. In particular, both schemes had: increased trade and workforce mobility across jurisdictional borders; contributed to the integration of participating economies; enhanced internal and external competitiveness; increased uniformity of standards; increased choice and lowered prices for consumers; decreased costs to industry; and increased access to economies of scale.

Principles embedded in international agreements

Trade and investment liberalisation

International agreements, in particular the multilateral rules-based system established by the GATT/WTO, have been important in reducing barriers to international trade. In addition, APEC processes, while voluntary, can be a trigger for reviewing regulation that impedes trade and investment, reducing so called ‘behind-the-border’ barriers. International agreements are also important in impeding the growth in such barriers at times of economic stress. For example, the recent global financial crisis and resulting contraction in world trade brought a new set of pressures on governments to support domestic businesses and activities, typically at the expense of trading partners, with a number of new protectionist measures introduced (PC 2008e).

However, international agreements will not necessarily lead to lower regulatory burdens, or faster domestic reforms. For example, in its assessment of bilateral and regional trade agreements (box D.12) the Commission noted that pursuing domestic reforms through bilateral and regional trade agreements could provide an incentive to delay reforms for use as ‘negotiating coin’ during negotiations.

Where there exists further scope for the pursuit of trade agreements, the issue arises as to whether Australia should delay or withhold otherwise beneficial domestic reforms in order to retain ‘negotiating coin’ to offer in future trade agreements. The issue arises from the perception that, while Australia gained significant domestic benefits from the unilateral reform already undertaken, as a result, it has little negotiating coin left. (PC 2010d, p. 214)

The Commission (PC 2010d) recommended that the Australian Government should not delay beneficial domestic trade liberalisation and reform in order to retain ‘negotiating coin’.

Box D.12 Regional trade agreements and regulatory burden

In its study into bilateral and regional trade agreements (BRTAs), the Commission noted that many BRTAs cover matters beyond the usual barriers to trade in goods and services. The Commission concluded that the inclusion of some of these matters, such as measures that work to strengthen economic cooperation, competition policy frameworks, customs procedures and other trade facilitation measures, may all add to efficiency with little downside risk. It noted, however, that inclusions of some other provisions, could be costly.

As part of the negotiations for the Australia-US Free Trade Agreement, Australia adopted a range of provisions from the US intellectual property system, substantially strengthening protection for copyright owners. Australian obligations included: ratifying a range of international agreements; extending the term of copyright and patent protection; and increasing enforcement and protections for intellectual property holders. The Commission (2010d) noted;

Given the risk of 'negative sum game' outcomes, the Australian Government should not seek to include intellectual property provisions in Australia's BRTAs as an ordinary matter of course, and should only include such provisions after an economic assessment of the impacts, including on consumers, in Australia and partner countries. (p. xxxii)

More generally, the Commission concluded that Australian Government should not include matters in BRTAs that increase barriers to trade, raise industry costs or affect established social policies without separate review of the implications and available options for change.

Source: PC (2010d).

International standards

The benefits of international trade and investment depend not only upon policy measures directly affecting trade and investment flows but also upon domestic regulations that are economically efficient and favour trade and investment. Past progress in tariff liberalisation has brought attention to other types of impediments to such flows, including 'behind-the-border' impediments resulting from domestic regulations. Divergent, duplicative or outdated standards in different markets are often perceived as a barrier to trade and investment. These barriers may be overcome by the development of international harmonised standards — which can then be used as a basis for domestic regulations.

As a small open economy, heavily reliant on trade and investment flows, Australia has much to gain by participating in international agreements and standard setting processes. International standards can help ensure technical compatibility across countries and convey information to consumers about products that have been

produced abroad or processes that took place in another country, reducing transaction costs and facilitating international trade (WTO 2005).

There are a number of initiatives in place to promote consistency with international standards. For example, the majority of OECD countries have a formal requirement to consider comparable international standards before setting new domestic standards as well as a requirement that regulators explain the rationale for diverting from international standards when country-specific rules are proposed. Australia is one of 11 countries reporting to require this ‘always’ — others include Canada, Germany, Korea and the UK.

A number of bodies are engaged in writing formal international standards. The International Organization for Standardization (ISO), International Electrotechnical Commission (IEC) and the International Telecommunications Union (ITU) are generally acknowledged as being the most important in terms of size and influence (WTO 2005). Combined, ISO and IEC produce around 85 per cent of all international standards. Of the approximately 2600 internationally aligned Australian Standards, just over 100 were adopted from sources other than ISO or IEC. Other areas where international standards play an important role include approval processes for food and drug use, recognition of qualifications, animal and plant health, maritime safety and civil aviation.

The available empirical literature on the effects of harmonised international standards on international trade flows is quite limited, reflecting the difficulty of the subject and the nature of the data. Nevertheless, there is evidence that the adoption of standards, even purely national ones, can increase trade. One estimate suggests that a 10 per cent increase in the number of shared standards enhances bilateral trade by 3 per cent (WTO 2005).

The Commission reviewed Australia’s arrangements for standard setting and laboratory accreditation (PC 2006c) and concluded:

In general, there should be a preference for international standards because they will facilitate the importation of a wider range of goods to consumers and industry and ensure Australia fully participates in the global marketplace. Already more than 2600 Australian Standards are wholly or substantially based on international standards.
(p. xx)

However, the Commission also noted that particular international standards will not always be suitable for adoption in Australia — for example, because they are inappropriate for local conditions, out of date, or not widely implemented around the world. It concluded that any decision to align with an international standard must be based on a case-by-case assessment of whether there are net benefits to the Australian community as a whole. In addition, it is most important that, as is the

case with any other standard, regulatory impact analysis be conducted before any international standard is referenced in regulation (PC 2006c).

Food safety regulation provides an instructive example as there have been a number of reviews of food safety regulation in different Australian jurisdictions (box D.13).

Box D.13 Food safety regulation

The Commission (PC 2009b) compared the food regulatory systems across Australia and New Zealand. It found that harmonisation was incomplete and progress had been variable. It noted that possible gains from greater consistency in food safety regulations included economies of scale from industry supplying to a national market, lower prices to consumers through greater competition and increased productivity, and decreased costs to industry. The Commission also observed a number of regulatory differences which either resulted in variable burdens being imposed on businesses in different jurisdictions and/or increased the costs of doing business across jurisdictions.

In relation to imported food, the Commission noted that inconsistent interpretation of food safety regulations across Australian jurisdictions increases the costs to businesses in ascertaining import requirements and managing imported product recalls.

The Commission also found that duplication and inconsistency in export and domestic requirements places an undue compliance burden on some Australian primary product exporters, while businesses benefit from an integrated regulatory structure in New Zealand. It was found that some Australian and many New Zealand primary food producers and processors met the highest export standard — either by choice or requirement — and incurred the associated auditing costs, whether or not they were exporting their product.

The Commission found that the Model Food Act and Australia New Zealand Food Standards Code in Australia have helped to achieve some level of harmonisation between states and territories in their consumer food safety requirements.

Source: PC (2009b).

D.4 What makes principles-based reviews work well or not?

How well do principles-based reviews identify areas needing reform?

Whether principles-based reviews are effective in identifying regulations that are imposing high costs depends on the costs and distortions imposed when regulation does not satisfy the principle.

In an economy with extensive restrictions on business activity that have evolved to protect incumbents, the ‘no unnecessary restrictions on competition’ principle has been shown to have considerable power in identifying regulations imposing high costs. There are likely to be decreasing returns to further reviews of the *stock* of regulation once the major anti-competitive regulations have been identified and removed. However, given the tendency of businesses to seek such regulatory protection — often under the guise of protecting consumers and workers — the competition principle remains an important part of Australian regulatory policy, and is applied as part of the assessment of new regulation in all Australian jurisdictions.

The capacity of the ‘national/international coherence’ principle to identify areas of regulation imposing excessive costs depends on careful design. In particular, it is not the current extent of cross-border trade (or ownership of production capacity) that tests the principles, but the extent to which the lack of coherence is restricting this trade.

Principles-based reviews can be particularly useful in screening a large amount of regulation quickly to identify possible problem areas that can then be scrutinised with more detailed analysis. However, principles-based reviews usually only apply one principle, and there may be other reasons why a regulation imposes unnecessary costs or does not deliver a net benefit. This is not a failing of the approach, as the principle itself can be a powerful indicator of potential reform gains, but as for other approaches, it suggests that it needs to be supplemented by others. This was recognised by the Australian Government in its application of NCP, as it added a criteria related to other undue costs.

How well do principles-based reviews identify better alternatives?

One benefit of principle-based reviews is that the selected principle can of itself provides guidance on the reform option. The competition principle options start with removing the restriction to competition, whether barriers to entry or exit, unnecessary higher (government-imposed) operating costs, or bans or restrictions on activity, unless they could be demonstrated to be in the public interest. However, beyond the ‘remove the provision’ option, further assessment was required to develop the alternatives to the anti-competitive restrictions that would achieve the objective, such as consumer protection from shoddy operators. The NCP directed the policy maker to look at alternative ways of achieving the regulatory objective without restricting competition.

The ‘national/international coherence principle’, too, provides guidance on the options. The challenge, at least in pursuing national approaches, is in selecting the regulatory set that all jurisdictions have to comply with.

Improving national and international coherence of regulations, and hence lowering regulatory and technical barriers to the movement of goods and people, can be achieved in a number of ways, including through jurisdictions:

- adopting uniform regulations
- harmonising key elements of their regulatory frameworks
- mutually recognising other jurisdictions' regulations (box D.14).

The Commission also noted that when well implemented, mutual recognition can achieve many of the benefits of harmonisation while maintaining a greater degree of jurisdictional independence and providing scope for regulatory competition (PC 2009f). This allows the principle of subsidiarity to feature strongly in consideration of national regulatory arrangements.

One of the challenges in seeking to introduce a national approach to regulation is ensuring that the stringency of the standard, qualification or certification under consideration is set at the minimum effective level. A potential risk that may arise when reform committees are under pressure to achieve harmonisation and jurisdictions are reluctant to compromise, particularly through any dilution of standards, is to adopt the standards of the most stringent jurisdiction, leading to regulatory creep.

As with all reviews, the effectiveness of principles-based reviews in finding solutions to identified regulatory priorities depends on the quality of the analysis and the review processes. It has proved important to afford jurisdictions flexibility in how to identify alternatives and implement many reforms. Benchmarking exercises can be very useful in this process where they identify leading practice (for example the Commission's study into zoning and planning (PC 2011c)). The potential for harmonisation processes to inhibit regulatory competition, and the scope for discovery has to be set against the potential benefits from spreading the uptake of leading practice.

Box D.14 National regulatory ‘coherence’: approaches

The principle of subsidiarity holds that central authorities should perform only those tasks that cannot be performed effectively at a more immediate or local level. For issues where there is no cross-jurisdictional intersection, the issue of national coherence does not arise.

There are three broad approaches to achieving a nationally ‘coherent’ approach.

- *Mutual recognition* of requirements usually imposes few negotiating and administrative costs on regulators and stakeholders. If existing requirements are capable of meeting the objectives of regulation (for example, protection of the public or the environment), an agreement by jurisdictions to mutually recognise compliance with each other’s requirements will lower the costs associated with mobility and transactions across their borders. Thus, required regulatory outcomes are maintained and some degree of jurisdictional independence is preserved. The scope for jurisdictions to modify unilaterally their requirements within a mutual recognition regime has the added benefit of promoting regulatory competition.
- *Harmonisation* of requirements means that differing requirements are aligned or made consistent. Harmonisation offers the advantage of greater certainty for stakeholders. However, when the requirements are far apart initially, the costs of negotiating alignment may be high. Of greater importance, the harmonised requirements may be more burdensome than the pre-existing ones for some stakeholders.
- *Uniformity* of requirements means that a single standard applies across all jurisdictions. Uniformity removes any doubt stakeholders may have had regarding the quality of goods or practitioners from other jurisdictions. This can help promote trade and labour mobility. As with harmonisation, however, implementing this model can involve high negotiating costs and the risk of a ‘hold out’ by a jurisdiction. Moreover, the uniform requirement that is adopted may not be readily achievable by all jurisdictions.

All of these approaches can lower regulatory burdens. Ultimately, the pursuit of national ‘coherence’ reflects a recognition by jurisdictions that the net benefits outweigh the reduction in sovereignty. However, determining appropriate standards has many challenges — with the potential that efforts to achieve a national approach could lead to either ‘lowest common denominator’ outcomes or alternatively ‘gold plating’, where the requirements of the most stringent jurisdiction are adopted.

Source: PC (2009f).

How influential are principles-based reviews in promoting reform?

For principles-based reviews to be effective in promoting reform, there must be commitment to apply the principles. Once a principle is agreed to it can become a touchstone for reformers in resisting pressures to retain regulation or alter it in ways that do not address the main sources of costs or distortions.

As noted earlier, the overall strike rate for the LRP was high, with governments reviewing and, where appropriate, reforming most of the nominated legislation. But while the process worked well it was not without problems, and a number of ways to improve the process were identified (box D.15).

Box D.15 Productivity Commission NCP review recommendations on improving legislation review

Based on its examination of lessons from Australia's legislation review program the Commission recommended a number of modifications to deliver better outcomes from reviews and reduce the program's transactions costs. These included:

- limiting the review process to areas where reform of anti-competitive regulation is likely to be of *significant net benefit* to the community.
- *greater flexibility in the timing* of reviews, including providing for second-round reviews to be brought forward where, for example, circumstances have changed significantly since the previous review, or where the external monitoring agency has assessed a review outcome to be 'problematic'.
- *greater emphasis on independent reviews*; providing for adequate public consultation and require governments to make review reports public.
- *explicit recognition in the public interest test* to distributional, regional adjustment and other transitional issues;
- a commitment by governments to *well-coordinated national reviews* where regulatory arrangements in individual jurisdictions have a significant impact on the scope to create national markets for the goods or services concerned.
- more *emphasis on monitoring* whether review outcomes are within the range of those 'that could reasonably have been reached'.
- provision for the monitoring body to be involved in helping to *set priorities* and timeframes within the more targeted program.

Source: PC (2005b).

A potential pitfall associated with efforts to achieve international or national coherence arises from the risk of regulatory 'creep'. In its review of Australia's SNE reforms in 2010, the OECD (2010d) noted that the process followed for the development of the SNE agenda recognised that there are potential benefits through innovation and diversity in regulatory competition, but it warned that:

[T]here is some risk that a process that sets out to achieve national reform will have an unanalysed preference for nationally consistent regulation, which will not always be optimal. Processes which assess the costs and benefits of alternative models of implementation are therefore important. (p. 33)

There can also be potential for larger jurisdictions to dominate proceedings and ensure that their preferred regulatory model is introduced nationally — which may be costly for some other jurisdictions. A key factor in avoiding this is ensuring that the net benefits of proposed reforms can be demonstrated rather than assumed. This requires an explicit recognition that costs and benefits have to be weighed and that at times the benefits of shifting to national approaches will not outweigh the costs.

What is the return on the review effort?

Principles-based reviews can be costly where the coverage of the program is large. The key to ensuring cost-effectiveness overall is for the governance framework to encourage ‘proportionality’. This was the case with LRP, where jurisdictions were able to make these assessments and prioritise their review efforts. For example, the guidelines for legislative review issued by the Victorian Government outlined four review models which could be applied depending on the scale/priority, independence and minimum consultation requirements for each issue (table D.3).

While the Commission did not attempt to estimate the overall review costs associated with the LRP, it acknowledged that the transactions costs of undertaking some of the more minor LRP reviews may have largely offset or even outweighed the benefits of change (PC 2005b). Recognising the costs of review, the Commission made a number of recommendations including: limiting the review process to areas likely to give significant net benefits to the community; removal of the need for periodic reassessment for relatively minor anti-competitive regulations; greater flexibility in the timing of the reviews; and making use of national review processes.

Equally, the cost-effectiveness of efforts to promote regulatory harmonisation across jurisdictions can be low. These processes can be very time consuming, usually requiring the involvement of people in each jurisdiction, and may test the resources of some of the smaller jurisdictions. Progress is often very slow due to the inherent complexity introduced by the involvement of so many different regulators and stakeholder groups. The likely net benefits, therefore, need to be material to warrant embarking on such reforms.

Table D.3 Review models

Victorian Government Guidelines for the review of legislative restrictions on competition

<i>Review/model</i>	<i>Scale/priority</i>	<i>Independence</i>	<i>Consultation</i>
1. Public review	Major scale High or medium priority reviews	All reviewers not engaged in the area under review; and department/government agency reviewers constitute the majority of review panel	Public notification and call for submissions that are available to the public; possible public inquiry process
2. Semi-public review	Complex-minor scale & high or medium priority reviews	All reviewers not engaged in the area under review; and non-department/ government agency reviewers majority on review panel	Public notification of review and call for submissions; targeted consultation with interest groups at the discretion of the panel
3. Combined review & reform	Simple-minor review scale & high or medium priority reviews	Reviews may be internal to department but must be independent of the activity under review and may use external consultants	Consultation at the discretion of panels; may focus on reform options rather than benefits of the status quo; consultation draft report may be considered
4. In-house review	All low priority reviews	As for 3. above	No minimum consultation requirement

Source: Victorian Government (1996).

The strengths and weaknesses of principles-based reviews are summarised in table D.4.

On balance, they can provide a powerful vehicle for regulatory reform and consideration of additional principles would be worthwhile (see chapter 4).

Table D.4 Strengths and weaknesses of various principles-based reviews

	<i>Competition policy</i>	<i>National coherence</i>	<i>International agreements</i>
Discovery — How well does the approach identify areas needing reform?			
Strengths	<ul style="list-style-type: none"> · Clear initial filter based on a key source of economic cost · Generally accepted principle 	<ul style="list-style-type: none"> · Good initial filter 	<ul style="list-style-type: none"> · Can pickup priority areas for businesses that trade internationally
Weaknesses	<ul style="list-style-type: none"> · Potentially large number of regulations involved, some of which may impose little cost · Needs further assessment of materiality 	<ul style="list-style-type: none"> · Success depends on screening/selection process 	<ul style="list-style-type: none"> · Relies on transferability of standards and approaches
Solutions — How well does the approach identify better alternatives?			
Strengths	<ul style="list-style-type: none"> · Automatic removal of regulations which can't be justified under NCP · Required to assess alternatives 	<ul style="list-style-type: none"> · Scope to use 'natural experiment' across jurisdictions to find alternatives 	<ul style="list-style-type: none"> · Alternative international practice is clear
Weaknesses	<ul style="list-style-type: none"> · Needs further assessment of options if objectives are important 	<ul style="list-style-type: none"> · Risk of 'lowest common denominator' outcomes, (or 'regulatory creep') · Loss of further scope to innovate and learn 	<ul style="list-style-type: none"> · Potential to increase rather than reduce regulation · Loss of scope to innovate if uniformity adopted
Influence — How influential is the approach in promoting reform?			
Strengths	<ul style="list-style-type: none"> · Use of incentive payments assisted · Empowered state-territory competition bodies 	<ul style="list-style-type: none"> · Can be influential where costs of overlap/duplication can be demonstrated 	<ul style="list-style-type: none"> · May help regulators pursue beneficial domestic reform without expending as much political capital
Weaknesses	<ul style="list-style-type: none"> · Reversal of onus of proof can cause backlash 	<ul style="list-style-type: none"> · Jurisdictions may resist if they see no benefits for them. 	<ul style="list-style-type: none"> · Limits to international influence where countries not convinced reform is in their best interests · Risk of beneficial reforms held back as 'bargaining coin' in negotiations.
Cost-effectiveness — What is the return on the review effort?			
Strengths	<ul style="list-style-type: none"> · Tackles key cost source in a broad way but allows proportionate responses 	<ul style="list-style-type: none"> · Potentially large win-win outcomes from sometimes small reforms 	<ul style="list-style-type: none"> · Potentially big gains if focussed on removing burdens and 'behind the border restrictions to trade and investment
Weaknesses	<ul style="list-style-type: none"> · If too ambitious, review resources stretched too thinly and reform suffers 	<ul style="list-style-type: none"> · Can be time consuming · May test resources of some jurisdictions 	<ul style="list-style-type: none"> · Gains may take time

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E Programmed reviews

Key points

- Programmed reviews are predetermined mandatory requirements to undertake a review of a regulation. They include statutory reviews, post implementation review requirements (PIRs) and sunset provisions.
- Programmed reviews can be effective tools in improving the stock of regulation, but their effectiveness hinges on how they are applied and the nature of the reviews. In particular they work well when:
 - the governance arrangements are specified in advance, with an appropriate level of independence and transparency
 - the scope is wide enough to examine all the key issues
 - data collection is built in as part of the implementation of the regulation
 - they observe the principle of proportionality to ensure cost effectiveness.
- ‘Embedded’ statutory reviews can be an effective approach where there is considerable uncertainty surrounding the likely effectiveness and impacts of a proposed regulation.
- PIRs are important in ensuring that regulation that has not been adequately assessed prior to implementation does not have unintended or adverse consequences. PIRs should also serve to deter avoidance of regulatory impact analysis at the decision-making stage.
 - The benefits of PIRs will be weakened if they are less stringent than ex ante analysis — including in assessing impacts and considering alternative regulatory options.
- The effectiveness of sunset clauses lies in the strength of their requirement to review and remake a regulation if it is not to lapse.
 - The large number of regulations affected by sunset provisions makes a timely filtering process essential. In practice, many regulations will not be able to terminate and need some form of review.
 - The consequences of the sunset of a regulation need to be considered in advance. This involves effective planning and engagement with affected parties, including the publication of a forward legislative review program.

The structure of this appendix is as follows:

- section E.1 — describes the main categories and features of programmed reviews
- section E.2 — provides examples of programmed reviews to highlight how they are usually commissioned (the triggers), the methods used to identify the areas for reform, the assessment of alternatives to the regulation in place, and the governance arrangements of the reviews
- section E.3 — considers how effective (or not) programmed reviews have been in promoting successful reforms to the stock of regulation
- section E.4 — draws out the lessons, making an assessment of the usefulness of programmed reviews in: identifying areas of regulation that need reform (discovery); identifying alternatives that would improve outcomes (solutions); promoting reform action (influence); and the overall return on the review effort (cost-effectiveness).

These lessons are brought together with those from the other appendixes in chapters 3 and 4 of the published final report.

E.1 What are ‘programmed’ reviews?

Programmed reviews are predetermined mandatory requirements that a review of a regulation be undertaken. This might be at a specified point in time in the regulation’s life, or be triggered by specific events. Many regulation impact statement (RIS) guidelines, including those administered by the Office of Best Practice Regulation (OBPR), require that proposed legislation be subject to some review mechanism. A programmed review can: be embedded in the legislation, such as where the outcomes of regulation or its continued appropriateness are uncertain; be covered by general legislation such as sunset clauses in the *Legislative Instruments Act 2003* (LIA); or occur by convention, such as with post implementation reviews (PIRs), where required process has not been followed in the introduction of the regulation.

Such automatic or programmed evaluation of regulation requires governments to assess, at some defined point, the performance of the regulation. Ideally this will be an assessment of whether the regulation is achieving its purpose at least cost, and whether the objectives of the regulation remain appropriate. A programmed review can be required while still in the implementation phase for a new or remade regulation, or later when the regulation has been in effect for some time.

A ‘review clause’ imposes a statutory duty to carry out a review of the relevant regulation on a specified timescale, but does not provide for automatic expiry (meaning that further legislative action would be required to remove or amend the regulations, but not for them to remain in force). A ‘sunset clause’ provides for automatic expiry after a specified period (meaning that further legislative action is required for the regulations to remain in force, with or without modification (HM Government 2011a)).

Sunset clauses

Sunseting can either be narrow, with clauses included in specific legislation, or broad, applying to classes of legislation. Sunsetting periods are normally 5 or 10 years. The Organisation for Economic Cooperation and Development (OECD 2002) notes that Australia has been at the forefront of OECD countries in the use of sunseting.

General sunset clauses applied to classes of legislation were first employed in Australia by state governments. Five jurisdictions in Australia — New South Wales, Victoria, Queensland and South Australia — have legislation for general sunseting of delegated legislation (box E.1). Queensland and South Australia introduced sunseting in 1986 and 1987 respectively as part of a general microeconomic reform process (ARC 1992). New South Wales introduced five-year sunseting of most subordinate legislation in 1989. Victoria’s *Subordinate Legislation Act 1994* requires that all regulations are revoked or ‘sunset’ after 10 years. Similarly, in Queensland, all statutory rules are automatically revoked after 10 years and all legislation restricting competition is to be reviewed after 10 years. Sunseting provisions also apply at the local government level for by-laws and local laws in some jurisdictions.

The Australian Government followed the states in introducing a 10 year sunset clause via the *Legislative Instruments Act 2003*, which requires subordinate legislation to begin sunseting from early 2015. The sunseting provisions require that 18 months before a given sunseting date a list of legislative instruments due to sunset be tabled in Parliament. The Parliament then has six months in which to pass a resolution to allow a legislative instrument (or provisions of a legislative instrument) on that list to continue in force as if remade (Australian Government 2004). The first sunseting Commonwealth legislation will be tabled in parliament in 2013 (box E.2). The Commission understands this is likely to involve a substantial number of instruments over the first three years of sunseting in particular.

Box E.1 **Sunset provisions in the states and territories**

In **New South Wales**, under the *Subordinate Legislation Act 1989*, most regulations are subject to automatic repeal after five years. All new and remade regulations need to contain sunset clauses. Some regulations that have not yet been through the staged repeal process do not contain sunset clauses, but will after review, if not repealed.

In **Victoria** the *Subordinate Legislation Act 1994* requires that all regulations are revoked or 'sunset' after 10 years.

In **Queensland**, under the *Subordinate Legislation Act 1994*, all statutory rules are automatically revoked after 10 years, and all legislation that restricts competition is reviewed after 10 years.

In **Western Australia**, while sunset clauses are used in Bills at the direction of Cabinet, Parliament or individual Ministers, there is no broad-based automatic repeal of regulations.

Under the **South Australian** sunset program, all regulations, except those detailed in section 16A of the *Subordinate Legislation Act 1978*, expire on 1 September in the year following the tenth anniversary of their promulgation.

In **Tasmania**, while sunset clauses are generally not contained in regulations, all regulations are automatically repealed after 10 years under the *Subordinate Legislation Act 1992*.

In the **Australian Capital Territory** sunset clauses are not contained in all regulations. However, a review clause may be inserted into legislation, particularly where regulatory impacts may occur in a dynamic environment that necessitates the need for relatively frequent review.

In the **Northern Territory** sunset clauses are contained in some legislation.

Source: ORR (2005; 2006), OBPR (2007; 2008; 2009; 2010).

Box E.2 Commonwealth sunseting of legislative instruments

The Australian Government *Legislative Instruments Act 2003* (LIA) introduced a comprehensive regime for the making, registration, publication, parliamentary scrutiny and sunseting of Commonwealth delegated legislation. Its aim is to ensure that legislative instruments are reviewed regularly, retained only if needed, and kept up-to-date.

How will sunseting work?

The sunseting provisions in Part 6 of the LIA provide that:

- 18 months before a given sunseting date, the Attorney-General is to table in the Parliament a list of the legislative instruments due to sunset on that date
- the Parliament then has six months in which to pass a resolution to allow a legislative instrument or provisions of a legislative instrument on that list to continue in force as if remade
- rule-makers may ask the Attorney-General to issue a certificate extending the life of a legislative instrument for six or 12 months.

When will instruments sunset?

The *Legislative Instruments Handbook* (Australian Government 2004, p. 61) states that the calculation of sunseting dates applying to particular legislative instruments 'can be complex and requires careful consideration' and when in doubt, agencies should contact the Office of Legislative Drafting and Publishing for written advice.

- 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.
- Amendments to a principal instrument will sunset on the same day as the principal instrument.

The LIA also requires sunseting of existing legislation. The sunseting date for a legislative instrument will depend on whether the instrument is made before or after 1 January 2005.

- The sunseting date for instruments made in the five years before the LIA commenced (2000–2005) is 1 October 2016. The sunseting date for instruments made prior to that five-year period (1995–2000) is 1 April 2018.

Exemptions and deferral

- A number of instruments are exempt from the sunseting provisions, including instruments that facilitate the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States.
- The LIA also contains provisions for short-term (6-12 months) 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.

Source: Australian Government (2004).

Post implementation reviews for ‘non-compliant’ regulation

In 2007 the Australian Government introduced the requirement for a post implementation review (PIR), where a proposal proceeds (either through the Cabinet or another decision maker) without an adequate RIS. Such a review must commence within one to two years of the regulation being implemented, and is required regardless of whether or not an exemption from the RIS requirements for exceptional circumstances was granted by the Prime Minister (Australian Government 2010b).

Agencies are required to list upcoming PIRs (including proposed timelines) in their Annual Regulatory Plans. And, as with a RIS, the PIR must be certified by the relevant departmental secretary or deputy secretary (or agency head/deputy head) prior to being passed to the OBPR for final assessment. The review must be sent to the relevant portfolio minister and the Prime Minister, and is published on the OBPR’s central online RIS register. The OBPR reports on compliance with the PIR requirements in the annual *Best Practice Regulation Report*.

Completed PIRs are posted on the OBPR’s website. At the time of writing, only three PIRs had been completed: for Maritime Transport and Offshore Facilities Security Amendment Regulations (2010); live cattle exports to Indonesia; and the Financial Claims Scheme for a guarantee of deposits in authorised deposit-taking institutions. The latter two formed part of a RIS for amended regulation.

- For the combined RIS/PIR for live cattle exports, the PIR component examined the ban of live exports to Indonesia and the subsequent issuing of revised export control orders to re-open the trade of live cattle to Indonesia. The RIS component examined changes to regulation in Australia’s livestock export industry — including reforms to supply chains on both a domestic and international level — as part of the Government’s response to the *Independent Review of Australia’s Livestock Export Trade* (The Farmer Review) announced in October 2011.
- For the combined RIS/PIR for the Financial Claims Scheme, the PIR component reviewed the FCS for authorised deposit-taking institutions as introduced in 2008, while the RIS component related to changes to the Financial Claims Scheme for authorised deposit-taking institutions, which were announced in September 2011.

All three PIRs were assessed by the OBPR as meeting the Government’s best practice regulation requirements.

The OBPR advised that, including these three, there were a total of 61 post implementation reviews as at November 2011 (OBPR pers. comm., 10 November 2011; table E.1). The number of regulatory proposals requiring PIRs, either due to granting of ‘exceptional circumstances’ or due to non-compliance with RIS requirements has been escalating — with around half of the total number of PIRs relating to regulatory proposals over the past 12 months.

Table E.1 Australian Government regulations requiring post implementation reviews

As at November 2011

Title of regulatory proposal

Fishing area closure and revised monitoring arrangements
Suspension of live cattle exports to Indonesia
Marriage Amendment Regulations 2009 (1 & 2)
Amendments to Australian Accounting Standards 1 & 7
Reducing the Financial Reporting Burden: a second tier of requirements for general purpose financial statements
Telecommunications Service Provider (Mobile Premium Services) Determination 2010 (No. 2)
Prohibited Imports Amendments (ACBPS)
Interim bans on covered and naked short selling (Class Orders 08/751, 08/752, 08/753, 08/763, 08/764, 08/801, 08/824)^a
Changes to the anti-siphoning system
Government response to NBN implementation review ^a
Improved competition in telecommunications markets ^a
Renewable Energy (Electricity Amendment Regulations 2010 (No. 3) ^a
Renewable Energy (Electricity) Amendment Act 2009 and Renewable Energy (Electricity) (Charge) Amendment Act 2009
Renewable Energy (Electricity) Amendment Regulations 2010 (No. 8) & Renewable Energy (Electricity) Amendment Regulations 2011 (No. 2)
Defence Trade Cooperation Treaty with US
Australian Government Procurement Statement
Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 and Fair Work Act 2009 ^a
Migration Amendment Regulations 2009 (No. 15)
Australian Inventory of Chemical Substances restriction on the use of certain lead compounds
Tax Laws Amendment (Medicare Levy Surcharge Thresholds) Bill 2008
Fifth Community Pharmacy Agreement
Aviation Transport Security Amendment (Additional Screening Measures) Act 2007; Aviation Transport Security Amendment Regulations 2007 (No. 4)
Maritime Transport and Offshore Facilities Security Amendment Regulations 2010 (No.1)
Tripartite Deeds for 12 Australian privatised airports
Northern Territory National Emergency Response Measures ^a
Resale Royalty Right for Visual Artists Bill 2008
Enhancements from the Review of the Australian Independent Screen Production Sector

(continued next page)

Table E.1 (continued)

Title of regulatory proposal

Financial Claims Scheme and Other Measures Bill 2008
Guarantee Scheme for Large Deposits and Wholesale Funding Appropriation Act 2008
Financial Claims Scheme (ADI) Levy Bill 2008
Financial Claims Scheme (General Insurers) Levy Bill 2008
Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009
Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009
Fairer Private Health Insurance Incentives Bill 2009 (Treasury/DHA)
Foreign Investment In Housing
Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009
Trade Practices (Industry Codes – Unit Pricing) Regulations 2009
Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 & Income Tax (TFN Withholding Tax (ESS)) Bill 2009
Foreign Acquisitions and Takeovers Amendment Bill 2009
Excise Tariff Amendment (Tobacco) Bill 2010 and Customs Tariff Amendment (Tobacco) Bill 2010
Foreign Acquisitions and Takeovers Regulations 2010 (no. 2)
Regulation of Litigation Funding
Farm Management Deposits
Future of Financial Advice (5 PIRs)
Taxation of Financial Arrangements — amendments to tax hedging rules
Government's Response to the Super System Review (Cooper Review) ^a
Competitive and Sustainable Banking System — develop a corporate bond market ^a
Competitive and Sustainable Banking System — ban home loan exit fees ^a
Competitive and Sustainable Banking System — allow banks to issue covered bonds ^a
Government Response to Australia's Future Tax System review (7 PIRs) ^a
Government's response to the Review of the Woomera Prohibited Area ^a

^a Exceptional circumstances were granted by the Prime Minister.

Source: OBPR (2011a and pers. comm. 10 November 2011).

The regulations cover a range of areas, including such significant regulatory areas as: executive termination payments (2009); industrial relations legislation (including the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* and the *Fair Work Act 2009*) (2010); pharmacy location rules (2010); live cattle exports to Indonesia (2011); and responses to the Australia's Future Tax System (Henry) Review, including the minerals resource rent tax and the targeting of not-for-profit tax concessions (2011).

PIRs are also used in Queensland, where a PIR must commence within two years of the implementation date of any regulation with significant impacts where a Regulatory Assessment Statement (RAS) was not conducted (Queensland Office for Regulatory Efficiency 2010). In its current review of regulatory gatekeeping and impact assessment processes the New South Wales Better Regulation Office (BRO)

has sought views on its proposal that subject to approval by the Premier, PIRs be allowed in exceptional circumstances. The BRO (BRO 2011) notes that:

In such cases, a post implementation review should be completed within two years. The review should be approved by Cabinet or the Better Regulation Office prior to public release. (p. 3)

Statutory reviews

Some legislation specifies that a review will take place at a specified time or in response to specific circumstances. As regulation becomes more complex and its effectiveness more uncertain, building in reviews is a means of reducing the risk of locking in poor regulation as well as providing an avenue for refinement in light of changing circumstances. Statutory reviews can be an effective mechanism to resolve uncertainties and reform the regulation if required. Deciding this when a regulation is being developed has the advantage that those most familiar with the regulation can be involved. The statutory nature makes it more likely that business and consumer groups affected by the regulation will be aware of the upcoming review, helping to ensure stakeholder engagement. Where managed well by the regulator, relevant data to inform the review will also have been collected.

Some examples of statutory reviews at the Commonwealth level have included wheat marketing arrangements, airport regulation and third party access arrangements under Part IIIA of the *Competition and Consumer Act 2010 (CCA)* (box E.3).

Statutory reviews are also employed at the state level. For example, NSW's *Guide to Better Regulation* (BRO 2009) states that a review clause should be included in all Bills, unless a Bill has a minimal impact, to ensure legislation remains effective and efficient. In most cases reviews are to be conducted every five years. Statutory reviews must be tabled in Parliament to allow for public scrutiny. However, the Guide allows flexibility in the review of principal legislation, with the timing of review and details about the review's objectives able to vary on a case-by-case basis. Overall, agencies completed 11 comprehensive statutory reviews of Acts in 2009-10.

The NSW BRO notes that despite these requirements, statutory review clauses do not appear to be consistently included in amending Bills. It is canvassing views on a proposal that RIA requirements be strengthened to mandate the inclusion of a review clause in all Bills, including amending legislation (BRO 2011).

As the approaches for embedding reviews can differ across reviews, further detail on the approaches is given in the next section.

Box E.3 Examples of statutory reviews undertaken by the Productivity Commission

- In September 2009 the Commission commenced an inquiry into *wheat export marketing* arrangements. The review arose out of the *Wheat Export Marketing Act 2008*, with section 89 of the Act requiring that the Commission commence a review of the new arrangements by 1 January 2010. In conducting the inquiry the Commission was asked to consider the effects of new marketing arrangements on relevant stakeholders and the costs and benefits that the new arrangements delivered. The Commission was also required to provide comment on those aspects of the new arrangements that were working effectively and identify those that required change. A final report was provided to the Government in July 2010.
- In 2002, the Government introduced a light-handed approach to price regulation of airport services in line with recommendations made by the Commission in its 2002 *Report on Airport Price Regulation*. Under the Government's policy, price notification and price caps under the *Prices Surveillance Act* were discontinued for all airports (with the exception of regional air services at Sydney airport), and price monitoring for Adelaide, Brisbane, Canberra, Darwin, Melbourne, Perth, and Sydney airports was introduced for a five year period, with a review of the arrangements to be conducted at the end of this period. The Government reserved the right to bring forward the review and, in April 2006, it asked the Commission to conduct a further inquiry.
- The Commission also completed a statutory review of the *National Access Regime* in 2001. In April 1995 the Commonwealth, States and Territories signed three Intergovernmental Agreements, including the Competition Principles Agreement (CPA), which established the framework for competition policy reforms. The CPA required that its own terms and operation be reviewed after five years of operation. Terms of reference for that review specified that the review of Clause 6 of the CPA be incorporated into the competition policy review of Part IIIA of the *Trade Practices Act 1974*.

Source: PC (2001; 2002a; 2007e; 20010f).

Five-yearly reviews

At the Commonwealth level, all regulations that are not subject to statutory review or to the sunset provisions of the LIA are subject to review five years after their introduction. The first tranche of five-yearly reviews are scheduled to commence in 2012.

In its 2010 review of regulatory policy in Australia the OECD recommended that the Australian Government use scheduled reviews of regulation to promote continuous improvements to regulation. It also recommended that the OBPR help

departments and agencies in identifying regulation for review (OECD 2010d). The Australian Government (2010a) response noted that:

A screening process will be used to identify those regulations that should be reviewed. The OBPR will provide advice to departments and agencies to assist with identifying which regulations should be reviewed, and on the modality of each review. In addition, the OBPR will provide advice to departments and agencies on appropriate quality control mechanisms and other matters, including the consideration of related policy issues, associated with the review of particular regulations. A trial of the proposed approach is being conducted with selected departments and agencies in 2009-10 to identify the scale and scope of the task. The final approach to the five-yearly reviews will be finalised taking into account the results of this trial. (p. 3)

The Commission understands that the OBPR has examined the regulation that would fall within the five yearly reviews for 2012 and 2013 and found that in practice of those regulations needing review, many are picked up by other review processes, including sunseting, in-built reviews and broader review processes. The Commission understands that the OBPR will be releasing the results of this analysis soon.

International use of programmed reviews

The number of OECD countries with programmed mechanisms for regulatory review and evaluation has grown steadily over the last decade. For example, most OECD member countries now report having mandatory periodic evaluation of existing regulation and automatic review requirements in some form. Sunseting clauses have also become slightly more widely used in recent years, although they are a less popular mechanism than either automatic review or periodic evaluation (figure E.1).

Sunseting and statutory reviews are an important part of the United Kingdom (UK) Government's regulatory review framework. Sunseting is now mandatory for new regulation where there is a net burden (or cost) on business or not-for-profit organisations. The UK Government guidelines state that domestic regulation enacted through secondary legislation should be subject to the formal requirement of a statutory review, and an automatic expiry date. Domestic regulation enacted through primary legislation, and any legislation that implements international — including European Union (EU) — obligations, should be subject to a review obligation only (HM Government 2011a). Other than in exceptional circumstances, the guidelines state that the first statutory review should in most cases be carried out and published no later than five years after the relevant regulation comes into force. And where the regulation is subject to automatic expiry, this should be scheduled to take effect seven years after the same date.

Figure E.1 Programmed reviews in OECD countries^a

^a Data for 1998 and 2005 are not directly comparable as data for 1998 are not available for the EU, Luxembourg, Poland and the Slovak Republic. This means that figures for 1998 are based on data for 27 jurisdictions whereas figures for 2005 and 2008 are based on 31 jurisdictions.

Data source: OECD (2011).

In addition, the UK Government impact assessment guidelines (HM Government 2011b) state that a PIR impact assessment should normally be produced for a policy intervention which triggered the RIA requirements, with the PIR normally expected 3–5 years after implementation. The PIR should be planned and carried out so as to feed into any statutory review of regulation as required in any sunset provision, and other related processes such as the post-legislative scrutiny of primary legislation. The guidance also notes that departments may also produce additional PIRs for implemented policies that were not subject to a pre-implementation impact assessment. This is recommended, for example, when a prediction that a policy will not change costs is subjected to widespread public criticism.

Other examples include Portugal, which has also begun using revision or sunset clauses in new regulations. For example, both the industrial facilities licensing regime and the licensing regime relating to livestock-related activities (both established in 2008) include ‘review clauses’. In addition, Korea introduced a new sunset clause mechanism in 2009, while in Austria, sunset clauses are applied in some secondary regulations (OECD 2009a). In Canada, however, rather than inserting a sunset clause in legislation, the insertion of a five year review clause is the preferred approach. In addition, for regulatory proposals with large impacts federal departments in Canada are required to complete a Performance

Measurement and Evaluation Plan (PMEP) designed to provide an overview of how the proposal will be monitored and evaluated (see appendix K).

E.2 How have programmed reviews been used?

This section draws on examples to discuss how programmed reviews are usually initiated, what methods are used to identify problematic regulations, how the options for change are assessed and the governance arrangements commonly used for programmed reviews. The final issue considered in this section is how much programmed reviews usually cost to conduct.

How are programmed reviews usually initiated?

As discussed in the previous section, the motivation varies for the different types of programmed reviews. Sunsetting is largely about ‘good housekeeping’, ensuring regulation past its ‘use-by-date’ is removed. However, it can also be used to encourage more systematic reviews to be conducted. PIRs are usually triggered by avoidance of good process when the legislation is introduced.

Statutory reviews can be used in a similar way to sunsetting, but can also be triggered by uncertainty about the longer-term impacts on the efficiency or effectiveness of the legislation. These reviews are ideal where there is:

- *uncertainty* about whether the solution can be implemented effectively due to the *complexity* of the regulation. For example, in its 2002 review of the national access regime, the Commission recommended a further independent review of the national access regime five years after the changes to Part IIIA of the *Trade Practices Act 1974* had been put in place. The Commission noted that ongoing monitoring and periodic review of the national access regime was likely to be particularly beneficial given ‘... the complexity of the access problem and the imperfect nature of the solutions to it’ (PC 2002b, p. 433). Hence, statutory reviews provide an explicit mechanism for taking account of the often substantial ‘learning by doing’ that occurs when regulatory solutions are complex.
- *uncertainty* over the *effectiveness* of the proposed regulatory solution. For example, when the Australian Government deregulated the marketing of bulk wheat exports in 2008 by removing the ‘single desk’ operated by AWB (International) Limited, the legislation also required the Productivity Commission to conduct a review of the marketing arrangements. The Commission’s review of aged care arrangements also recommended a number of

statutory reviews in future years to assess how some of the proposed changes — in particular how the recommended consumer-directed system — had worked in practice (PC 2010f)

- *uncertainty* over the *future context* for the regulation. This might arise where international regulatory approaches are still in development (for example financial market regulation), or the regulation is a response to a crisis. For example, in response to the heightened uncertainty and declining confidence during the onset of the global financial crisis in late 2008, many governments around the world substantially increased deposit guarantees and provided guarantees over wholesale funding. While most governments nominated a deadline for the availability of the guarantee, Australia did not (RBA 2009). An amendment to Australia's *Guarantee Scheme for Large Deposits and Wholesale Funding Appropriation Bill 2008* to insert a sunset clause to the effect that the Act should cease to have effect two years after its commencement was moved by Senator Bob Brown, however the amendment was unsuccessful (Parliamentary Library 2008)
- the need for an '*insurance policy*' before committing to change, especially where some stakeholders have doubts about the regulation. For example, in its review of price regulation of airport services, the Commission (PC 2002a) recommended a shift to 'light handed' regulation. As this was a substantial shift from existing arrangements, the Commission recommended that '[P]rice regulation of airports should be reviewed towards the end of the five-year regulatory period. The review should be independent and public. Its objective should be to ascertain the need for any future price regulation of airports (including price monitoring or more stringent price regulation)' (Recommendation 6, p. XLVII).

What methods are used to identify regulations needing reform?

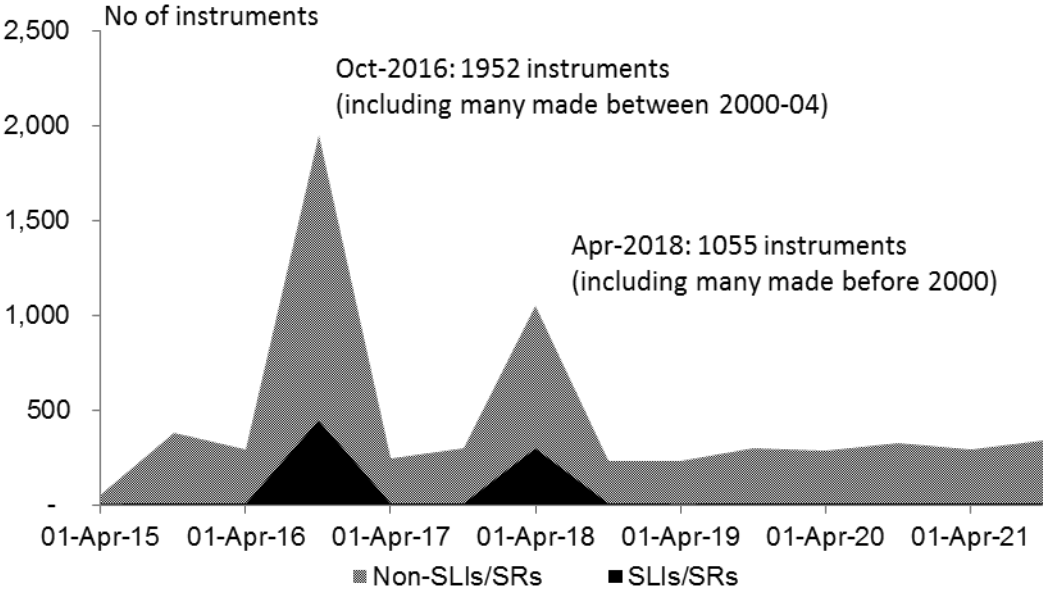
The ability of programmed reviews to identify areas of regulation needing reform depends greatly on their scope. Where statutory reviews are required for the kinds of reasons set out above, the scope of the review is usually specified in the legislation. This scope often determines the parts of the regulation that can be changed in response to the findings of the review. For example, the review of the wheat marketing arrangements (PC 2010f) was focused on the operation of the export accreditation scheme that was put in place as part of the transitional arrangements, following the deregulation of exports (removal of the single desk). The review did not reconsider the issue of whether a single desk or deregulated exports was the superior policy.

For sunseting, the scope to identify the need for reform depends on the coverage of the sunset provisions. In general, these apply only to subordinate legislation, and in some jurisdictions, only to new legislation. In Australia, under the LIA, in addition to all instruments reaching the ten years point, all pre-existing instruments are subject to sunseting processes unless a permanent exemption applies (box E.2). Sunseting of pre-existing instruments has also been employed in some states, with New South Wales for example sunseting all pre-existing instruments over a five year period following the commencement of the *Subordinate Legislation Act 1989*.

Under the Australian Government sunseting provisions the challenge of identifying regulations needing reform will be substantial, particularly in the first few years of the commencement of sunseting. The current LIA arrangements for when pre-2005 instruments are scheduled to sunset mean that the number of sunseting instruments will be both large and highly volatile.

Data provided by the Office of Legislative Drafting and Publishing (OLDP) show ‘twin peaks’ in the number of sunseting instruments that will see an estimated 2000 principal instruments sunset in October 2016 and a further 1000 in April 2018, with this pattern likely to be repeated every 10 years (figure E.2). The challenges in managing the associated workload are discussed in the next section.

Figure E.2 ‘Twin peaks’: Australian Government regulation by sunset date^a



^a Based on FLRI data at 21 October 2011 for principal instruments that are due to sunset. SLIs = select legislative instruments, SRs = statutory rules.

Data source: OLDP (pers. comm. 25 November 2011).

How are the reform options assessed?

The default reform option for sunseting is that regulation lapses. While sunseting legislation generally does not specify the examination of alternatives, the need to follow best practice guidelines to remake the legislation means those regulations with an impact on business will generally also require the preparation of a RIS. Sunset clauses in legislation can provide the default option in statutory reviews, especially where regulations are used as part of transition arrangements.

Statutory reviews required during the implementation stages of a regulation may be limited to considering how to fine-tune the regulation to improve efficiency and effectiveness, without revisiting the appropriateness of the regulation. However, some programmed reviews may allow scope to consider whether a more comprehensive in-depth review is needed to identify a wider set of options for reform.

The *Best Practice Regulation Handbook* notes that while the terms of reference for each review will depend on individual circumstances, the PIRs should generally be similar in scale and scope to what would have been prepared for the decision making stage (that is, as part of a RIS). Issues examined (could) include the problem that the regulation was intended to address, the objectives of government action, the impacts of the regulation and whether the government's objectives could be achieved in a more efficient and effective way (Australian Government 2010b).

As programmed reviews take place after implementation this provides an opportunity to collect better information on the actual impacts of the change. The *Best Practice Regulation Handbook* notes in regard to PIRs (Australian Government 2010b):

The key difference between a PIR and an analysis prepared prior to implementation is that, in the case of a review, the agency can report accurately on the implementation of the regulation and its actual impacts. Agencies should gather data from business and other stakeholders on the actual impacts of the measure, including compliance costs. (p. 21)

In the UK, the Government guidelines (HM Government 2011b) advise that the depth of analysis for a PIR should be proportionate to the likely benefit of conducting the review. A high-impact policy should be subject to a full PIR, including an evaluation of the actual costs and benefits that result from the policy. In many cases a less detailed review will be appropriate (box E.4).

Box E.4 UK guidelines for post implementation review analysis

The United Kingdom (UK) Government applies PIRs as a general mechanism to review legislation that has specific impacts, rather than as a failsafe mechanism in response to process failure. Their guidelines for PIR analysis note that for high-impact policy interventions the following questions should be considered:

- to what extent has the policy achieved its objectives?
- to what extent have the success criteria been met?
- to what extent have there been unintended consequences?
- is the mechanism that was expected to link intervention with outcome credible in hindsight?
- hence, what scope is there for simplification, improvement or deregulation?
- what are the costs and benefits, in hindsight? and going forward?
- is government intervention still required, in light of changing circumstances?
- do compliance levels indicate that the enforcement mechanism chosen is appropriate?

The guidelines note that for low-impact interventions, answering all these questions might be disproportionate, but that reviews are expected to cover the first three questions at least. Departments are required to complete a PIR plan which outlines key elements of the PIR including:

- **basis of the review** — the basis of the review could be statutory (forming part of the legislation, that is, a sunset clause, or a duty to review), or there could be a political commitment to review
- **review objective** — is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern; or as a wider exploration of the policy approach taken; or as a link from policy objective to outcome?
- **review approach and rationale** — for example, describe the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc) and the rationale that led to the choice of approach
- **baseline** — the current (baseline) position against which the change introduced by the legislation can be measured
- **success criteria** — criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives
- **monitoring information arrangements** — provide further details of the planned/existing arrangements in place that will allow a systematic collection of monitoring information for future policy review
- **reasons for not planning a PIR** — explanation required if a PIR is not planned.

Source: HM Government (2011b).

The UK Government (2011b) noted:

Government expects policymakers to evaluate policies after implementation because such evaluation can yield invaluable insights. Examining the actual impact of policies can show what works, what could be improved, and how others can learn from the approaches used. (p. 13)

The trigger for a PIR in the UK differs from that in Australia, with PIRs normally required in the UK for all proposals that trigger the RIA requirements, rather than as a ‘failsafe’ for cases where ex ante assessment is not conducted.

What are the governance arrangements?

Governance arrangements cover who conducts the review, the resources available for review, the transparency of the process, and the response to the review findings. These vary with the type of programmed review. Governance arrangements may be explicit in the legislation or left to the discretion of the policy agency or agency tasked with undertaking the review.

Australian Government agencies whose regulation has a significant impact on business are required to develop an Annual Regulatory Plan (box E.5). These plans set out all proposed reviews and development of regulatory proposals over the next year. These plans are public and are posted on the OBPR’s website. The Australian Government (2010b) notes that:

The website and the Annual Regulatory Plan initiative are therefore cost-effective ways of alerting stakeholders to potential regulation. (p. 52)

Statutory reviews

The process for a statutory review is usually set out in the legislation (or subordinate legislation). This may specify: the agency responsible for, or independence of, the review; who is to undertake the review; the timing of the review; required consultation approaches; and the degree of transparency, such as publication of the review. For example, sections 59 and 60 of the LIA contain requirements for the review of the operation of the Act as well as a review of the operation of the sunset provisions (box E.6).

A statutory review can also set out the requirement to repeal, amend or fine tune the regulation, unless the review finds that it is working well. Some legislation will also set out monitoring requirements, and assign this task to a regulator. Monitoring may be included to act as a discipline, where breaching the guidelines triggers a review. It may also be in place to ensure that reviews have access to the information needed

to assess the efficiency, effectiveness and/or appropriateness of the regulation. A substantial proportion of regulation of utilities and major infrastructure requires price and quality monitoring.

Box E.5 Annual Regulatory Plans

The *Best Practice Regulation Handbook* (Australian Government 2010b) outlines requirements for Commonwealth agencies:

Agencies responsible for regulatory changes that may have a significant impact on business are required to prepare and publish an Annual Regulatory Plan in July each year.

These plans provide business and the community with information about planned changes to Australian Government regulation, and make it easier for business to take part in the development of regulation that is likely to affect them.

These plans contain information about proposed regulatory activity, including a description of the issue, information about the consultation strategy and an expected timetable. The OBPR provides assistance to agencies preparing or updating Annual Regulatory Plans.

Annual Regulatory Plans are published on the website of each agency and the OBPR also publishes the plans on its website. The plans are also linked to the business consultation website which aims to make consultation more effective.

It is up to individual agencies to manage the coordination and publication of Annual Regulatory Plans within their portfolio. (p. 49)

The OBPR (2010b) *Guidelines for departments and agencies on preparing and publishing annual regulatory plans* outline activities which should be included in annual regulatory plans, including:

- policy development processes aimed at finding a way to address a particular problem or achieve an objective where regulation is likely to be one of the options under consideration
- development of the Government response to a report or inquiry, especially where regulatory change has been put forward as a possibility
- review of a piece of legislation
- sunseting legislation
- implementation of election promises or government undertakings
- legislation in the process of drafting, where consultation is still being undertaken.

Source: Australian Government (2010b); OBPR (2010b).

Box E.6 Statutory review of the *Legislative Instruments Act 2003*

Section 59 of the LIA states:

Review of operation of this Act:

During the 3 months starting on the third anniversary of the commencing day, the Attorney-General must appoint persons to a body to review the operation of this Act.

A person appointed to the body may resign from it by giving the Attorney-General a signed notice of resignation.

The body must review all aspects of the operation of this Act and any related matters that the Attorney-General specifies.

The body must give the Attorney-General a written report on the review within 15 months after the third anniversary of the commencing day.

The Attorney-General must cause the report to be laid before each House of the Parliament within 6 sitting days of the House after the Attorney-General receives the report.

Section 60 of the LIA states:

Review of operation of the sunseting provisions

During the 3 months starting on the 12th anniversary of the commencing day, the Attorney-General must appoint persons to a body to review the operation of Part 6 [sunsetting of legislative instruments].

A person appointed to the body may resign from it by giving the Attorney-General a signed notice of resignation.

The body referred to in subsection (1) must review all aspects of the operation of Part 6 and any related matters that the Attorney-General specifies.

The body must give the Attorney-General a written report on the review within 9 months after the 12th anniversary of the commencing day.

The Attorney-General must cause the report to be laid before each House of the Parliament within 6 sitting days of the House after the Attorney-General receives the report.

Source: LIA (2003)

Post implementation reviews

To meet Australian Government PIR requirements, agencies are required to list upcoming PIRs (including proposed timelines) in their Annual Regulatory Plans. For example, the Department of Health and Ageing's 2011-12 Regulatory Plan (updated to September 2011) provided information about three forthcoming PIRs, including the decision to retain pharmacy location rules, changes to the Medicare Levy surcharge threshold and restrictions on the use of lead compounds. Information provided on the PIRs included a description of the issue, opportunities for consultation by stakeholders, expected timetable and contact details.

As noted, the OBPR also reports on scheduled PIRs (when they are required to commence and whether they are underway) as well as completed PIRs in its annual best practice regulation reports and provides regular updates on the OBPR website.

Governance arrangements for post implementation reviews can vary. For example, completed PIRs at the Commonwealth level have been prepared by the responsible policy department — Treasury prepared the PIR on the financial claims scheme; the Department of Agriculture, Fisheries and Forestry prepared the PIR on live cattle exports and the Department of Infrastructure and Transport prepared the PIR for the changes to the Maritime Security Identification Card Scheme.

However, in the case of the forthcoming PIR of the Fair Work Act, the Government has indicated that the review will be ‘independent’ (Vasek 2011). Details about the scope and nature of the review have yet to be publicly released.

Although the Department of Education, Employment and Workplace Relations (DEEWR) Annual Regulatory Plan for 2010-11 states that the PIR for the Fair Work Act 2009 will commence in January 2012 and that consultation will be undertaken to inform the PIR process, details of such consultation were ‘yet to be developed’ (DEEWR 2010, p. 18). DEEWR’s Annual Regulatory Plan for 2011-12 does not discuss the PIR (DEEWR 2011).

Sunsetting

For sunseting of Australian Government legislation, the LIA requires that a list of instruments and provisions of instruments due to sunset be tabled in the Parliament 18 months before the sunseting date. Either House of Parliament may pass a resolution within six months after tabling of the sunseting list indicating which instruments and provisions should continue in force for a further 10 years (box E.2).

Victoria’s sunseting processes provide an example of governance arrangements at the state level. Victoria’s *Subordinate Legislation Act 1994* requires that all regulations are revoked or ‘sunset’ after 10 years. The Victorian Competition and Efficiency Commission (VCEC) lists the regulations that will sunset in the following year in its annual report. All government departments were asked to verify, and amend where necessary, a list of sunseting regulations based on information provided by the Office of Chief Parliamentary Counsel. They were also asked to provide other relevant information about the regulations, including whether a RIS might be required (VCEC 2011).

In New South Wales the Subordinate Legislation Act requires that subordinate legislation must be reviewed and remade every five years or face automatic repeal.

The NSW Legislation Review Committee examines and reports to Parliament on compliance (BRO 2011).

How much do programmed reviews cost?

The overall costs of programmed reviews vary, depending on such factors as: who conducts the review; the depth of the review; data requirements; and the extent of public consultation. Costs associated with in-house reviews are likely to be lower than for commissioned independent reviews, particularly in cases where monitoring, data collection and evaluation are already being undertaken as part of the ongoing activities of the regulator. In addition to the costs for individual reviews, there are also the overhead costs associated with the management/governance of the wider review program.

Costs for major statutory reviews will often be similar to the costs associated with in-depth reviews (appendix C). For review programs where a lot of legislation is due to sunset in a narrow timeframe, costs are likely to be similar to those for wide-ranging principles-based review programs (appendix D). The extent of the forthcoming review task associated with Australian Government sunseting requirements under the LIA is discussed in the following section.

E.3 How effective have programmed reviews been in promoting regulation reform?

Effective programmed reviews would not only identify beneficial reforms, but also be influential in getting them implemented.

This section looks at some examples of programmed reviews and how effective they have been in promoting regulation reform. However, as key elements of the Australian Government requirements, including sunseting and PIRs, have either not commenced, or have only recently begun, much of the discussion examines processes and emerging issues that may influence their effectiveness.

Statutory reviews

The number of statutory reviews and the scope of these reviews is not recorded in any consistent way, other than being flagged in agencies' annual regulatory plans. However, where the reviews have been undertaken in a transparent manner they appear to be a highly effective mechanism for promoting changes to the regulation to make it more efficient and effective.

For example, Government responses to the Commission's statutory reviews of price regulation of airports and the national access regime were positive with substantial acceptance of review recommendations (box E.7).

Box E.7 Outcome for statutory reviews undertaken by the Productivity Commission

Review of price regulation of airport services

Inquiry Report no 40 signed 14 December 2006, report released 27 April 2007.

On 30 April 2007 the Government announced that it supported nearly all of the Commission's recommendations on a new price monitoring regime for airport services through to 30 June 2013. The Government (Costello 2007):

intends to amend Part IIIA of the Trade Practices Act, as recommended by the Commission, to restore the interpretation prevailing before the recent Federal Court decision upholding the declaration of the domestic airside services at Sydney Airport

accepted Commission proposals to address systemic shortcomings in the current regime including through establishing a credible threat of re-regulation by incorporating a 'show cause' mechanism, strengthening the Government's Aeronautical Pricing Principles, setting a starting aeronautical asset base at each of the monitored airports as at 30 June 2005, widening the coverage of monitoring largely as recommended by the Commission (but car parking prices at the major airports are to be monitored separately from the aeronautical price monitoring regime)

in accordance with the Commission's recommendations, the new price monitoring regime is to apply to Adelaide, Melbourne, Perth and Sydney Airports, and from 1 July 2007, Canberra and Darwin Airports would no longer be subject to formal price monitoring

accepted the Commission's recommendation that an independent review of the new regime be carried out in 2012.

Review of the national access regime

Inquiry Report no. 17 signed 28 September 2001, released 17 September 2002.

The Government released an interim response on 17 September 2002 which endorsed the thrust of the majority of the Commission's recommendations (described in detail in PC (2002)). In particular, broad agreement was apparent about the need to introduce changes to the national access regime to clarify its scope and objectives, provide potential investors with greater certainty, encourage commercial negotiations and improve the regulatory process.

Sources: PC (2007e); PC (2002b); Costello (2007).

Sunset reviews

The OECD (2002) has stated that sunseting should radically reduce the average age of the stock of regulation. At least theoretically, the OECD recognised it as a tool to

ensure regular review and reform of the stock of regulations. However, the OECD also noted that problems may arise if sunseting leads to a reduction in the predictability of the regulatory environment, or if it leads to a reduction in compliance toward the end of the lifespan of a regulation. It is also potentially costly for regulators, as resources must be committed to remaking the regulation with all regulators associated with the government regulation-making process.

The OBPR notes that sunset clauses can be an effective means of keeping the overall burden of regulation on the community at an acceptable level, and of reducing the number of outdated regulations still in force. It also notes that a sunset clause is particularly suitable for regulation that has been established to deal with an unexpected emergency or with temporary problems, such as measures aimed at providing drought relief (Australian Government 2007).

Sunseting at the state level

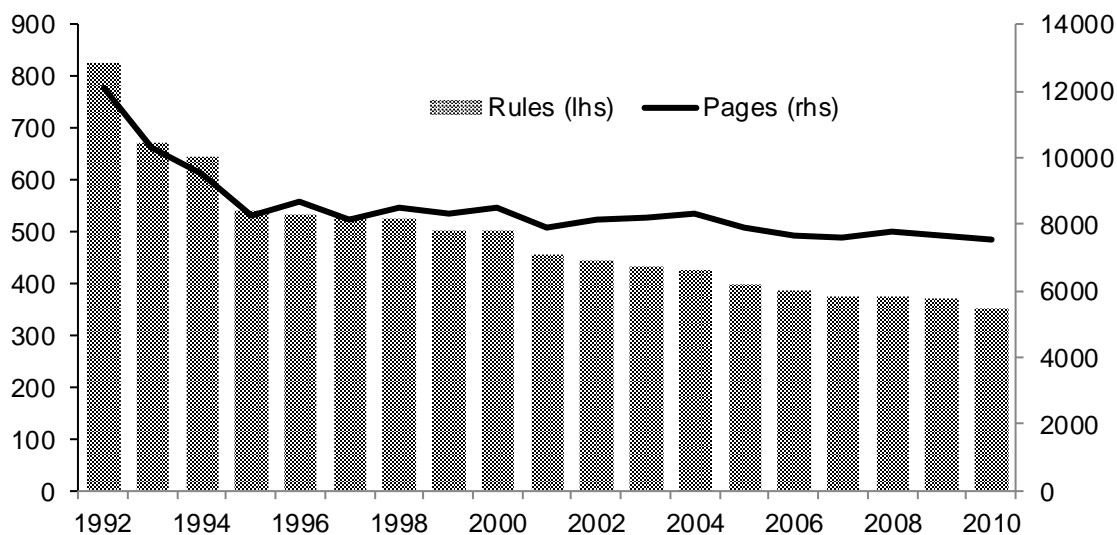
At the state level, sunseting has played some role in promoting better regulatory outcomes. For example, an OECD study (1999) reviewed the use of sunseting in several Australian states and concluded that it had substantially reduced the overall number of regulations in force, removed much redundant regulation from the statute books and encouraged the updating and rewriting of much that remained.

Sunseting can be effective, particularly if there is early engagement from the relevant departments. For example, Victoria uses the sunseting provisions of regulations to introduce additional reform. VCEC notes that effective early engagement by regulators improved the regulatory proposals relating to sunset reviews of the *Environmental Protection (Industrial Waste Resource) Regulations 2009* and the *Children's Services Regulations 2009*. The departments responsible for both of these RISs engaged with the VCEC more than 12 months before the regulations were due to sunset. VCEC (2009) notes that early engagement enabled these RISs to be used as tools to analyse the costs and benefits of various options, and better shape the proposed regulations.

New South Wales is currently examining the operation of its sunseting provisions, with a range of options for reform canvassed in an issues paper released by the BRO in September (BRO 2011). While not a measure of the level of regulatory burden, data on the number of instruments and pages of regulation subject to staged repeal in New South Wales via sunseting show a significant reduction in regulation after the introduction of sunseting (figure E.3).

Figure E.3 Instruments subject to staged repeal program in NSW

Number of instruments/pages of legislation repealed per year



Data source: Better Regulation Office (2011).

Reduction was greatest in the first few years, as the Subordinate Legislation Act required the sunseting of the pre-existing stock of regulations (all statutory rules in force prior to 1 September 1990) in stages — with a fifth of the stock sunseting each year between 1991 and 1995. Even allowing for this, the reduction has slowed in recent years, with the BRO (2011) noting:

This may reflect in part that the easiest reforms have been identified and resolved in the early years of this program. The resources needed to undertake reviews on an ongoing basis is substantial. (p. 27)

The OECD (1999) review of NSW sunseting arrangements noted that there was also some evidence to suggest that sunseting in NSW has, in addition to removing redundant regulation, played a significant role in the updating and rewriting of other regulation which has remained in existence.

Postponement of sunseting

There have also been challenges in the operation of sunseting at the state level. The OECD (1999) found that New South Wales' more frequent (five-yearly) sunseting requirement has seen substantial numbers of regulations that were scheduled to sunset being postponed. For example, of the statutory rules in NSW that were due to sunset on 1 September 1998, 63 were repealed and 101 were retained. For approximately 70 per cent of those 101 rules, the sunseting date had already been postponed by between three and six years (OECD 1999).

The latest data indicate that this problem remains. In 2009 and 2010, the staged repeal of 51 per cent and 42 per cent of expiring regulations respectively, have been postponed. The BRO (2011) notes that this may reflect a review period (five years) that is too short for some regulations and that agencies are choosing to allocate resources to higher priority activities. Options for addressing this problem while ensuring the stringency of sunset provisions in NSW are maintained are currently being examined.

Mechanisms for delaying the sunset of subordinate legislation are available in other jurisdictions including:

- South Australia — postponement of expiry for two years, to a maximum of four years
- Victoria — on the certificate of the minister, the Victorian Governor may extend the operation of a regulation once only for a period not exceeding 12 months
- Queensland — extensions of one year or a maximum of five years for subordinate legislation substantially uniform or complementary with legislation of the Commonwealth or another State.

A recent review of Queensland's sunset provisions found that although expiry of substantial numbers of instruments had been delayed over the previous decade due to the granting of extensions, the numbers had been falling steadily — down from 100 extensions granted in 1998 to only 32 in 2008. The review concluded that this evidence 'suggests that the process of regulation review may have become more well-established' (Scrutiny of Legislation Committee 2010, p. 24).

For the Australian Government's sunset requirements under the LIA short-term deferral of sunset is available. However, the circumstances for which this can be granted are limited and the period of deferral is relatively short (6-12 months). This means that there is currently limited flexibility for departments and agencies to package related regulations for review.

Managing the workload from Australian Government sunset

The burden for government departments and regulators of dealing with a large amount of sunset legislation can be considerable. Australian Government legislation will start sunset from early 2015. Around 6300 principal instruments are scheduled to sunset between 2015 and 2022. The bulk of these will sunset on or before 1 April 2018, the majority of which are regulations made prior to the commencement of the LIA in 2005.

Instruments scheduled to sunset range from a large number of relatively minor regulations to larger and more complex regulations with more significant impacts on business. It is not clear how many of these instruments will need to be remade, and if so, how many of the remade instruments will have an impact on business and trigger the Government's best practice regulation requirements for the preparation of a RIS.

While the exact extent of the forthcoming review task facing departments and agencies is not known at this time, it is potentially very large. Concerns have been expressed for some time about how the volume of reviews will be handled.

As early as 2004, rule-making agencies were advised to monitor their registered instruments and review them well before sunset. The LIA handbook (OLDP 2004) warned that: agencies should not wait until the last 18 months before they review their instruments and decide whether some should be repealed, or remade in updated form and continued in force; agencies that propose to repeal existing instruments and remake them in updated form will need sufficient time to seek the necessary approvals and draft replacement instruments; and agencies that leave these matters until the last 18 months risk having their instruments sunset by default.

The 2009 review of the LIA commissioned by the Attorney-General (Legislative Instruments Act Review Committee 2009) warned that:

Sunsetting may place acute demands on drafting resources if agencies propose that legislative instruments due to sunset should be remade. This will have a flow-on effect for [the Attorney-General's Department's] lodgement and registration workload. (p.48)

In the Committee's view, agencies should commence action now to identify which legislative instruments will need to continue beyond their sunset date, and to propose the repeal of spent instruments to minimise the number of instruments that must be reviewed.

Leadership on this issue would be helpful, not only from AGD but also the Department of Finance and Deregulation, because removing redundant legislation is a key element of the Government's deregulation agenda. (p. 48)

Consultations undertaken for this study indicate that, for the most part, departments and agencies do not appear to have been active in preparing for sunset. The Commission understands the Attorney-General's Department has provided all portfolios with comprehensive information on whether and when their legislative instruments sunset. Departments have been asked to verify this information before it is published on the Australian Government's ComLaw website.

The Department of Agriculture, Fisheries and Forestry notes that it is planning for its review of sunseting portfolio instruments and that (Sub. DR12):

Sunseting will be an opportunity to consider whole-of-government regulatory reform. However it has the potential to become onerous if there is limited direction on expectations. The department would encourage further direction and resourcing to assist agencies in the review process. (p. 1)

The sheer volume of regulatory instruments points to the importance of good process if sunseting is to be used as a general mechanism for improving the stock of regulation. A series of filters which identify which regulation could go, which must stay, and which require more detailed review, could reduce this burden. The proposed treatment — for allowing regulation to lapse, remake as is, or review before remaking the regulation (and the extent of the review) — would need to be tested. This could be done by publishing the list and calling for business to identify any proposed treatment that they disagree with. An alternative would be to form a business/community advisory panel to confirm the proposed approach. In any case, any filters used would need to be constructed carefully if the intent of the sunseting is to be achieved.

Post implementation reviews

Only a few PIRs have been completed at the Australian Government level so it is too early to assess how well the overall process is working. However, the large and growing number of PIRs required — combined with concerns by some departments consulted during the course of this study that PIRs may focus more on implementation issues — points to questions about their potential to serve as a ‘failsafe’ mechanism and to prevent ‘bad’ regulation. It also raises questions about their effectiveness as a deterrent to avoiding the Government’s best practice regulation requirements.

E.4 What makes programmed reviews work well or not?

Priorities for reform are those areas that are currently imposing high costs or distortions for which there are better alternatives (which may be repealing, amending, or integrating the regulation). However, in seeking to promote reform, governments are also mindful of the costs of achieving change — both in terms of political capital for pushing through reforms and in terms of the funding of the review processes. In addition, governments want to avoid pitfalls that can arise from setting in train review processes.

How well do programmed reviews identify areas needing reform?

The capacity for programmed reviews to identify high-cost and distortionary regulations depends on a number of factors. PIRs triggered by avoidance of best practice process can provide a clear signal that the associated regulation has, at the very least, the potential to impose high costs and hence warrant closer scrutiny. Statutory reviews by their nature should be targeted at problem areas if they reflect a genuine uncertainty about likely impacts rather than being put in place simply to give comfort to stakeholders.

The OECD (2009b) suggests that the benefits from systematic regulatory reviews are likely to be most apparent in sectors or areas where change is most rapid. The rapidly changing technical, legal and economic environment of industries such as communications and IT, for example, may be a contributing factor in the increasing inclusion of mandated review provisions in primary laws in OECD countries. Gains from systematic regulatory reviews are also likely to be found in areas where regulation is increasing. Sunsetting can be regarded as a housekeeping mechanism useful for cleaning of the stock of regulation to remove that past its ‘use-by’ date. But it can also be used as an opportunity to undertake more systemic reform. This requires using sunsetting as the trigger to examine related groups of legislative instruments in a thematic or systemic review.

At the Australian Government level, while there are some provisions in the LIA to postpone sunsetting for some instruments in exceptional circumstances, there is no general provision that either allows, or provides an incentive for, packaging of related instruments. The introduction of such a provision that allows regulations to extend beyond their sunset date if they are scheduled to be reviewed as part of a package of related regulation would allow agencies the flexibility to package related regulations for review. The large number of regulations affected by sunset provisions means that for them to work well a filtering process is essential to identify regulations with high costs/unintended consequences. Filters or screens would follow the same sets of broad principles used in determining reform priorities with other types of identification tools (discussed in chapter 6).

How well do programmed reviews identify better alternatives?

The scope for most programmed reviews to identify options for reform is generally defined by the review requirements.

PIRs provide scope to identify improvements to the regulation. With implementation costs known, and early outcomes monitored, they should yield better information than ex ante reviews. Where PIRs assess alternatives rather than focussing just on implementation issues they have the potential to identify options

for reform. But, because they are done after the regulation has been implemented this can change the cost-benefit calculus for different options.

An important motivation for introducing a PIR requirement is that it reduces the incentive to avoid the RIS process, as well as verifying that such regulation has been appropriate. PIRs can also be effective as a fail-safe for ‘crisis’ regulation. With regard to PIRs, the *Best Practice Regulation Handbook* (Australian Government 2010b) states:

While the terms of reference for each review will depend on individual circumstances, the review should generally be similar in scale and scope to what would have been prepared for the decision making stage. Issues that could be examined include:

- the problem that the regulation was intended to address
- the objective of government action
- the impacts of the regulation (whether the regulation is meeting its objectives), and
- whether the government’s objectives could be achieved in a more efficient and effective way. (p. 14)

There is, however, no mandatory requirement for a PIR to include the same level of analysis required in a RIS. For PIRs to work effectively guidelines need to be established, including: rules about when a PIR is to be conducted; a process by which this occurs, including the monitoring of data required to inform the review; and rules around how the recommendations of the review are to be handled.

The scope of statutory reviews will largely define the extent to which they are able to consider a wide range of alternatives, including whether the regulation is even necessary. As discussed earlier, statutory reviews can have considerable scope, but it depends on the areas of uncertainty that motivated the inclusion of the review.

The extent to which sunseting identifies options for reform depends on the approach taken to the review when policy agencies wish to retain, and hence have to remake, the regulation. If agencies plan, and allocate time and resources, to the review this can be a good mechanism for ensuring that the option that goes forward for approval is the best way of achieving the regulatory objective.

For programmed reviews to work well, ensuring an appropriate level of independence and transparency in the conduct of the review and the methodology applied is crucial. Programmed reviews, by nature, run the risk of being insufficiently independent and transparent, particularly in instances when the department or agency conducting reviews are the authors of the regulation. In these instances there is a risk they could become mechanical ‘tick and flick’ exercises. If the governance arrangements for such reviews are inadequate, they could lend unearned legitimacy to poor regulation, which could prove counterproductive and actually mask underlying problems, delaying beneficial reforms.

How influential are programmed reviews in promoting reform?

The effectiveness of programmed reviews in promoting reform depends on how they are implemented. While in Australia PIRs have not been in place long enough to determine their influence, in theory they should reduce the incentives to avoid best practice process at the regulation development stage. However, for the disincentive effect to be strong, the scope of the PIR must be similar to a RIS and governments need to be required to respond to the PIR recommendations. Similarly, statutory reviews can be influential where there are requirements to comply with review recommendations, or where transparency and consultation create a constituency that will push for reform.

It is also too early to tell how well the Australian Government's sunseting regime will operate in practice — both in improving the quality of regulation that government wishes to retain and in removing redundant regulation. In other jurisdictions the experience with sunseting has been mixed, and there have been a number of ways that governments have avoided or delayed addressing problems.

The scope of programmed reviews varies considerably. The wider the scope, the more likely the review will be an effective mechanism for reforming the stock of regulation. However, proportionality is crucial. Narrowly-targeted reviews can also be effective in fine tuning the regulation to improve effectiveness, reduce business compliance costs, or remove unintended distortions. The scope of sunset clauses in specific legislation is reduced by exemptions and extensions. The scope of statutory reviews can be very limited, often to only the transitional arrangements. And for PIRs the range of options that can be considered is narrowed by the implementation of one option, that may not have been the preferred option *ex ante*.

A sound review process is also important for programmed reviews to be successful. Where governance arrangements for programmed reviews allow them to be ignored (or postponed), or where they lack independence or transparency — a particular risk with statutory reviews where these arrangements are not spelt out in the review clause — then the capacity of such reviews to promote genuine reform is likely to be minimal. Similarly, although sunseting can be highly effective in removing regulation or forcing amendments, its value can be compromised if the volume of regulations results in a rubber stamping, rather than genuine assessment.

Another important factor affecting how influential programmed reviews are in promoting reform is how rigorous the arrangements are for monitoring and reporting on reviews and implementation of reforms.

Australia is one of few jurisdictions to have a complete database of all major government regulation, in the form of the ComLaw website, which incorporates the

Federal Register of Legislative Instruments (FRLI). RIS documents are also published on the OBPR website, along with details of what if any post implementation reviews may be required. ComLaw enables regulatory agencies to lodge material for registration and to track key processes such as tabling and disallowance.

The Commission understands that ComLaw is currently being expanded to cover sunseting processes and outcomes. It could cover a variety of other review processes and outcomes, such as COAG processes, Parliamentary processes, Productivity Commission reports, and one-off exercises such as the recent Review of pre-2008 Subordinate Legislation. This gives ComLaw the potential to act as an organising platform to monitor such actions as: proposed reviews of regulation, the draft then final recommendations made by reviews, government response to the recommendations, and legislative changes that result.

What is the return on the review effort?

Programmed reviews, like principles-based reviews, have the potential to be costly where the scope of the programmed review program is large. Observing the principle of proportionality is therefore particularly important for this category of reviews. Programmed reviews need to take into account the scale or order of magnitude of the expected and actual costs and benefits to business and the community stemming from reform of the regulation.

Good data collection is important. Regulators need to think about data requirements early and build in data collection as part of the operation of the regulation. While costs will vary depending on the data requirements, it could be expected that the costs of data collection (and data quality) will be much lower if they are collected as part of the day-to-day operation of the regulation rather than after a period of time (such as by an external reviewer).

As discussed, the burden of dealing with a large amount of sunseting legislation can be considerable. To work well, clear and transparent processes to manage the flow of sunseting legislation are essential. This requires effective planning and early engagement with affected parties, including through the publication of a forward program of sunseting regulations and associated reviews. The necessity of planning programmed reviews ahead of time also provides opportunities to save costs by avoiding duplication with other review processes. Packaging together reviews of regulations that are overlapping or addressing similar issues can be cost-effective.

For example, the UK Government guidelines (HM Government 2011a) for sunseting and PIRs advise that departments should coordinate their activities where more than one review is required in overlapping policy areas. Combining the delivery of a programmed review of a particular regulation with a broader review has some potential advantages. By framing the individual regulation in a broader policy context, this approach can produce more meaningful conclusions and has the potential to directly improve the quality of future policy development. And by avoiding the duplication of work involved in running separate reviews, it is also more efficient.

If well targeted, statutory reviews can themselves be highly cost effective, as they focus on areas of uncertainty that could impose unnecessary costs, can be well informed if the data collection has also been embedded, and have some authority to recommend changes.

Table E.2 summaries the key strengths and weakness of programmed reviews.

Table E.2 Strengths and weaknesses of programmed reviews

	<i>Post implementation reviews</i>	<i>Statutory reviews</i>	<i>Sunset provisions</i>
Discovery — How well does the approach identify areas needing reform?			
Strengths	<ul style="list-style-type: none"> Priority well flagged by initial avoidance of best practice process 	<ul style="list-style-type: none"> Especially useful where required because of uncertainty 	<ul style="list-style-type: none"> Forces review action to keep legislation
Weaknesses	<ul style="list-style-type: none"> Can be hard to change regulations that have already been set in place 	<ul style="list-style-type: none"> Generally limited to specific aspects of the regulation 	<ul style="list-style-type: none"> Risk of becoming mechanical ‘tick and flick’ exercises Potential for unanticipated implications of expiry — may result in rushed regulation
Solutions — How well does the approach identify better alternatives?			
Strengths	<ul style="list-style-type: none"> Better information should be available for analysis 	<ul style="list-style-type: none"> Potential for discovery if ongoing monitoring in anticipation of review collects meaningful information 	<ul style="list-style-type: none"> Can package regulation for review giving greater scope to consider options
Weaknesses	<ul style="list-style-type: none"> Potential for adopting a narrow approach and merely fine tuning 	<ul style="list-style-type: none"> Depends on scope of review 	<ul style="list-style-type: none"> Potentially vast coverage may reduce scope to look at better ways to achieve objectives that remain appropriate
Influence — How influential is the approach in promoting reform?			
Strengths	<ul style="list-style-type: none"> Should reduce the incentives to avoid good process at regulation development stage 	<ul style="list-style-type: none"> Influential where reviews are in-depth 	<ul style="list-style-type: none"> Expiry is effective trigger in forcing review or amendment
Weaknesses	<ul style="list-style-type: none"> May degenerate to an implementation review Reviewer independence is low where reviewers are authors of regulation 	<ul style="list-style-type: none"> Requirements to comply with review recommendations may be lacking 	<ul style="list-style-type: none"> Volume may result in ‘rubber stamping’ or widespread deferral
Cost-effectiveness — What is the return on the review effort?			
Strengths	<ul style="list-style-type: none"> Greatest value if an effective deterrent to RIS avoidance Review of ‘crisis’ legislation 	<ul style="list-style-type: none"> Could be lower costs if data collection is already built in 	<ul style="list-style-type: none"> Costs could be high — if large numbers of regulations are up for review
Weaknesses	<ul style="list-style-type: none"> May lack scope once legislation is implemented 	<ul style="list-style-type: none"> In-depth reviews can be costly 	<ul style="list-style-type: none"> Not cost effective if filter weak

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F Benchmarking

Key points

- Regulatory benchmarking is a process for comparing aspects of regulation across jurisdictions in order to highlight which jurisdictions are leading or lagging and to identify leading regulatory practice.
 - The aspects of regulation which can be benchmarked include costs, outcomes, administration and enforcement.
- If regulatory outcomes are not identical across jurisdictions, the cost of the regulation must be weighed against the differential benefits of the outcomes achieved.
- Ad hoc benchmarking of specific areas of regulation across the states and territories draws on the ‘natural experiment’ of Australia’s federal system to identify leading practices in areas of particular interest.
- Regular benchmarking exercises, such as the World Bank’s *Doing Business*, are particularly useful for developing countries as a motivating factor for reform, through pointing out where countries lag their peers. League tables create pressure for reform.
 - But the indicators used often sacrifice precision for simplicity.
- Benchmarking findings can be used to drive reform to the extent that leading practices in one jurisdiction would create benefits in other jurisdictions. Principles are likely to be transferrable, but the transferability of practices will depend on the institutions and other conditions in place.
 - Benchmarking exercises can often reveal whether reforms to promote greater coherence across jurisdictions are warranted.
- The ability to benchmark using quantitative indicators depends on the availability of comparable data. Such data usually need to be collected as part of the benchmarking exercise.
 - In the benchmarking exercises for the Council of Australian Governments an advisory panel from central agencies has been useful in getting cooperation for the extensive data collection required. It has also been valuable in testing the findings and in facilitating ‘ownership’ of the results across governments.
- To be cost-effective, benchmarking exercises should be prioritised and sequenced such that they feed into reform processes in time to inform the consideration of options for reform.

The structure of this appendix is as follows:

- section F.1 describes the main features of benchmarking
- section F.2 provides examples of benchmarking to highlight how they are usually commissioned (the triggers), the methods used to identify the areas for reform, the assessment of alternatives to the regulation in place and the governance arrangements of the reviews
- section F.3 considers how effective benchmarking has been in promoting successful reforms to the stock of regulation
- section F.4 draws out the lessons, making an assessment of the usefulness of benchmarking in: identifying areas of regulation that need reform (discovery); alternatives that would improve outcomes (solutions); promoting reform action (influence); and the overall return on the review effort (cost-effectiveness).

These lessons are brought together with those from the other appendixes in chapters 3 and 4 of the final report.

F.1 What is benchmarking?

Regulatory benchmarking compares the costs, and sometimes the outcomes, of regulations in different jurisdictions. A system, or aspects of a system, can be benchmarked nationally or internationally by comparing the way other jurisdictions achieve the same or similar results.

Probably the best known example of regulation benchmarking internationally is the World Bank's *Doing Business* report. This report has been produced since 2004, and compares indicators of the regulatory burdens faced by business across 183 countries (box F.1). It is an example of regular or general benchmarking when a set of indicators or measures from different jurisdictions are compared on an annual (or other regular) basis.

Box F.1 The World Bank's *Doing Business* report

The World Bank Group's *Doing Business* report uses a synthetic measurement approach whereby a 'typical business' is defined and the costs for this business of meeting some or all of its regulatory obligations are identified. Indicators cover the following aspects of business regulation:

- degree of regulation — such as the number of procedures to start a business or to register and transfer commercial property
- regulatory outcomes — such as the time and cost to enforce a contract, go through bankruptcy or trade across borders
- extent of legal protections of property — for example, the protections of investors against looting by company directors or the range of assets that can be used as collateral according to secured transactions laws
- tax burden on businesses
- various aspects of employment regulation.

Of 183 countries, in 2010 Australia ranked tenth for ease of doing business across all nine regulatory outcomes, such as starting a business, obtaining credit or registering property.

Source: World Bank (2010).

The federal nature of the Australian system of government allows jurisdictions to learn from each other about what works well and why. The Productivity Commission has undertaken benchmarking of regulation in recent years as part of a Council of Australian Governments (COAG) program (box F.2).

Performance benchmarking, which compares jurisdictions against each other, is more common than standards benchmarking, which compares actual practice against an agreed best practice. Standards benchmarking is particularly useful when benchmarking administration and enforcement.

There are several different methodologies that can be applied to benchmarking. Time-use and expenditure surveys can be conducted that record the effort that businesses and regulators expend meeting regulatory requirements. Where surveys are impractical or too costly, an alternative is to use a 'synthetic' measurement approach, which defines a 'typical business' and then explores the costs for this business of meeting some or all of its regulatory obligations. This is often done by applying a standard cost calculator that adds up the average time to complete each regulatory requirement and uses the relevant wage rate to estimate the cost to the business of compliance. (More detail and examples of the use of compliance cost calculators are set out in appendix J.)

Box F.2 COAG's Regulatory Benchmarking Projects

The Productivity Commission's 'feasibility' study

To help implement COAG's 2006 agreement on benchmarking and measuring regulatory burdens, the Commission was asked to examine the feasibility of developing quantitative and qualitative performance indicators and reporting framework options. This feasibility study concluded that benchmarking was technically feasible and could yield significant benefits (PC 2007a).

The 'quantity and quality of regulation' & 'cost of business registrations' reports

In December 2008, the Commission released two benchmarking reports. The 'quantity and quality' report (PC 2008a) provides indicators of the stock and flow of regulation and regulatory activities. It included a number of quality indicators for a range of regulatory processes, across all levels of government. The 'cost of business registrations' report (PC 2008b) provided estimates of administrative and substantive compliance costs for business in obtaining a range of registrations required by the Australian, state, territory and selected local governments. The study tested three methods for benchmarking — regulatory surveys, 'synthetic' or representative business estimates and business focus groups. The aim was to triangulate the estimate of compliance costs. Much was learned in the exercise, including the difficulty of estimating compliance costs in a consistent way across jurisdictions, even for relatively simple regulation.

The 'food safety regulation' & 'occupational health and safety' reports

The 'food safety' report (PC 2009b) compared the food regulatory systems across Australia and New Zealand. The Commission found considerable differences in regulatory approaches, interpretation and enforcement between jurisdictions, particularly in those areas (such as standards implementation and primary production requirements) not covered by the model food legislation.

The 'occupational health and safety' (OHS) report (PC 2010a) compared the occupational health and safety regulatory systems of the Commonwealth and state and territory governments. The report found a number of differences in regulation (such as record keeping and risk management, worker consultation, participation and representation and for workplace hazards such as psychosocial hazards and asbestos) and in the enforcement approach adopted by regulators.

Planning, zoning and development assessments

The Commission examined and reported on the operations of the states and territories' planning and zoning systems, particularly as they impact on business compliance costs, competition and the overall efficiency and effectiveness of the functioning of cities (PC 2011d).

Source: PC (2011d).

A range of indicators have been used for regulatory benchmarking across countries. For example, two key international metrics used by the Organisation for Economic Co-operation and Development (OECD) are weighted indexes of product market regulation and employment protection legislation (OECD 2010d). As these indicators are collected consistently across time and countries, they allow OECD countries to benchmark their regulatory environments over time and against each other. (For an overview of the OECD's index of product market regulation see box F.3.)

For more robust comparisons to be made, indicators should be objective (not rankings of subjective perceptions), outcomes-based and not context dependent (that is, not likely to vary significantly when external factors change). However, it is difficult to construct completely consistent indicators. Accordingly, less than perfect indicators are often used, typically along with appropriate caveats and methodological notes. International benchmarking indicators were used by the OECD in its latest review of Australia's regulatory reform program (OECD 2010d).

In addition to benchmarking regulations, the performance of regulators can also be benchmarked. There are fewer examples, though this was done in benchmarking food safety (PC 2009b), occupational health and safety (OHS) (PC 2010a) and planning and zoning (PC 2011d).

F.2 How has benchmarking been used?

This section reviews the ways compliance and other costs of regulation have been benchmarked. Examples are used to discuss how the reviews are usually initiated, which methods are used to identify problematic regulations, how the options for change are assessed and the governance arrangements commonly used in benchmarking. Governance arrangements include the independence of the review process, the transparency of the process, the opportunity for stakeholders to engage and any requirements for governments to respond to recommendations. The final issue considered in this section is the cost of benchmarking.

Box F.3 The Organisation for Economic Cooperation and Development's indexes of product market regulation

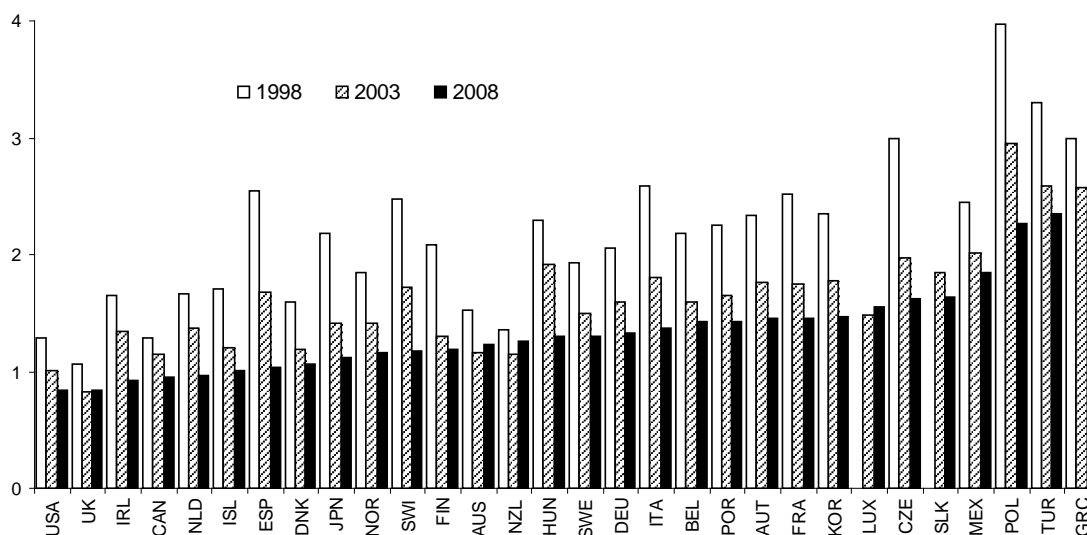
The purpose of the index is to measure ongoing developments in product market regulation (PMR) across OECD countries to enable better analysis of changes in individual regulatory policies and their impact.

The PMR index converts qualitative data on laws and regulations into a quantitative indicator that is consistent across time and countries. The main sources of information the OECD uses to construct the index are the responses to the OECD's *Regulatory Indicators Questionnaire* provided by national governments in 1998, 2003 and 2008.

The PMR index covers: general regulatory issues concerning public control and price controls; legal and administrative barriers to entrepreneurship; and barriers to trade and investment. It also covers some industry-specific regulatory policies in air and rail passenger transport, rail and road freight, telecommunications and retail distribution.

The latest rankings based on the PMR index show that OECD countries have extensively liberalised product markets during the decade to 2008, with a convergence in the product market regulations evident (below). The OECD notes that reforms appear to have slowed in the most recent period (2003–08) compared to the period 1998–2003. Australia was ranked 13th of 30 OECD countries in terms of the restrictiveness of product market regulation in 2008.

Economy-wide product market regulation^a



^a Index scale of 0–6 from least to most restrictive.

Data source: OECD Regulation database.

Sources: OECD (2010); Wöfl (2009).

How is benchmarking usually initiated?

Benchmarking studies are often commissioned in cases where there is uncertainty about the costs and benefits of different approaches that have been adopted in different jurisdictions. When governments are seeking to identify the best way of regulating, systematic comparison is valuable. This may be where a government is considering options for reform, or where a number of governments are seeking to agree on a common way forward. Benchmarking can be used to highlight the good (or bad) performance of regulation and regulators, and create pressure for reform or reward good practice. As such, benchmarking reports are often less directive than reports with recommendations, but they serve a useful purpose where those being benchmarked are sensitive about their independence.

Forums that have cross-jurisdictional membership, such as COAG or the World Bank, have adopted performance benchmarking as part of their mandate to assist their partner jurisdictions or countries in pursuing reform.

Information about comparative performance can stimulate public pressure for reform in jurisdictions that are not doing as well as others. The World Bank's *Doing Business* indicators (box F.1) were created for this purpose.

Around the world, international and local benchmarking has proved to be a powerful force for mobilizing society to demand improved public services, enhanced political accountability, and better economic policy. (World Bank 2004, p. ix)

Benchmarking can be a valuable first step to inter-jurisdictional harmonisation or coherence by identifying leading practices. For example, regulatory harmonisation was a key aspect of the food safety and OHS benchmarking exercises commissioned in December 2008 (PC 2009b; PC 2010a). These are two areas where COAG has agreed to harmonise. Jurisdictions can also use what they learn about their relative strengths and weaknesses to improve their own systems.

What methods are used to identify regulations needing reform?

International and cross-jurisdictional benchmarking can highlight areas where a country or jurisdiction is lagging. However, just because a jurisdiction ranks behind others on an indicator does not necessarily represent a case for reform. First, the indicator needs to be considered in the context of the jurisdiction's institutional and economic structure. Second, even if a higher cost or less effective approach has been adopted there are costs and benefits of reform.

Specific benchmarking is generally applied to find the best approach to achieving a regulatory objective rather than identifying priority areas for reform. Quantitative

estimates of differences in cost (or cost-effectiveness) of other approaches to the one a jurisdiction has adopted can, however, make a more compelling case for reform.

Approaches to benchmarking differ in:

- *focus* — such as the costs of compliance, effectiveness, cost-effectiveness, processes in place
- *method applied* — options include consultative, survey-based and synthetic approaches, with differing degrees of quantification and approaches to quantification (see appendix J for detailed descriptions of the various approaches to quantification of costs)
- *use* — benchmarking exercises can be conducted in isolation, as part of an in-depth review, or as part of a series.

In its benchmarking feasibility study, the Commission noted various issues and constraints in relation to methodologies (box F.4).

Prioritisation is important, given the large potential number of areas that could be benchmarked (PC 2007a).

Survey data

Benchmarking surveys can be used to measure the actual costs to businesses of complying with a regulation and the costs of administering the regulation. Surveys can also seek information on the outcomes of regulation in order to benchmark effectiveness.

Surveys are often necessary where data is not consistently available across jurisdictions. For example, in the Commission's studies (PC 2009b; PC 2010a) national data was available on food borne illnesses and on OHS incidents, however problems were encountered when comparing data because some of the data inputs were defined differently in different jurisdictions. Surveys of regulators were accordingly used by the Commission to provide comprehensive, nation-wide data that were comparable (PC 2009b; PC 2010a).

Box F.4 Productivity Commission findings on benchmarking methodology

The Commission's benchmarking series was preceded by a feasibility study (PC 2007a). Its findings included a number on methodology.

- Indirect indicators have to be used because it is difficult (and, in most cases, impossible) to measure compliance costs directly. Consequently, a suite of indicators would usually be required to provide a broader picture and signal where significant unnecessary burdens might exist.
- Despite its appeal, it is not possible to produce a composite ('meta') index to gauge the overall levels of regulatory burden (the burden imposed by every rule of a regulatory nature) on business across jurisdictions, due to measurement and interpretation difficulties.
- Existing data are limited in many areas and additional data collection would be required. In the case of administrative compliance costs, data would have to be collected directly from businesses. In other cases, government agencies would have to be involved in providing information that is not publicly available.
- Data collection and management approaches would have to be tailored to the regulations benchmarked and the indicators being used.
- Consultation with government and business in designing, measuring and interpreting specific indicators would be essential, given their knowledge of the availability and limitations of data, and because their support is needed for the results to be seen as credible.

Source: PC (2007a).

Regulatory costs can impact on businesses in very different ways. A large sample group is needed to generate robust data. There will be a distribution of costs depending on the business characteristics, so sample selection is also an important aspect of survey design.

Where surveys are used, there are two key considerations.

1. Who conducts the survey?

- Regulators — may collect data on an ad-hoc or on-going basis. An example of on-going data collection is a 'time to complete' box on administrative forms (box F.5).
- Independent body — these type of surveys are more likely to be ad hoc surveys for a specific benchmarking exercise.

2. The structure of the survey.

- Time use diary — a time audit on a sample of representative firms is relatively accurate in terms of measuring business compliance time and expenditure, but also more expensive than other types of surveys.
- Reflective data — where firms make a self-assessment of the cost of compliance. This structure is well suited to gathering qualitative or subjective data. However firms may struggle to correctly identify the counterfactual — that is, the costs they would have faced in the absence of regulation.

Box F.5 The Australian Tax Office's on-going data collection

The Australian Tax Office (ATO) collects information on the time it takes to complete forms and reports this data annually. For 2008-09:

- the average time taken to complete a business income tax return was 5.7 hours
- the average time taken to complete a Business Activity Statement (BAS) was 2.0 hours
- it took an average of 12.0 hours to complete a fringe benefits tax return.

Source: ATO (2009).

In 2008, the Commission identified several key lessons for conducting surveys (box F.6). Engaging businesses at the level required to estimate compliance costs has proven intractable. For example, in the study on benchmarking planning and zoning, only surveys of regulators got sufficient responses to yield representative data. Only 50 businesses responded to a 30 minute survey, out of thousands of businesses who were alerted to the survey by their industry associations. A notable exception, to this general observation about the participation of business, was the case where an extensive survey on the land supply process was sent to 25 large developers and 16 replied (PC 2011d). In contrast, 119 out of 173 local councils contacted (69 per cent) responded to an extensive survey of their planning activities. Regulators were willing to provide data for an exercise that was supported by their government. The support of the advisory panel (box F.6) was critical in encouraging responses from departments and government regulators.

Also, asking regulators to collect data from businesses on compliance costs has not generally proved fruitful, primarily because of the need to assure businesses of confidentiality and to ensure answers were not biased by the possibility of being attributed by regulators to particular businesses.

Box F.6 **Some lessons on survey design and use**

The cost of business registrations study (PC 2008b) acted as a ‘pilot’ for the methodology and approaches to data collection for benchmarking purposes. It highlighted several areas for improvement:

- ways are needed to improve business participation. Benchmarking regulation that imposes more significant, ongoing compliance costs should motivate greater business engagement
- understanding in detail differences in the processes of each jurisdiction is central to developing appropriate synthetic analysis and regulator questionnaires
- sequencing is important in data collection, as early business feedback can help to inform the design of the regulator survey and synthetic exercise
- regulators are well placed to collect data from businesses on compliance costs, so options to work with them to collect business feedback cost-effectively should be explored
- support from a central coordinating agency in each jurisdiction is crucial to achieving comprehensive and timely responses.

Source: PC (2008b).

Consultative approaches to benchmarking

Depending on the breadth of the benchmarking exercise, consultation can be used to identify which aspects of a regulatory regime should be benchmarked to gain information on the performance of a particular regulation. Consultative approaches primarily generate qualitative data gained from meeting with stakeholders in business or government, focus groups, experts or expert panels. The aim is to ensure that a full range of views are canvassed. Conclusions on the performance of a regulation (its costs, effectiveness, impact, etc) are ideally arrived at by a process of ‘triangulation’, or finding the areas of coincidence. A more formal approach to finding the common ground is the Delphi method (appendix I).

‘Focus groups’ are sometimes used to identify the sources (and to rank the magnitude) of costs related to specific regulations or classes of regulation. If businesses affected by the regulations are largely homogeneous, these costs can be extrapolated to other businesses to derive an estimate of regulatory burdens. However, the Commission’s study on business registration (PC 2008b) found that using focus groups to quantify costs can be problematic (box F.7).

Box F.7 Problems with the use of focus groups to identify the cost of regulation

In benchmarking the cost of business registration, the Commission attempted to construct focus groups of recently-registered businesses in different industries. This attempt was largely unsuccessful due to a lack of businesses willing to participate. Furthermore, the idea that these focus groups would be able to provide data on a wider range of regulatory costs in later studies did not eventuate.

More often than not, businesses themselves cannot say how much a certain regulation or requirement costs them. This means that even resource intensive focus groups and interview-style surveys may not be able to collect reliable information on the cost of a certain regulation to a relatively efficient business.

Source: PC (2008b).

Synthetic cost method

The synthetic method defines a representative business and then estimates the costs for this business to comply with regulation. Compliance with the regulation is usually broken down into steps. Expert assessments or surveys are then used to estimate the time taken for each step. This method may be supported by a tool like the Standard Cost Model which is used by the World Bank for the *Doing Business* indicators and the OECD (box F.8).

A significant concern with the synthetic method is the distribution of actual businesses around the synthetic or ‘average’ business. The Australian Chamber of Commerce and Industry (ACCI) in its submission gave several reasons why small businesses may bear disproportionate regulatory costs, even where regulations apply uniformly across the economy (ACCI, sub. 4). In cases where this difference is significant, a representative business would not reflect the experience of both small and large businesses. It is important to address the question of distribution even if only a qualitative assessment is possible.

In benchmarking the cost of business registration, the Commission aimed to ‘triangulate’ data from regulators, synthetic analysis and business feedback to establish representative estimates. In practice, synthetic analysis was not sufficiently comprehensive and business response rates were too low for the data to provide reliable comparisons across jurisdictions. Consequently, the aggregate time cost estimates were based on data provided by the regulators (PC 2008b).

Box F.8 International benchmarking methodologies: OECD and World Bank

The OECD in 2007 undertook a limited pilot exercise in 11 OECD countries to measure administrative burdens in the road freight sector, in regards to hiring a worker and operating a vehicle during a year.

The OECD's Red Tape Assessment project (RTA) was conceived to take up the challenge of using cross-country comparisons of administrative burdens for similar business activities as a tool for identifying possible simplification measures in each of the participating countries. (OECD 2007, p. 9)

The benchmarking methodology used was the Standard Cost Model (SCM). The time it takes a 'normal efficient business' to comply with an information obligation was estimated based on interviews of typical businesses. These data are indicative proxies on administrative burdens rather than representative data.

The methodology behind the World Banks' *Doing Business* indicators is also based on the SCM and is essentially the same as for the OECD study above, except that the coverage is much broader — 183 countries and across a range of industries — and time and cost estimates were collected from legal and financial professionals rather than directly from businesses.

The *Doing Business* data are collected in a standardised way. To start, the *Doing Business* team, with academic advisers, designs a survey. The survey uses a simple business case to ensure comparability across economies and over time — with assumptions about the legal form of the business, its size, its location and the nature of its operations. Surveys are administered through more than 8,200 local experts, including lawyers, business consultants, accountants, freight forwarders, government officials and other professionals routinely administering or advising on legal and regulatory requirements. (World Bank 2010, p. 110)

The SCM is often used to calculate administrative burdens across an industry or nation via the formula:

$$N \times W \times T$$

N = the number of businesses affected by the obligation

W = the hourly tariff of those involved in meeting the information obligation

T = the number of hours taken to meet the administrative obligation in a year

The SCM does not measure the true level of the administrative burden, rather, it produces a standardised set of numbers which provide an overall picture of regulatory burden. For example, it assumes that a particular obligation takes a set time and does not take into account the circumstances which might cause the length of time to vary.

Source: OECD (2007b); World Bank (2010).

Survey of legislation

Simplistic measures such as the number of pages of legislation are easy to report but may have little relationship to the burden imposed by regulation. However, such quantity benchmarking is still quite common (box F.9).

Box F.9 Benchmarking the quantity of regulations

In the Commission study on the quantity and quality of benchmarking (PC 2008a), quantity measures were used. However, the report also noted several shortcomings of measuring the number of regulations as a proxy for regulatory burden on business.

- Only those regulations aimed at regulating business or with substantial impacts on business should be included. However, regulation databases, such as Federal Register of Legislative Instruments, cannot be sorted for these kinds of features.
- Quasi legislation also imposes burdens but is usually not taken into account.
- Rather than counting the number of regulations, the number of requirements imposed by regulation is likely to be a more meaningful measure of burden. The Canadian province of British Columbia has followed this approach (appendix G).
- Even a total number of requirements would require some analysis of how significant each requirement was before an accurate picture of regulatory burden could be used to compare jurisdictions.

On top of these limitations, implementation and enforcement of regulation can have a greater impact on regulatory burden than the way the regulations are spelled out.

Source: PC (2008a).

A more sophisticated approach than counting pages in regulation is comparing legislative requirements across similar legislation, for example the requirements for registering a business. The requirements can be assessed against criteria such as anti-competitiveness or degree of prescription. Variations in standards, definitions and other elements of the regulation can also be useful to identify as, while they may not be an issue for businesses operating in a single jurisdiction, they may impose additional costs on business operation across jurisdictions.

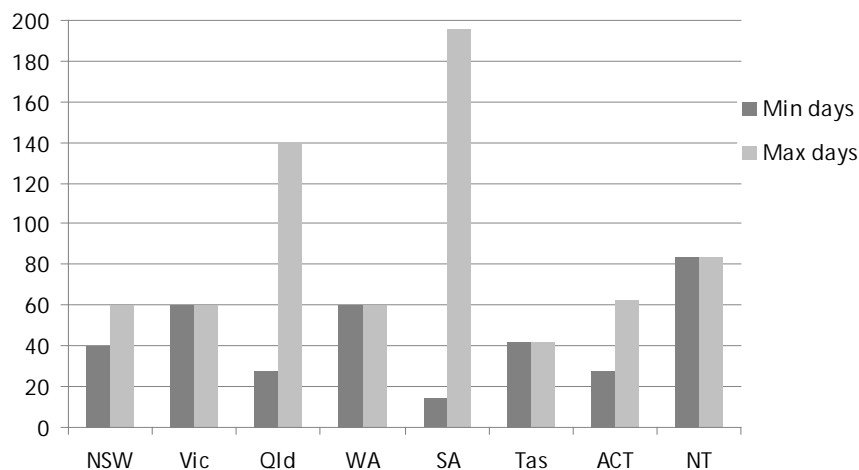
Such analysis needs to be balanced by the way regulation is enforced in practice. For example in the Commission's benchmarking planning and zoning study (PC 2011d), the legislative time limits for development assessments were benchmarked, and were found to be different from the median and average times actually taken by regulators (box F.10). This type of legislative comparison is more difficult, but useful for highlighting the difficulties faced by businesses wishing to operate across jurisdictions.

Box F.10 Statutory time frames for development assessments

All planning and zoning systems have a requirement for certain development proposals to be assessed by the regulator. All the jurisdictions also have time limits for these assessments — as a discipline on regulators — embedded in relevant acts and regulations. Jurisdictions that impose shorter timeframes should be less burdensome on businesses because of lower holding costs. However, in a recent benchmarking exercise (PC 2011d) the Commission found that the following differences made it difficult to present a simple comparison.

- 'Stop the clock' provisions allow some time taken to not be included in the timeframe, and these varied between jurisdictions.
- Jurisdictions had different timeframes applying to different types of development applications, and these types did not line up exactly.
- The legislated timeframes didn't necessarily apply to all applications, for example if they were processed by a different regulator.
- Extensions were allowed in most jurisdictions but for different reasons, and some were easy for regulators to obtain while others were not. One jurisdiction had a base time limit of 14 days but could allow up to 196 days for different application types and cumulative extensions.
- If a regulator fails to meet the deadline, the implications for business vary. In two jurisdictions they are granted a deemed approval, in others, it is a deemed refusal which then has to be appealed.

Maximum statutory timeframes for development assessment: lowest and highest



The way regulation is implemented can often impact more on business than the letter of the law. Actual time taken to assess developments (median and mean) was also benchmarked and found to be above the 'maximum' statutory times in four jurisdictions.

Source: PC (2011d).

Choosing benchmarks and finding data

Benchmarks should always be seen as signals rather than definitive indicators. The right choice of benchmarks, however, can minimise the number of times that a misleading signal is sent. (Green 2006, p. 3)

Benchmarking methodology centres around choosing indicators for which data is available or can be created. It is often impossible to directly measure the outcomes of regulation — for example the reduction in food borne illnesses achieved by food safety regulation — so a range of related indicators are benchmarked, such as the total number of food borne illnesses, or the number of food safety inspections conducted. Box F.11 lists suggested indicators for electricity regulation.

Box F.11 Electricity liberalisation in Europe

Following the liberalisation of energy markets in the European Union (EU), Green (2006) sought to create a list of benchmarks to assess the progress of liberalisation across countries. Regulation was one part of the benchmarking program.

Knowing what aspect to benchmark is particularly difficult when benchmarking regulation. For example, if the market is functioning well, less regulation is better, but it is difficult to design a set of indicators with this level of sophistication.

Green's suggested list of indicators broadly covered the following:

- freedom and independence of regulator (appointment, financing)
- availability of information, both from and to the regulator
- ex post assessment of regulator decisions
- performance: a social cost benefit analysis of regulation
- cost of the regulatory agency per customer
- trend in electricity prices
- incentives for regulator to be efficient and meet deadlines.

Source: Green (2006).

Choosing which jurisdictions to benchmark against

Australia's federal system creates learning opportunities across its state and territory governments. International benchmarking across countries has also been found to be valuable where systems have significant commonality. For example, the food safety benchmarking exercise (PC 2009b) included New Zealand alongside Australian jurisdictions. It showed that there were numerous regulators in Australia undertaking the same regulatory tasks whereas only one regulator in New Zealand

was responsible for these same regulatory tasks. In a study of the United Kingdom (UK) rail network (Department of Transport (UK) 2011), eight other countries were benchmarked in relation to the rail network and other industries were also benchmarked in relation to common elements such as asset management.

Benchmarking regulators

The approach followed by a regulator can be largely conditioned by the legislative base (see also Appendix H). This is illustrated in the following recollections of a former regulator, attached to WSP Group's submission (sub. 1):

At one stage one water authority in Victoria had 26 separate licences and 226 pages of prescriptive conditions. They now have a single corporate licence with 3 pages of outcome-based obligations. They would send in 400 pages of monitoring data, 'that we would pretend to read and if we did read it we often wouldn't really understand it.' The EPA changed the law in Victoria so each company has the option of sending in a one-page statement signed by the CEO and that signature gave the regulator the assurance of the company delivering the compliance that was stated there. This 'freed up the regulator's resources to send people out inspecting sites, doing random orders, so that we could check and verify in a much more productive way than what was going on.' (attachment 4, p. 3)

However, it is widely considered by business groups that much of the unnecessary compliance costs imposed by regulation is also due to the way regulators administer regulations rather than the nature of the regulations themselves. For example, the Property Council (sub. 7) stated:

Regulatory stringency is usually too high

- Even when regulation is legitimately needed, it is often applied too broadly, and captures businesses which weren't the intended target.
- The concept of regulation representing a minimum standard, in order to eliminate poor practice, appears to be outdated, with 'good' practice now a common goal. (p. 7)

This suggests that benchmarking regulators could be useful to obtain a picture of the different approaches to the enforcement of regulation. Such an approach was undertaken in the Commission's reports on the quality and quantity of Australian business regulation and on planning and zoning (PC 2008a; PC 2011d; box F.12).

It may also be useful to benchmark regulator behaviour specifically; that is, compare regulators either across one sector or more broadly. This may help identify low cost approaches to enforcing and managing regulatory systems. Aspects that could be compared include: resourcing; information requirements and how information is collected; education and assistance to increase compliance; whether a

risk-based approach is followed; fee basis (cost recovery or other); and any powers the regulator may have to respond to changing risks and requirements, for example by reducing the information burden on business.

Box F.12 Examples of regulator benchmarks

In its report on benchmarking business regulation (PC 2008a), the Commission benchmarked the quality of regulatory administration, across a range of measures. These included specific measures in the following areas:

- accessing information and lodging forms online
- fees and charges
- timeliness of response
- appeal mechanisms
- mutual recognition
- enforcement of regulation.

In its report on benchmarking planning and zoning (PC 2011d), the Commission considered aspects of regulator activities, including:

- inputs — financial resourcing, fees charged, staff time for assessing development applications and for more strategic land use planning, staff qualifications, staff remuneration, staff turnover
- performance — average and median days to process development applications
- application of regulations — infrastructure charges were found to vary across different local councils within the same state, where legislation was the same but local needs varied and regulator (council) attitudes also varied.

Source: PC (2008a); PC (2011d).

Different organisational models, such as ‘super-regulators’ (so that business deals with just one regulator instead of several), or regulator independence, could be benchmarked to identify potential gains in efficiency or effectiveness. The Commission (PC 2009b) found that quite different organisational models were used among different Australian jurisdictions to regulate food safety. Surprisingly, in this case, business did not report greater duplication and inconsistency for the more devolved models except in the regulation of internationally traded food. Both performance and process benchmarking could yield important information for reform opportunities.

Countries generally considered front-runners in regulatory practice (such as the Netherlands and the UK, as well as Australia) are increasingly turning their attention to regulator behaviour, with a number moving toward risk-based

approaches to regulation (VCEC 2010). In Australia several leading practice guides for regulators have been developed in recent years, including:

- Australian National Audit Office (ANAO) (2007) *Administering Regulation: Better Practice Guide*
- Queensland Ombudsman (2009) *Tips and Traps for Regulators*
- New South Wales (NSW) Better Regulation Office (2008) *Risk-Based Compliance*
- Consumer Affairs Victoria (2008) *Better Business Regulation*.

How are the reform options assessed?

Leading practice can be identified through comparison of costs and outcomes across different jurisdictions. If the outcomes are substantially the same, the focus is on identifying the jurisdiction with the least cost approach to achieving this outcome. Often a set of activities are benchmarked rather than just one. However, outcomes usually vary, and higher compliance costs may lead to better outcomes (for example, lower incidence of food borne disease), so benchmarking costs alone will not provide a complete picture of cost-effectiveness. In this case outcomes should be benchmarked along with inputs (costs).

Once more cost-effective practices are identified, the next question is whether those practices are transferrable to other jurisdictions. Jurisdictions may differ in many respects such as demographics and the institutional framework in place. For example, some aspects of the Australian Capital Territory (ACT) planning system are a result of the leasehold system and the absence of local councils.

Transferability and leading practice options were considered in the Commission's planning and zoning study (PC 2011d), after being tested with the study's advisory panel (box F.13). However, benchmarking studies may not analyse the transferability of approaches across jurisdictions. For example, the Commission's food safety and OHS studies (PC 2009b; PC 2010a) did not focus on whether outcomes were achieved and whether they could have been achieved better; rather the focus was on documenting the differences in the regulatory systems (rules, regulators and processes). However, the quantitative and qualitative data provided a useful input into more detailed analysis of options for improving the national coherence of this regulation.

Moreover, regular benchmarking and indexes do not usually focus on options. The World Bank's *Doing Business* exercise, for example, offers no analysis, relying exclusively on country rankings to suggest which countries might offer some lessons and which should be seeking such guidance.

Box F.13 Planning and zoning — leading practices

Leading practices were identified in the Commission's planning and zoning study (PC 2011d) where elements of planning regulation were likely to be transferable to most or all jurisdictions. Sometimes this meant stating leading practice principles and some key elements rather than detailed practice of how to implement those principles. For example, timeliness and transparency are principles that can be applied to any system but do not need to be applied in a uniform way. In other cases, common elements were drawn on to show leading practice that was likely to be generally applicable. For example, a risk-based approach to development assessment — whereby applications are streamed into different processes depending on the level of risk and hence assessment required — was considered leading practice, and was already being used in all jurisdictions, but to varying degrees and with different levels of success.

Source: PC (2011d).

What are the governance arrangements for benchmarking?

The governance arrangements — or notably, the degree of independence or transparency of the review — should be designed to lend credibility to the data provided by the benchmark report. It is desirable to consult with the jurisdictions and countries to understand the sources of differences in the approaches to regulation. Such consultation can also improve the influence and acceptance of the benchmarking results by engaging stakeholders and creating an understanding of the need for reform.

Independence of the review team

The major benchmarking studies considered in this appendix were all conducted by an independent body. Such independence gives confidence to both the regulator and the regulated that the exercise is not biased, and also makes use of specialised skills available in standing review bodies.

The OECD (2010g) commented on the importance of an independent and credible review team in relation to the Commission's benchmarking reports.

.... the credibility of the institution conducting the benchmarking, as well as clarity on the methodology and assessment criteria are essential to ensure jurisdictions' buy-in and ultimately the effectiveness of benchmarking. Australia provides important examples of both practices. (p 56)

Consultation processes and transparency

Commission benchmarking studies include high levels of consultation and transparency, including:

- calls for submissions
- meetings with stakeholders
- publicly available draft and final reports.

Consultation is valuable because benchmarking needs to draw on specialised knowledge to identify the problems and test the solutions. Stakeholders may have very different conceptions of issues and reform needs, so it is important to consult widely. There are also some things that stakeholders will say privately but not publically. Many aspects of a regulatory system are difficult to map out for consistent benchmarking or even identify based on desk research alone. This is because not all processes are documented, let alone actual practices.

Commission benchmarking studies have also included an advisory panel composed of representatives from the central agencies in each state and territory government and the Australian Government. The role of the advisory panel in these studies was to assist in communication between the Commission and the regulators. For example forwarding questions and requests for information to the right people in the relevant department helped to provide a 'reality check' for results, and to promote state and territory ownership of the report and its conclusions.

How much does benchmarking cost?

The cost of benchmarking can be quite high. It often requires surveys to obtain data that is not available or not available in comparable form. The nature of the data requirements and the scope and type of surveys conducted determines much of the costs involved. Costs are also incurred by participating regulators, government agencies and businesses that respond to surveys or otherwise provide data.

Some examples of the range of costs are described below.

- The Commission's Benchmarking report, stage 1: indicators of the quantity of regulation and quality of regulatory processes (PC 2008a) and business registration (PC 2008b): \$2 285 000.
- The Commission's Benchmarking report stage 2: food safety regulation (2009b) and occupation health and safety regulation (2010a): \$1 886 000.
- The Commission's Benchmarking report stage 3: zoning and planning regulations (2011d) \$1 715 000 (PC Annual Reports 2008-09, 2009-10).
- The Department of Sustainability and Environment, Victoria, created a database for ongoing reporting of planning permit indicators \$1.5 million over three years (design and implementation) and \$300 000 per annum as ongoing costs (PC 2007a, p. 154).

F.3 How effective has benchmarking been in promoting regulation reform?

Various features of benchmarking promote regulation reform. Benchmarking studies have the potential to identify where countries or jurisdictions have fallen behind others, which can inform governments about reform opportunities. Where the studies are public, the comparisons can stimulate public interest and pressure for reform.

During 2005-06 the World Bank (2006b) claimed that the *Doing Business* survey had prompted some 43 countries to reduce the regulatory burden for business start-up by simplifying procedures, lowering costs and reducing delay. While not possible to conclusively prove that those reforms would not have happened in the absence of the report, the World Bank (2006a) found:

... for example, the number of new business registrations in Serbia and Montenegro jumped 42% after the minimum capital requirement for company start-up was cut from \$5,000 to \$500, and the number of days to open a business from 53 to 13. (p. 1)

There are some limitations to the *Doing Business* rankings. For example, the analysis is based on a standard business model which may not reflect normal business experience in every case. A shift in the rankings of a few places is not likely to be statistically significant. However, a simple country ranking is easily understood by politicians and journalists and this simplicity lies behind much of the influence of the *Doing Business* indicators.

The OECD also conducts regulation benchmarking, including benchmarking product market regulations to measure regulatory improvements, such as through reducing barriers to entry (OECD 2010d). The main value of these indicators appears to be in facilitating analysis of regulatory policies and driving research of the impact of regulation on economic growth. Drawing on this, a recent study by the OECD on lessons from ten years of product market reform concluded that there was still scope for reform in Australia with Australia ranked 11th of 27 countries (Wölfl et al. 2009).

The Commission's benchmarking studies have not included recommendations and tended to attract less media coverage than some other reports. However feedback from state and territory governments, and from regulators, suggests that these benchmarking studies have contributed to reform by providing information on, and raising awareness of, the costs of regulation, as well as allowing jurisdictions to identify leading practice. They have also helped central agencies apply pressure for regulatory reform.

In response to the Commission's food safety study (PC 2009b), COAG members agreed to the development of a new intergovernmental agreement on streamlining food regulation advice (COAG 2009). For other studies it may take more time to see tangible results and additional supporting research may be required. But in other cases, such as OHS (PC 2010a), significant reform had already been agreed. In this case, the benchmarking study was perceived to have maintained the momentum for reforms to achieve national harmonisation. It also raised particular issues, such as the treatment of bullying by OHS regulation, which may warrant attention in the future.

F.4 What makes benchmarking work well or not?

How well does benchmarking identify areas needing reform?

As discussed, international and cross-jurisdictional benchmarking can highlight areas where a country or jurisdiction is lagging. When done well, benchmarking results can provide a first step in identifying areas needing reform.

However, further investigation will generally be required, as indicators are typically blunt and many not reflect actual circumstances. For example the Chinn-Ito index, which is the most commonly used indicator of capital account openness in recent empirical literature (based on International Monetary Fund data) ranked Australia as among those countries less open to international capital flows because of Australia's

Foreign Investment Review Board requirements to screen foreign direct investment inflows (OECD 2011). However, the board has only rejected one investment proposal in the past 10 years and, in practice, Australia is a recipient of significant foreign investment, suggesting a high degree of openness to cross-border capital flows.

Benchmarking can help identify which regulatory systems (or areas) may have potential for reform. Priority areas are chosen where there are significant differences observed in practices or outcomes. The presence of significant differences raises the question of what is driving these differences and which system works best. For example, the Commission included New Zealand in its benchmarking of food safety (PC 2009b). This was valuable because there were important differences in how the two countries regulate the safety of food exports and imports.

COAG (2007) anticipated that the Commission benchmarking program would determine areas where further review would be advantageous.

Benchmarking the compliance costs of regulation will assist all governments to identify further areas for possible regulation reform. (p. 10)

More specific benchmarking can help identify regulations that could be changed, removed or applied differently to improve the performance of the overall system (see below).

Assessing future priorities for benchmarking

There are many areas that could benefit from benchmarking across Australian jurisdictions to identify leading practice and develop new regulatory solutions. Five criteria can usefully be applied to selecting priorities (PC 2008b):

1. there are differences in either the regulation itself or in the administration and enforcement of that regulation
2. the benchmarking analysis of the regulation or its enforcement/administration should contribute to either current or proposed reforms
3. there appears to be a difference between jurisdictions in the cost the regulation or its enforcement/administration imposes on business
4. where there are differences in the costs imposed by regulations, those differences do not appear to be matched by a difference in the effectiveness of those regulations
5. it appears feasible to construct indicators which will enable informative benchmarking across jurisdictions, wherever possible based on existing data. (p. 65)

Furthermore, in determining future priorities the scale of cost differences should be significant for business. Benchmarking should be applied to areas where there is concern about excessive compliance costs, rather than areas where the costs are well recognised as appropriate (such as police checks for child care staff) (PC 2008b).

How well does benchmarking identify better alternatives?

As noted, benchmarking is well suited to identify leading practices within Australia's federal system. How well it does so depends firstly on making a credible link between the regulations and performance. Even where the report findings are not immediately accepted or implemented, the findings may be used for further investigations.

Findings of leading practice help to focus reform efforts, but solutions can also be inferred from the data presented by the report. That is, jurisdictions can learn from the jurisdiction with the best score in any particular area. For example, the Commission (PC 2009b) identified several food regulators who 'had the broadest suite of what could be described as good governance practices (including targeted assistance programs and client feedback mechanisms) leading to the lowest business compliance burdens' (p. 154).

The key challenges to doing benchmarking well, and applying the results, are the availability of comparable data and the transferability of lessons or leading practice. Benchmarking may also be criticised for seeming to provide a level of accuracy it does not lay claim to. This problem is more acute when quantitative measures are used based on standardised 'average cost' formula.

Transferability

In its benchmarking planning and zoning study (PC 2011d), the Commission found that each jurisdiction had a planning system that had evolved independently, so while there were some broad commonalities, the structural differences were significant. This created challenges for benchmarking, because it was difficult to determine if the same thing was being compared when terminology and processes were so different. Furthermore, comprehensive data were only available in a few jurisdictions, so large surveys of regulators were undertaken.

However, lessons from benchmarking across jurisdictions domestically are more likely to be transferrable than from benchmarking across countries. (For example, New South Wales has more in common with Victoria than Japan.)

Data quality and comparability

Even if the data are reliable, data may not be easily comparable (box F.10). Comparable data should be collected in the same way, relate to the same period of time and be defined consistently. As noted by Green (2006):

The key to benchmarking is collecting comparable data from each country, and using it to infer how well that country is performing. (p. 2)

Synthetic cost estimates can be misleading when compliance costs are not uniform across businesses, but vary with the scale and nature of the business. When the distribution of burdens is highly skewed, businesses at the high cost end of the tail must be considered.

Some other issues with data quality and usefulness were identified in the Commission's 2007 feasibility study (PC 2007a; box F.4). The Commission found that it was not feasible to attempt to measure incremental compliance costs directly, because business accounting systems did not identify these separately. Also it was not possible to construct an index to gauge the overall levels of regulatory burden on business across jurisdictions.

The OECD (2007b) also found comparability of data to be a major hurdle in its *Comparing Administrative Burdens Across Countries* exercise, which led to nine out of 17 indicators being excluded from analysis, and two out of 13 countries not being benchmarked.

Nevertheless, difficulties with obtaining and reporting data are not a reason to avoid quantitative benchmarking. Some degree of quantification is valuable for preserving analytical rigor. Quantification is desirable but not always achievable, in which case qualitative or process benchmarking is also useful.

Use and misuse of indicators

The purpose of benchmarking is usually to rank jurisdictions, which raises the question of which approach is appropriate, especially when the underlying reality may be complex. For example, the World Bank's *Doing Business* indicators were criticised for giving a higher score for less regulation in seven of the 10 *Doing Business* indicators. It was argued that such a score does not necessarily reflect whether the country's regulatory regime is optimal (in terms of outcomes achieved at reasonable cost) or is simply too underdeveloped. Further, lower taxes improve a nation's score on the 'paying taxes' indicator, but this approach gives top scores to tax havens and implicitly discounts the fact that tax revenues might be spent in some ways that benefit the business climate. Some of these criticisms were

subsequently addressed. *Doing Business* now gives zero scores to a country with no regulation in an area or if regulation does not meet minimum standards.

This experience suggests that the results of benchmarking may not provide sufficient information to identify regulatory problems and solutions, and in some cases it will just form one part of the evidentiary base for reform. That said, benchmarking results are still useful to point to areas where further investigation is warranted.

Ranking or aggregating data may create interpretative problems if the appropriate qualifications are not understood by the target audience. One way to avoid this is to present the data ‘as is’ without further analysis or synthesis (as the OECD does with its *Social Indicators*). Ranking can create pressure for reform only if the data and methodology are credible. Less analysis may be appropriate for programmed or periodic benchmarking as it allows policy makers to apply the data. They may be more likely to appreciate the limitations of the data. It may also be inappropriate to rank data where opinions differ as to whether more or less of something is necessarily better (or worse), for example the number of children in child care (SCRGSP 2011).

Suitable information should be provided for users on what the indicator does and does not measure. No single indicator can give comprehensive information for reform or improvement. Some things are measurable and others are not. However, that does not mean only measurable information is valuable.

How influential is benchmarking in promoting reform?

Comprehensive benchmarking exercises demonstrate the need for change, identify the options available among ‘peers’, and can thereby create political pressure for reform.

Areas of reform potential are highlighted through measuring the strengths and weaknesses of each jurisdiction. The data reported, whether quantitative or qualitative, represents tangible evidence to support criticisms of the system and calls for reform. Stakeholders often know the main problems, but independent evidence can secure wider support for change. Consultation can be critical to drawing out ideas, as can presenting them in an accessible format from an independent source.

Some benchmarking exercises highlight leading practices that other jurisdictions can use to model their own reforms or use collectively for regulatory harmonisation. An analysis of how findings can be applied in other jurisdictions would complement

the benchmarking exercise. It may not be appropriate to highlight leading practices if the differences between jurisdictions are too great, as for large scale international benchmarking such as the *Doing Business* indicators.

As noted, ranking jurisdictions, where appropriate, can create pressure for reform. However, this kind of ranking may not always be useful in the Australian context:

Although the World Bank *Doing Business* reports are suitable for looking at a 'league ladder' and identifying significant differences, it is unlikely that the survey approach is refined enough to identify differences in regulatory burdens between Australian jurisdictions, where differences in compliance costs could be relatively small. (PC 2007a, p. 45)

A constituency for change can be created through consultation and 'buy in' to the benchmarking process. The advisory panel process in the Commission's benchmarking for COAG has helped create wider 'ownership' of the report, as well as increasing the quality of the content and therefore the likelihood of reform.

What is the return on the review effort?

The key challenges to doing benchmarking well and applying the results are:

- the availability of comparable data
- the transferability of lessons or leading practice.

If the data quality is sound and the methodology is sufficiently robust and transparent, results can withstand criticism and identify tried and tested regulatory processes that lead to better outcomes. Independence and credibility of the review body also promotes confidence in the report's findings.

However, high quality benchmarking studies are expensive both in terms of the direct cost of running the review and the time and effort required from industry and regulators. The Commission was asked to benchmark the cost of business registrations in response to industry concern that this was a high cost area, but found that while costs varied significantly between jurisdictions, costs were not great (PC 2008b). Greater attention to prioritisation may not have seen this topic identified.

The timing of a report is also relevant. The food safety study (PC 2009b) was well timed because this area was being considered for regulatory change. The OHS study (PC 2010a) took place simultaneously with reform efforts following a separate review. The Commission understands that it nevertheless helped maintain momentum for reform. However, benchmarking should ideally be conducted prior to developing reform options.

The strengths and weaknesses of benchmarking are summarised in table F.1.

Table F.1 Strengths and weaknesses of benchmarking reviews

Discovery — How well does the approach identify areas of regulation that are imposing high costs and distortions that need reform?

- | | |
|------------|--|
| Strengths | <ul style="list-style-type: none">· Highlights areas where a country or jurisdiction is lagging· Results can take regulator practice into account |
| Weaknesses | <ul style="list-style-type: none">· Comparative data may not be available or may be expensive |

Solutions — How well does the approach identify alternatives (removing or amending regulation) that would significantly improve outcomes?

- | | |
|------------|---|
| Strengths | <ul style="list-style-type: none">· Benchmarking identifies actual alternatives in use and leading practices can be identified· Can be used as a first step in the reform process |
| Weaknesses | <ul style="list-style-type: none">· Approaches may not be transferrable across jurisdictions· Indicators may be misinterpreted· Performance benchmarking does not allow for identifying the best option if not already in operation in one of the jurisdictions |

Influence — How influential is the approach in promoting reform?

- | | |
|------------|--|
| Strengths | <ul style="list-style-type: none">· Ranking jurisdictions creates political pressure for reform in jurisdictions that are lagging· Consultation processes such as an advisory panel can be effective in promoting accuracy and ownership of the report and its findings |
| Weaknesses | <ul style="list-style-type: none">· Reports need to be well timed |

Cost-effectiveness — What is the return on the review effort?

- | | |
|------------|--|
| Strengths | <ul style="list-style-type: none">· High payoff to review effort where areas for review are prioritised well and consultation and cooperation is extensive |
| Weaknesses | <ul style="list-style-type: none">· High direct cost of running the review and cost to industry and regulators to participate· High cost of obtaining new survey data, which is often necessary |
-

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G Stock management tools

Key points

- Different countries and jurisdictions have used or proposed a variety of more routine tools to manage the stock of regulation. These include:
 - red tape reduction targets — a requirement for agencies to reduce administrative or compliance costs by a certain percentage or dollar value
 - regulatory budgets — a limit on the regulatory costs an agency can impose
 - one-in one-out rules — a regulation must be removed for each regulation added.
- Most jurisdictions implementing red tape reduction targets have reported achieving substantial reductions in regulatory burdens. However, surveys of business perceptions find little, if any, reduction in business compliance costs despite the targets. Red tape reduction targets:
 - may be most useful where a jurisdiction is starting out on a regulatory reform process. Due to their narrow focus on administration costs, their usefulness is limited when a jurisdiction’s regulatory reform program is well advanced
 - are more effective where there is independent analysis of the estimated cost reduction and targets are set at realistic levels. Over time, such programs need to expand to cover a wide range of regulatory burdens.
- The complexity of regulatory budgets — particularly the difficulties of measuring the compliance costs to set budgets — and the scope for perverse effects (such as delaying unilateral reform or being unable to enact a regulatory response), has limited their use.
- A ‘one-in one-out’ rule when it relates to pieces of legislation or even the number of requirements, is a blunt instrument. It may lead to perverse incentives, including holding on to redundant or costly regulation as ‘negotiating coin’.
- The United Kingdom has introduced a version of a ‘one-in, one-out’ rule that requires compliance costs in new regulation be fully offset by reductions elsewhere.
- The Regulation Impact Statement process requires policy-makers to examine existing legislation at all levels of Government when introducing new regulation. This diminishes the potential for overlap, and may result in some regulation being removed or amended.

This appendix follows the following structure:

- section G.1 — the main features of red tape targets, regulatory budgets and one-in one-out rules are briefly described
- section G.2 — uses examples of these tools to highlight how they have been used in practice
- section G.3 — again draws on examples to consider how effective (or not) such tools have been in promoting successful reforms to the stock of regulation
- section G.4 — draws out lessons, making an assessment of: the usefulness of the approaches in identifying areas of regulation that need reform (discovery); how effective they are in assessing alternatives that would improve outcomes (solutions); how well they promote reform action (influence); and the overall return on the review effort (cost-effectiveness)
- section G.5 — a range of other, less common stock management tools are discussed, including Better Ministerial Partnerships, suggestion boxes and internal stocktakes.

G.1 Other ‘stock management’ tools

In addition to the various reviews and benchmarking exercises, governments have adopted a range of other ‘stock management tools’. These include red tape reduction targets and stock-flow linkage rules such as regulatory budgets and ‘one-in one-out’ rules. These tools are triggers or decision rules requiring agencies to consider or reassess the efficiency and effectiveness of their existing regulation. They also impose a discipline on agencies to reduce the burden of regulation, or at least not expand it.

Setting targets for the reduction in red tape has become a common approach in Australia as well as overseas. The Netherlands, in 2002, was the first to set an explicit target reduction in red tape (25 per cent by 2007). In Australia, New South Wales, Victoria and South Australia have set explicit target savings to be achieved through reductions in red tape, while Queensland reports on the savings made through its stocktake program. Targets have been set in terms of dollars saved and as a share of the total burden of regulation.

Regulatory budgets place a limit on the compliance costs of regulatory activities that can be imposed by any policy agency or regulator. ‘One-in one-out’ rules require governments to maintain the total number of regulations by removing a regulation for each one they add. These rules have rarely been implemented, though

the United Kingdom (UK) has recently introduced a limited regulatory budget (although they describe this as a ‘one-in one-out’ rule). Regulation impact statement (RIS) requirements in Australia require agencies to consider the costs of the current stock of regulation on those businesses affected by new regulation.

Red tape targets and stock-flow linkage rules encourage agencies to examine the stock of regulation to: identify regulation that can be removed; amend existing regulation by combining it with the new; or amend the regulation, or its administration, to reduce regulatory compliance costs.

G.2 How have these tools been used?

Red tape reduction targets

How has ‘red tape’ been measured?

‘Red tape’ generally refers to the administrative costs imposed on business in order to comply with regulation. It is largely made up of record keeping and reporting costs — both the time and the financial costs to business of meeting the application and reporting requirements. Administrative costs are largely synonymous with paperwork and do not include the more substantive investment and training costs required to comply with a regulation. From a business perspective, administrative costs include the fees and charges to business imposed by the regulator. From a community-wide perspective it is the total administration cost that matters, not just the share imposed on business.

Some Australian states have included other compliance costs (box G.1) in their red tape reduction targets. A few other countries have placed greater emphasis on the administration costs — as reductions to these costs save either taxpayers or business (appendix K). However, most jurisdictions have yet to expand their targets beyond administrative costs — largely due to the difficulties associated with measuring other types of costs.

Generally, the focus of the burden reduction target has been on the costs to businesses. In some cases, the target was extended to citizens and the public sector. For example, the Dutch target included citizens, and the UK target included charities and social enterprises.

In most jurisdictions, the first step in setting a red tape reduction target has been to measure the total administrative costs associated with regulation in the economy. This has provided a baseline level of the cost of regulation against which to measure

performance in meeting the target. The analysis can also provide information to assist departments in proposing reforms.

Box G.1 **Administrative and other compliance costs**

Administrative costs refer to costs incurred by a business in order to demonstrate compliance with a regulation, or to allow government to administer the regulation. These costs primarily consist of paperwork, record keeping and applications.

Administrative costs are a subset of **compliance costs**. Compliance costs cover all the costs of complying with a regulation, including capital costs, the costs of employing and training workers to achieve compliance and the cost of providing information to third parties. Administrative costs relate to the provision of information and are called **substantive compliance costs**.

In addition to the compliance costs other ‘costs’ associated with regulations include:

- **financial costs** — the fees and charges associated with a regulation
- **delay costs** — the costs associated with delay in activity due to the time taken to complete or approve an application. The cost of delay depends in large part on how predictable its (if not too long)
- **economic costs** — such as externalities and the impacts on competition.

Most jurisdictions with red tape targets have adopted the standard cost model (SCM) — which attempts to estimate the administrative costs faced by the ‘normally efficient business’. (More detail and an assessment of the SCM is provided in appendix J.) The SCM is a ‘bottom-up’ approach, in that it attempts to measure the regulatory burdens associated with each regulation. According to the Organisation for Economic Cooperation and Development (OECD), 28 jurisdictions have used the SCM, or some version of it, in estimating administrative costs (OECD 2010c).

Some jurisdictions have attempted to limit the cost of estimating the baseline by limiting its scope. Flanders (Belgium) measured only the most costly 20 per cent of regulations, on the assumption that these impose 80 per cent of the burden. Victoria did not attempt to undertake a full benchmark, but based their estimate on the assumption that the administrative burden as a share of gross domestic product (GDP) in Victoria was the same as that of the UK, and that 44 per cent of this was imposed by State regulation (Victorian Department of Treasury and Finance 2007). However, a more detailed of estimation of regulatory burdens was undertaken for the reforms introduced in response to the target.

Victoria has used an expanded version of the SCM for the purposes of evaluating new regulatory reforms. Their ‘regulatory change measurement’ model aims to include broader compliance and delay cost in the measurements. Other states, such

as South Australia, have used the Office of Best Practice Regulation's (OBPR) business cost calculator (appendix J) to evaluate reform options.

An alternative to setting a cost-reduction target may be to set a target based on the number of 'must comply' provisions. This approach has been used in the Canadian province of British Columbia (see below).

What targets have been set?

While red tape reduction targets had been proposed,¹ the Netherlands was the first country in the world to actually set a target — a 25 per cent reduction between 2003 and 2007. This was backed by a comprehensive measurement exercise (box G.2). Most other jurisdictions subsequently introducing red tape reduction targets also specified a 25 per cent reduction — including, Germany, France and Italy. In addition, the European Union (EU) has set a target of reducing the administrative burden associated with EU legislation by 25 per cent (box G.3).

¹ For example, then Prime Minister John Howard undertook to reduce red tape by 50 per cent following the Small Business Deregulation Taskforce (Howard 1997).

Box G.2 Reducing red tape — the Netherlands

The Netherlands was the first country to establish a red tape reduction target — set at 25 per cent between 2003 and 2007.

In meeting its initial target the Netherlands first used the Standard Cost Model to estimate the baseline level of administrative burdens in the economy. The level of burden was estimated at €16.4 billion — 3.6 per cent of GDP.

To assist agencies to meet their targets, two co-ordinating entities were established.

- The inter-ministerial unit for administrative burdens was responsible for the day-to-day co-ordination of the scheme. This involved co-ordinating reporting and monitoring and assisting ministries.
- The Dutch Advisory Board on Administrative Burden was responsible for scrutinising reports from the Ministry of Finance on progress towards meeting the target.

Ministries used information from the benchmarking exercise, and from consultation with the corporate sector, to compile a list of potential burden reductions. The burden reductions were not spread evenly across ministries, and ranged from an 18 per cent reduction (Ministry of Economic Affairs) to a 37 per cent reduction (Ministry of Justice).

Progress towards meeting the target was monitored via twice-annual reporting, in line with the budget cycle. These reports contained a list of expected increases and decreases in administrative burdens over a four year cycle.

Subsequently, the Netherlands committed in 2007 to a further 25 per cent reduction by 2011. More recently, this target has been reduced to 10 per cent in 2011-12 and 5 per cent per annum thereafter.

Source: OECD (2007c); appendix K.

Box G.3 European Union red tape reduction target

In 2007, the European Union (EU) set a target of reducing the administrative burden associated with EU legislation by 25 per cent. The EU identified 13 priority areas for reform — agriculture, company law, cohesion policy, environment, financial service, fisheries, food safety, pharmaceuticals, public procurement, statistics, tax, transport and employment relations.

The European Commission undertook a benchmarking exercise in the priority areas using the standard cost model. This involved the identification of the information requirements imposed on business in 72 legal Acts. In addition, a list of ‘fast track actions’ was proposed, which were technical changes in existing rules that could be implemented quickly.

As of 2009, proposals for amending 26 of the Acts had been submitted, of which 16 were already adopted. These proposals were expected to reduce the burden on business by €30 billion.

Source: EC (2011).

In Australia, four states — Victoria, New South Wales, Queensland and South Australia — have introduced red tape reduction targets (box G.4). The targets in each case have been expressed in absolute terms (for example, South Australia aimed to reduce red tape by \$150 million), rather than as a percentage reduction, thus avoiding the need for a baseline ‘burden’ measurement.

While most jurisdictions have implemented ‘gross’ targets — that is, burdens associated with new regulations are not included in the target — some have implemented ‘net’ targets, which take into account the impacts of new regulations. For example, in South Australia, agencies were required to include in red tape reductions plans any regulations introduced between 2006 and 2008 that were likely to lead to an increase in the regulatory burden on business.

Jurisdictions have also used varying approaches to meet their red tape reduction targets. In some cases, the target has been divided across individual agencies. For example, in the UK under the former government, all agencies were assigned a 25 per cent target (with the exception of the Cabinet Office (35 per cent) and Office of National Statistics (19 per cent)).

The bottom-up baseline exercises (discussed above) can help to identify areas of regulation that are imposing the highest administrative burdens. This provides a guide for where reforms are most likely to be achieved.

Box G.4 Red tape targets in Australian states

Several Australian states have implemented red tape reduction targets (box G.5 discusses the administrative arrangements behind these targets).

- In July 2006, the **Victorian** Government committed to reduce the net administrative burden of regulation by 15 per cent by July 2009 and by 25 per cent by July 2011, or \$256 million from an estimated baseline of \$1.03 billion. This target was subsequently broadened and expanded to a new target of \$500 million per year by July 2012, and involved: expanding the types of regulatory costs to include substantive compliance and delay costs, and increasing the coverage to include the income generating activities of individuals and some government services.
- In 2006 the **South Australian** Government set a target of \$150 million in annual net cost savings to business by reducing administrative and compliance burdens by 25 per cent by July 2008. Following completion of this target, a second target of an additional \$150 million reduction by 2012 was set.
- The **New South Wales** Government has committed to reducing red tape (including administrative and compliance costs) by \$500 million by June 2011.
- The **Queensland** Government has a target of an annual \$150 million reduction in administrative and compliance burden to business between 2009 and 2013.

Sources: NSW Department of Premier and Cabinet (2010); Queensland Government (2010); South Australian Government (2008); Victorian Department of Treasury and Finance (2010).

British Columbia's regulatory 'requirements' approach

In contrast to schemes such as red tape reduction targets, which focus on the cost of regulations, or 'one-in one-out', which are concerned with the number of regulations, the Canadian province of British Columbia has implemented a red tape reduction scheme that focuses on the number of regulatory 'must comply' requirements in place.

The scheme was introduced in 2001, when some 360 000 regulatory requirements were reportedly in place. The objective was to reduce the number of regulatory requirements by 33 per cent by 2004. The scheme was subsequently expanded, with an objective of maintaining this reduction through to 2012.

The British Columbia Ministry of Finance reported that the 2004 target was exceeded, with a reported reduction in regulatory requirements of 36 per cent by 2004. As of March 2011, the expanded objective was also on target to be exceeded, with the regulation count decreasing by 10 per cent between 2004 and 2012. Some examples of reforms pursued under this scheme are:

-
- reducing the number of reporting requirements for schools by 10–15 per cent, and reducing the timing load of the remaining reports
 - removing a requirement for travel agents to have a commercial premises
 - allowing a greater range of vehicles to be used without a policy-issued permit (StraightForward BC 2009).

What methods are used to support achieving targets?

Regardless of whether the target is divided between agencies or not, agencies are generally required to submit ‘simplification plans’ to a co-ordinating body. Such plans will often outline a list of potential regulatory changes, along with a list of the expected burden reductions associated with the reforms.

A combination of systems and methods are used.

- *Establishing a co-ordinating central agency.* This appears to be used in most red tape reduction targets. For example, in the Netherlands an inter-ministerial unit for administrative burdens was established to assist agencies with reducing burdens and to co-ordinate reporting. The Better Regulation Unit performs a similar function in Victoria (box G.5).
- *Incentive payments.* In Victoria, a \$42 million fund was available to departments via tender to offset some of the costs of implementing reforms. In addition, while not an official policy, departments were often allowed to retain part of the savings to administration costs generated by the projects (VCEC 2011).
- *Reporting.* In most jurisdictions regular reports were published showing the progress departments had made in meeting the targets (see for example, Victorian Department of Treasury and Finance 2010; HM Government 2011a and 2011c). In the Netherlands, these reports were linked to the budget cycle.
- *Consultation.* A key aspect of the EU red tape reduction program was obtaining suggestions from stakeholders. For example, in 2009 a competition was opened offering a prize for the best idea for reducing the regulatory burden (EC 2009).
- *Verification of results.* In some cases, an independent body was used to verify the cost savings reported by departments. Some examples of this include the Victorian Competition and Efficiency Commission (VCEC), the Dutch Advisory Board on Administrative Burden, and the UK’s External Validation Panel.

Box G.5 Meeting red tape reduction targets in Australian jurisdictions

The Australian states have used differing approaches to meet their red tape reduction targets.

Victoria uses an expanded version of the Standard Cost Model, called the Regulatory Change Measurement methodology to estimate the burden reductions associated with regulatory changes. This model expands on the standard cost model by including compliance and delay costs.

In order to encourage departments to reduce their regulatory burden, Victoria used an incentive fund of \$42 million. This was administered by the Better Regulation Unit within the Victorian Treasury, which also has responsibility for providing guidance to departments and monitoring and reporting. The Victorian Competition and Efficiency Commission is responsible for assessing the adequacy of department estimates of cost savings.

The **South Australian** targets are overseen by the South Australian Competitiveness Council. To meet the first target, the Council requested that all agencies develop a plan to reduce red tape on business. Additionally, a series of industry reviews investigated ways that red tape could be cut, and assisted departments in developing their plans.

The Australian Government's business cost calculator is used to measure cost savings from reforms. These estimates are audited by a consultant twice a year.

All Directors General of **New South Wales** Government departments are required to report in writing by 30 June and 31 December of each year to the Better Regulation Office (BRO) on achievements in cutting red tape, and planned reductions over the following 6 months. Reductions in red tape are part of the performance agreements of the Directors General.

The BRO suggests that departments use the standard cost model where administrative costs are likely to form a large proportion of the costs. Otherwise, the business cost calculator can be used.

Queensland departments have submitted simplification plans, which are available for public comment and consultation. Cost reductions are estimated using a modified version of the business cost calculator.

Sources: NSW Department of Premier and Cabinet (2010); Queensland Government (2010); South Australian Government (2008); Victorian Department of Treasury and Finance (2010).

How much do red tape reduction targets cost?

Costs associated with red tape reduction targets include the costs of measuring the benchmark level of regulation against which targets are set, the costs of establishing units to co-ordinate the reduction efforts, and the costs within agencies of reviewing and proposing regulatory changes.

There are a number of estimates for the combined costs of setting such targets. In the Netherlands, the costs of the baseline measurement was estimated to be €3 million. In addition, the co-ordinating agencies hired 30 staff between them (OECD 2007a). In the UK, the National Audit Office reported that, as of 2008, the cost of its program was £28.3 million. Of this, £18 million was related to the initial measurement exercise (NAO 2008). This suggests setting and enforcing targets can be costly in gross terms. These costs could be decreased greatly by bypassing the baseline measurement exercise, as in Victoria.

Stock–flow linkage rules

Regulatory budgets, ‘one-in one-out’ and ‘offset’ rules all require regulators to identify options for reducing regulatory burdens when new regulations are proposed. Although many have proposed the use of such rules, their use in practice has been very limited.

A regulatory budget works by establishing an upper limit on the cost of regulatory activities across the government. This budget would be divided across regulators.

The UK considered the use of regulatory budgets in 2008, before implementing a modified ‘one-in one-out’ rule. This rule requires that for any regulation that imposes a cost on business to be introduced, there must be the removal or modification of regulation with an equivalent or greater cost on business (box G.6). (As such, the UK’s approach is probably the first example of the practical implementation of a regulatory budget tool.)

This form of a regulatory budget is closer to an ‘offset’ rule. The Australian Government, for example, has a non-binding ‘offset’ requirement which asks agencies to link offsetting compliance cost savings when introducing new regulation (see below and Department of Finance and Deregulation, sub. DR11). Victoria requires that, where new regulation increases red tape, ministers must pursue reforms that lead to a reduction in the regulatory burden. In Belgium, the Flemish government adopted a similar approach, requiring that administrative burdens associated with new regulation must be offset by a reduction in administrative burdens elsewhere.

Box G.6 Regulatory budgets in the United Kingdom

Regulatory budget proposals

In 2008, the UK Government released a consultation document which outlined its proposal for a regulatory budget. The budget would have placed a limit on the cost of new regulation that could be introduced by a department. These could have been offset by cost savings from removing or refining existing regulation, and the budgets could have been traded between departments (allowing for greater flexibility). Departments would have been required to report their performance against the regulatory budget.

The regulatory budget would have been based on the direct and indirect costs of regulation. Benefits of regulation would not have been netted off when setting the budget.

In response to the consultation document, the Government decided not to proceed with regulatory budgets at that time.

Implementation of the ‘one in one out’ rule

In late 2010 the Government introduced a modified form of regulatory budget, called the ‘one in, one out’ rule, that is more akin to an incremental regulatory budget — the introduction of primary and secondary UK legislation that imposes costs on business requires the removal of regulation with an equivalent cost on business. Regulations required to comply with EU obligations are exempt from this rule (appendix K).

The rule requires that any new regulation must be costed, and validated by the Regulatory Policy Committee. A statement of new regulation, monitoring performance against the rule, published twice a year.

Sources: HM Government (2008; 2011a).

Quantitative ‘one-in one-out’ targets have also been proposed by some. These rules are based on the number of regulations, as opposed to the cost they impose. They require the removal of one (or more) pieces of regulation with the introduction of a new regulation. For example, the opposition party in Tasmania has proposed the introduction of a ‘one-in, two-out’ rule — which, if implemented, would require the removal of two regulations for each new regulation.

The Australian ‘offset’ requirement

Under Australian regulation impact statement (RIS) requirements, when proposing new regulation departments must consider relevant existing regulation at all levels of government, and why it does not adequately address the problem. This reduces the duplication of regulation that may arise.

The process is outlined in the Department of Finance and Deregulation's submission (sub. DR11):

The Australian Government agreed that in bringing forward regulatory proposals, Ministers address the availability of regulatory offsets. This commitment was given effect in a Guidance Note issued by the Department of Finance and Deregulation to Commonwealth agencies in January 2009 setting out arrangements for the operation of the Government's one-in one-out policy.

A regulatory offset is any regulation or regulatory process that can be removed, repealed or amended which results in a net reduction in the cost of regulation. Examples might include the removal of redundant regulation, streamlining reporting requirements or simplifying administrative procedures. The requirement to provide offsets is not mandatory, however, agencies must provide evidence that opportunities for offsets have been considered. (p. 3)

While this is not an explicit requirement to remove regulation when new regulation is introduced, it does require some consideration of the stock of regulation. While the Australian Government has implemented its 'one-in one-out' rule through requiring agencies to explicitly consider regulatory 'offsets', this arrangement (which is assessed by the Department of Finance and Deregulation (Finance)) is separate from the arrangements set out in the RIS which are assessed by the OPBR.

G.3 How effective have these tools been in promoting regulation reform?

Effective stock management tools would not only identify priorities for reform that have a high potential return to the proposed changes in regulation, but also be a force for change. This could occur through a commitment by governments to consider and implement recommendations, or through the influence that the analysis and involvement has on the stakeholders who can drive reform.

Red tape reduction targets

Most jurisdictions have reported success with red tape reduction targets. In most cases targets are reported to have been met, and estimates of the annual red tape reduction have been up to several billion dollars.

- The Victorian Treasury reports that the Victorian Government expects to surpass its original five-year target of reducing net administrative burden by \$256 million per annum by July 2011, and is on track to deliver the expanded target of reducing regulatory burden by \$500 million per annum by July 2012 (Victorian Department of Treasury and Finance 2010). This is based on an assessment of

reforms implemented or in the process of being implemented, which as of 2010, were expected to lead to annual cost reductions of \$401 million (of which \$343 million were administrative costs). The scheme led to simplification initiatives being introduced in areas such as licensing, applications for planning and record keeping (box G.7).

- In 2008, Deloitte undertook an audit of agency estimates of red tape reductions resulting from the South Australian scheme. They found that the target was met by the 30 June 2008 deadline, and the initiatives are on track to save South Australian businesses more than \$170 million per year. Of this, \$112.7 million was associated with completed initiatives, \$60.7 million was due to initiatives partially implemented in 2008, that were expected to be implemented fully by 2009. Offsetting this was an estimated \$3.3 million increase in regulatory burden resulting from new regulation over the period (South Australian Government 2008).
- As of 30 June 2010, New South Wales reported that it had achieved burden reductions of \$400 million — with the majority of these savings achieved through improvements to planning approval processes. These savings were estimated based on reports submitted by the Director General of each department to the Better Regulation Office (Better Regulation Office 2010).
- The UK reported burden reductions of £3.5 billion between 2005–2010 (HM Government 2010). This estimate was based on department estimates of burden reductions associated with reforms they have implemented, and the majority (88 per cent) had been verified by the UK external validation panel (an independent panel set up to scrutinise claimed burden reductions). The departments that achieved a large proportion of the savings were in the Department of Business, Innovation and Skills, the Department of Communities and Local Government, and the Health and Safety Executive (HM Government 2010). The current UK Government has moved away from red tape reduction targets. In addition to the ‘one-in one-out’ rule it has implemented a Red Tape Challenge website (appendix K).
- The World Bank reported that the Netherlands achieved annual burden reductions of €4 billion between 2003 and 2007 (box G.8).

Box G.7 The Victorian Government's red tape reduction target

How did Victoria's scheme operate?

The Better Regulation Unit was responsible for monitoring and reporting on progress towards the target, and providing assistance to agencies. VCEC was responsible for an independent assessment of cost savings achieved by reforms where savings were estimated to be more than \$10 million per year.

How effective was Victoria's scheme?

The Victorian Government has reported that it is on track to reach its red tape reduction target (Victorian Department of Treasury and Finance 2010). A range of reforms were reported, mostly in the area of reducing licensing and paperwork requirements.

VCEC review

As part of its review into Victoria's regulatory system, VCEC considered the effectiveness of Victoria's red tape reduction target. It suggested that Victoria's approach provided a good basis for reducing red tape on business, and that regulatory targets had been a good motivator. Additionally, it made some suggestions on how Victoria's future red tape reform program should proceed. These included:

- setting a target that takes into account both administrative and compliance costs. VCEC noted the difficulty associated with setting a percentage target for compliance costs (due to measurement difficulties), and therefore suggested a target expressed in absolute terms. It also noted the risks associated with setting a target — set too low and the target will have little effect; set too high and the target may result in the removal of legislation with net benefits
- the target should be a net target — any new regulation that imposes a cost to business should be offset by the removal of regulation with a equivalent cost
- including a 'let out clause' for regulation with large costs, but also large offsetting benefits. This would lessen the risk that net benefit regulation would be removed due to the target

VCEC considered that the incentives for departments to reduce their regulatory burden were 'weak'. It recommended an explicit commitment by the government to allow departments to retain the reductions in their administration costs associated with reductions in compliance costs. They also recommended reducing the regulatory burden should be included in the performance agreements of department secretaries. VCEC did not recommend the use of an incentive fund.

Sources: Victorian Department of Treasury and Finance (2009a; 2010); VCEC (2011).

Box G.8 World bank review of the Dutch red tape reduction scheme

In a 2007 review of the Dutch administrative simplification program, the World Bank considered that the scheme had been successful in reducing red tape. The World Bank outlined four reasons for the success of the program:

- announcing the 25 per cent target attracted attention and made it easy to communicate reform
- locating the co-ordinating unit within the Ministry of Finance, and the strong link to the budget cycle
- the establishment of the Dutch Advisory Board on Administrative Burden made evaluation independent
- the commitment across all political parties to reduce administrative burdens.

However, the World Bank noted a number of areas where the program could be improved. First, it suggested co-ordinating many of the reform activities within the Ministry of Finance — in particular where the reforms are outside the realms of individual ministries.

Second, the World Bank suggested improving accessibility to ‘burden information’. In particular, it noted that under the 2003–2007 program, there was no central database of regulatory cost information, and little public access to such information.

Third, the World Bank also recommended closer consultation with business. This could be done through annual business surveys, in order to address the gap between the reported burden cost reductions, and the perceptions of business regarding red tape reduction schemes.

Finally, the World Bank suggested that a further target was needed. This target would go beyond administrative costs to target broader compliance costs.

Source: World Bank (2007).

The OECD (2010c) has noted that the targets have generally been effective at motivating agencies to reduce red tape:

Targets are used so widely because they help create momentum at the beginning and make the monitoring of progress easier. When individual targets for participating ministries are set in addition to a general reduction target, this creates a pressure on participating institutions to deliver results in time. (p. 40)

However, a concern is that these estimated red tape reduction figures, may not fully reflect the costs and benefits associated with the programs (box G.9).

Box G.9 Other costs and benefits associated with burden reduction targets

There are a range of costs and benefits that are not included in the estimated burden reduction calculations. For example:

- there may be issues associated with the measurement of the burden of regulation, including:
 - some costs that are classed as burdens may have existed even in the absence of the regulation
 - standard models assume 100 per cent compliance with the regulation. This may not always be the case.
 - using the ‘normally efficient business’ ignores businesses reducing costs via ‘learning by doing’.
- reducing compliance burdens on one sector may increase compliance burdens on a range of other sectors, or increase monitoring costs
- reducing administrative burdens can affect a range of social and environmental costs (either positively or negatively)
- reducing burdens can free up resources that can be used for more productive uses
- reducing burdens may lead to reduced barriers for entry into the business.

Source: OECD (2010a).

Business perceptions

Moreover, some jurisdictions have found that, despite the headline cost savings, business has reported minimal impact on their costs.

In Victoria, a 2011 business perceptions survey undertaken for VCEC found that over half (56 per cent) of business and not for profit organisations reported that regulation had become more costly over the previous three years. This compared to just three per cent of businesses that felt that the regulatory burden had decreased over the same time period (Wallis Consulting 2011).

Business perceptions surveys in the UK have also raised doubt about the degree to which business actually experienced a decrease in regulatory costs. According to the UK National Audit Office (2011), in a series of surveys between 2008 and 2010, only 1 per cent of businesses reported that they had noticed a decrease in time spent complying with regulation.

Similar results were reported in the Netherlands. Despite the Government meeting its targets, the OECD (2010c) reported that business remained frustrated at ‘slow

progress and the failure to tackle issues that really matter from its perspective’ (p. 34).

These perceptions by business of the limited effectiveness of red tape reduction targets may be because:

- while the absolute burden reduction numbers may be large in aggregate, these may be quite small when expressed as a cost for an individual business
- the costing model used is based on an ‘average’ business
- there may be a delay in the visibility of results to business — legislation may take time to be repealed, or there may be a delay in the impacts of the reform
- countries may focus on ‘easily removable red tape’ — obsolete regulations that are not usually complied with, so only imply a cost ‘on paper’
- regulations that are classed as the most burdensome may not be the most ‘irritating’ to business (OECD 2010a)
- some measures may still be complied with once the regulation is removed. For example, the Dutch scheme removed a requirement to put price tags on display items (World Bank 2007).

Due to these factors, the true impact of red tape reduction schemes remains unclear.

British Columbia’s scheme (which focuses on reducing the number of ‘must comply’ requirements in place) may be influential in increasing awareness of the costs to business associated with regulation, but it avoids the measurement costs associated with standard red tape reduction targets. However, it shares the other pitfalls associated with red tape reduction targets (such as the difficulties in setting an appropriate target), and indeed, focusing on the regulatory requirements may have further pitfalls. Such an approach may encourage agencies to focus on getting rid of less costly requirements and, if implemented on a ‘net’ basis, may lead to large reforms or beneficial policies not being implemented.

Stock-flow linkage rules

As regulatory budgets have rarely been implemented, experience with these tools is limited. Early indications following introduction in the UK of a ‘one in one out’ rule suggests that it may be limiting the flow of regulation. While the UK Government (HM Government 2011c) concluded that over the first year of the ‘one-in one-out’ program that ‘the increase in business burdens has remained at, or close to zero’ (p. 5) its impact on the stock and, most importantly, quality of regulation is as yet unclear.

In the period January 2011 – June 2011, the number of proposed regulations in the UK dropped by 70 per cent, to 46 (of which 11 were expected to have a net cost to business). Nine ‘outs’ were proposed, with a net saving to business of £3.2 billion (box G.10). (Much of this net saving was attributed to a change in private sector pension schemes for other reasons.) Over the period January 2001 — December 2011, 19 ‘ins’ were offset by 33 ‘outs’ with the result calculated as a net saving to business of £3.342 billion (mostly as a result of the change in private sector pension schemes) (HM Government 2011c). However, during the second six month period (June – December 2011), it would appear that the cost of new regulation exceeds the offsets by around 20 per cent. As noted in appendix K, the UK’s ‘one-in one-out’ rule has also provided an incentive to review the existing stock of regulation at the same time as proposing regulatory changes.

Box G.10 Regulations modified since the UK’s ‘one-in one-out’ rule was adopted

During the first six months of the UK one in, one out policy, nine regulations were proposed for modification or removal:

- allowing adult gaming centres and bingo clubs more operational flexibility
- delaying an energy efficiency scheme until 2013 (net saving to business of £0.04 million)
- raising the number of customers that are needed for energy companies to be required to participate in a range of social and environmental programs (£0.38 million)
- releasing a listing of fisheries that are included in licensing schemes (£0.08 million)
- some licensing and enforcement functions have been delegated to the Marine Management Organisation (£0.198 million)
- revising information requirement for independent schools applying for a license (£0.07 million)
- requiring private sector pension schemes to increase benefits in line with the consumer price index, rather than the retail prices index (£3260 million)
- allowing mutual societies to communicate with shareholders electronically (£10.4 million).
- allowing notification of firearms transactions to be sent electronically (£0.83 million).

In total, these reforms were estimated to result in a net saving to business of £3.3 billion. However this was almost entirely due to the pension scheme reform, which would appear not to have been motivated by the one-in one-out scheme.

Source: HM Government (2011a).

The OECD (2010c) noted that the Flemish (Belgian) scheme had serious implementation issues, and had had little effect in practice. The OECD (2010c) also noted that regulatory budgets and ‘one in one out’ schemes had proven to be:

... generally inapplicable in most countries especially due to their rigour. While controlling the flow of new regulatory burdens is necessary, there may be cases where additional administrative burdens may be acceptable without any compensation. In general, these are cases where overall benefits to society are exceeding overall costs, including additional administrative burdens. (p. 54)

G.4 How well do these stock management tools work?

This section draws on the examples and discussion in the previous sections to identify some of the common features of red tape reduction targets, regulatory budgets and one-in one-out rules that work to promote successful reform. It also considers features that can limit the effectiveness of these tools, or result in unintended consequences.

How well does the approach identify areas needing reform?

As with all review processes, the success of stock management tools is dependent on the processes put in place for the review of regulations by departments. Quantitative targets appear to be an effective driver for departments to consider their stock of regulation and propose potential areas for reforms.

Stock management tools are generally concerned with incremental improvement, rather than identifying large areas for reform. Bottom-up estimation of the compliance costs of regulation provides a starting point for identifying high cost reforms. However, such exercises tend to only measure the administrative costs associated with regulation, and estimating even this subset of compliance costs can be costly. Estimating a baseline for burdens beyond administrative costs would be complex and even more costly.

The emphasis on quantifiable savings inherently limits the scope of reform that can be identified by these approaches. There is a risk that a single focus on administrative burdens may result in other costs of regulation being ignored, especially if regulation is subsequently considered to have been ‘reviewed’.

The extent to which there is flexibility within any scheme may influence its ability to identify areas for reform. If targets or budgets are rigidly applied to each agency, it is more likely that some agencies would struggle to find cost reductions which may have to at a cost to the effectiveness of their regulation. More problematically,

agencies may be reluctant to cut red tape by more than the target, or even build in red tape, in order to have easier means to meet further targets. And agencies that have minimised the red tape burden are disadvantaged, especially where incentive payments are linked to achieving targets. Allowing trading of budgets between agencies may increase the scheme's effectiveness, but could also lead to greater transaction costs.

The use of a rigid target or rules are most useful where there are many regulations with excessive red tape costs. The effectiveness of these tools is diminished where the scope for reform is limited, and it is more likely that significant pitfalls would then be encountered.

How well does the approach identify better alternatives?

Aligned with the focus on administrative burdens, the main option considered in meeting red tape targets or other rules is simplification of the record keeping and reporting requirements — either by streamlining or reducing processes or relying on electronic approaches.

As a whole, targets and rules appear to be limited to reducing administrative burdens. In some applications they have been extended to more substantive compliance costs and to 'irritations', 'nuisance' and delay costs but these tend to be add-ons and it is difficult to apply a strict rule to them. A major gap in targets and rules is the lack of any assessment of the effectiveness of the regulation — with the cost reductions taken to not affect the effectiveness of the regulation.

In addition, targets and rules neglect the benefits associated with regulation. This is a particular problem with 'one-in one-out' rules as while removing regulations may reduce the 'regulatory burden' placed on business, it may also remove the benefit to society as a whole of the regulation.

Highlighting the difficulties with setting an appropriate target are the risks associated with the setting of the budget cap or target. For example, if the budget cap or target is set too tight, or the scheme is inflexible, the risk that net benefit regulation may be removed is increased. However, too loose a target risks reducing the effectiveness of the scheme.

There are several factors that may make red tape reduction targets more effective.

- *The scope of the policy* — a broader scope (for example, including compliance costs) would lead to more options for agencies to reduce their regulatory burden. However, these costs are more difficult to measure, so including such costs would come at the sacrifice of some accuracy in the cost reduction estimations.

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- Fees and charges are generally used by agencies as cost recovery mechanisms. Including fees and charges in the target would create incentives for agencies to reduce such costs. The greater the regulator’s administration costs, the greater the burden of funding the regulation that is shifted away from regulated entities and on to taxpayers.
 - *Incentives for agencies* — incentive payments may further encourage agencies to examine the stock of regulation. However, caution must be exercised to ensure that these payments do not create perverse incentives for agencies. For example, allowing agencies to keep internal savings generated by reform may lead to a disproportionate focus on those regulations where the administration cost to the agency is high.
 - *The size of the target* — in most cases a 25 per cent reduction target has been used. What target to implement requires careful consideration, as the target may have perverse effects if set too high. An ‘iterative’ approach to setting the target may be useful, whereby a small initial target is set, with achievement of this target resulting in further targets. On the other hand an initially high target is likely to fall over time, as experienced in the Netherlands (appendix K).
 - *Independent review of cost reductions* — independent evaluation of agency estimations of cost reductions would reduce the scope for ‘gaming’ by agencies (for example, agencies reporting higher estimated cost reductions than is actually the case).
 - *Flexibility* — rigid application of the target to each individual agency could lead to a greater risk that net benefit regulations may be removed.

How influential is the approach in promoting reform?

Red tape reduction targets appear to have been effective at promoting interest in, and understanding of, the administrative costs of regulation. The use of a target approach has encouraged agencies to evaluate their stock of regulations and propose options for reducing administrative cost, and in some case more extensive reforms. However, as noted above, business has reported little impact from this process.

Given their limited actual application, the influence of regulatory budgets and quantitative ‘one-in one-out’ approaches is uncertain. The main influence of the approaches may be to limit the flow of regulation. They may result in greater attention being given to the compliance costs of regulation, as business, regulation makers, and regulators have been exposed to attempts to reduce these costs. Regulatory budgets would require agencies to consider how to cost-effectively allocate a scarce regulatory budget. ‘One-in one-out’ may give regulation makers pause to consider the value of taking a regulatory approach to problems that have

emerged, and may encourage looking at existing regulation as to whether it can be amended to address the problem rather than adding a new regulation.

However, there are significant practical difficulties and pitfalls associated with regulatory budgeting and quantitative ‘one-in one-out’ targets, which has limited their use. For example, while non-compulsory ‘offset’ rules may limit the pitfalls of ‘one-in one-out’ targets, it is the lack of compulsion which also reduces the incentives for agencies to find significant offsets.

What is the return on the review effort?

The cost effectiveness of red tape reduction targets is unclear. While the estimated burden reductions on business tend to be high, the full impact of these schemes on society has not been estimated, and where perceptions surveys have been undertaken business has reported little impact (chapter 3).

However, the red tape reduction targets themselves may be effective at enhancing the culture of reform across departments.

The costs of the scheme, in particular baseline measurement, can be high. While such measurement tools may have some usefulness in identifying regulation imposing high costs, they are imperfect tools which have significant measurement issues. Measurement is more difficult where these tools are extended to substantive compliance costs. In particular:

- considerable information on compliance costs is required which would impose large collection costs on both government and business
- indirect costs of regulation are uncertain, and difficult to measure
- some compliance related expenditures may have occurred even in the absence of the regulation (Malyshev 2010).

As such, given their large costs, it is unlikely that estimating the baseline cost of regulation is cost-effective.

Regulatory budgets have some theoretical appeal (box G.11). For example Malyshev (2010) stated that regulatory budgets would:

- result in a more cost effective allocation of regulatory resources — as opposed to allowing regulatory agencies to treat regulatory costs as a ‘free good’
- require explicit consideration of the aggregate costs of regulation
- rely on more decentralised decision making.

Box G.11 Regulatory budgets literature

The use of regulatory budgets has been considered for some time, in particular in the United States (US).

Tozzi (1979) noted parallels between a regulatory budget and fiscal budgets, in that they both keep 'expenditures in line with available national resources'. Tozzi recommended that the idea of regulatory budgets should be further explored. However, Tozzi also noted several issues with regulatory budgets, in particular the measurement issues associated with compliance costs.

DeMuth (1980) suggested that 'the most practical possibility for confronting regulators with the costs of their actions would be to construct a shadow budget ...'. DeMuth suggested that a regulatory budget would only consider the costs of regulation — and should not be offset by the benefits of regulation.

White (1981) suggested that basing regulatory decisions on cost alone is 'fundamentally misguided'. White suggested that the optimum level of regulation is the point where the benefits exceed the costs by a certain amount, and that setting an arbitrary level of costs is not appropriate.

Crews Jr. (1998) stated that the cost of regulation in the US was over US\$600 billion per year. Crews Jr. noted several potential benefits with regulatory budgets, including that:

- it would lead to full accounting of the impact of regulation in the economy
- it would lead to a better ranking of risks — regulators would be forced to focus on those risks they deem the most important.

However, Crews Jr. also listed some pitfalls with regulatory budgets, including that they may increase the legitimacy of regulation, and lead to measurement issues.

Meyers (1998) noted several issues with implementing a regulatory budget, including the difficulty in setting the budget level; difficulties in determining the scope of the budget; measurement issues; and that considering only the costs of regulation would bias the regulatory process.

Sources: Crews Jr. (1998); DeMuth (1980); Meyers (1998); Tozzi (1979); White (1981).

However, regulatory budgets raise significant issues. There is scope for 'gaming' by agencies, if the estimated cost reductions are not subjected to sufficient independent analysis. In addition, regulatory budgets may lead to regulations with net benefits being removed or not enacted. Comprehensive estimation of burdens of regulation and trading of the budget between agencies would reduce these pitfalls, but would be very expensive to do well and require considerable oversight. These issues suggest that the cost-effectiveness of regulatory budgets is likely to be poor.

Quantitative 'one-in one-out' tools are blunt instruments, and there would be scope for agencies to introduce regulations with a high cost on business, while removing

those with low or no cost to business. Indeed, such an approach may even be counterproductive — if designed so that the regulation must be removed at the point a new regulation is introduced, there may be an incentive for an agency to delay reforming a redundant or costly regulation until they wish to introduce a new regulation. It should be noted that a recent review of Australia’s Commonwealth regulation found over 4000 redundant regulations (Sherry 2011). As such, there is scope for a ‘one-in one-out’ rule to simply focus on removing these redundant regulations.

The UK’s recent experience in implementing their ‘one-in one-out’ rule suggest that a more sophisticated ‘offset’ program can instil discipline. Whether the benefits warrant the costs is yet to be seen and is worth monitoring.

G.5 Other tools

This section discusses a range of other approaches that have been less widely considered or applied. These include:

- the Better Ministerial Partnerships scheme in Australia
- suggestion boxes
- internal departmental stocktakes of regulation.

Better ministerial partnerships (Australia)

In recent years the Australian Government has undertaken an initiative called Better Ministerial Partnerships. These partnerships are an agreement between the Finance Minister and another minister to improve the effectiveness of an area of regulation.

In 2009-10 two ministerial partnerships were completed — reviews into accessible product disclosure statements for financial products, and into improving the timeliness of patient access to medical technologies. Six other partnerships were also underway, including consolidating anti-discrimination legislation; improving regulation of agricultural and veterinary chemicals (box G.12); rationalising tariff concession arrangements; reducing the number of visa classes; establishing a single security vetting agency and transferring the administration of excise equivalent goods to the Australian Taxation Office (ATO) (Department of Finance and Deregulation 2010).

Box G.12 Better Ministerial Partnerships — agricultural and veterinary chemicals

The Australian Government has used the Better Ministerial Partnerships program to introduce some reforms in the agricultural and veterinary chemicals sector. In July 2010, a range of reforms to the sector were enacted. These primarily involved labelling provisions — the Australian Pesticides and Veterinary Medicines Authority (APVMA) is no longer required to assess elements of a product's label including colour, presentation, logos, warranties and other company information. In addition, company applicants are no longer required to provide a list of approved persons that are authorised to contact the APVMA regarding the application.

In late 2010, a discussion paper was released. This paper proposed a number of reforms, targeted at:

- implementing risk frameworks for agricultural and veterinary chemicals assessment and review
- improving the quality of chemical assessment and registration processes
- enhancing chemical review processes
- using overseas assessments
- establishing an independent science panel
- enhancing the provision of expert advice
- improving legal interaction within the APVMA
- improving the APVMA's enforcement capabilities.

Sources: APVMA (2010); Ludwig (2010).

Once a ministerial partnership is formed, this process can create significant drive for change in the reform area. It is unclear how priorities for ministerial partnerships are decided, but by its nature, the scheme is likely to focus on areas with significant complaints from electorates or business.

According to the Department of Finance and Deregulation (sub. DR11), six Partnerships have now been completed and are being implemented and a further four Partnerships are currently in train.

Suggestion boxes

One approach that has been used to encourage consultation between Government and stakeholders are 'suggestion boxes'. These mechanisms are often online tools, such as blogs, that allow businesses and consumers to easily register complaints or suggestions regarding regulations.

One example of the use of suggestion boxes has been in the UK. The UK ‘red tape challenge’ website began in April 2011, and allows consumers and business to provide feedback on restrictive or redundant regulations. Every few weeks, a list of regulations in a ‘theme’ are put up for comment. The responses are available online for further discussion, or alternatively a private submission can be lodged.

Views on the effectiveness of suggestion boxes are mixed. The UK has announced that, as part of its red tape challenge website, around 160 regulations affecting the retail sector will be removed or simplified (UK Department for Business, Innovation and Skills 2011). However, in Australia, State and Federal Government experience suggests that suggestion box mechanisms have not been effective — potentially due to a reluctance from business to deal with significant issues in this way.

Internal stocktakes

Internal departmental or government stocktakes of regulation are a further, if less frequently used, stock management tool. Notable examples include:

- the EU’s programme of simplification of EU rules, launched in 2005 and discussed in detail in appendix K. In 2011, the programme covered 185 measures, of which the EC had adopted 132 (EC 2011b).
- the 2009 Australian Government review of subordinate legislation made before 2008 ‘to document those regulations which impose net costs and identify scope to improve regulatory efficiency’. The review entailed extensive effort (including screening around 55 000 subordinate instruments) but identified a relatively small number of targets for regulatory review (box G.13).

The success of internal stocktake reviews in promoting regulation reform varies, with some yielding greater reform outcomes than others. In commenting on the recent internal review of subordinate legislation, Department of Finance and Deregulation stated:

- Across portfolios as a whole, the Pre-2008 Review identified 4204 legislative instruments, or around 14 per cent of the stock, that were redundant or potentially redundant. In the process of identifying the redundant regulations, 10 Acts were also identified that appeared to be redundant. (sub. DR 11, p. 5)

Box G.13 Review of pre-2008 subordinate legislation

A review of all subordinate legislation (regulation made under an Act of Parliament) made before 2008 was undertaken as part of an Australian Government initiative to identify scope to improve regulatory efficiency. This involved screening around 55 000 instruments, including all subordinate legislation in force, contained on the Federal Register of Legislative Instruments.

After examining various classes of instrument on the register around 73 per cent were found likely to have an economic impact on business. 17 per cent were Government internal administrative requirements, while 10 per cent concerned the delivery of services and payments to citizens.

Almost 32 per cent of those regulations likely to have an impact on business were air worthiness directives, that is, technical standards mirroring international compliance requirements for aircraft and aeronautical product safety. While arguably having an economic effect on the aviation industry, discretion to amend or remove them is probably zero. 14 per cent were tariff concession orders which provide tariff relief for importers in relation to Australia's small remaining tariff requirements.

This filtering left 11 444 legislative instruments (grouped thematically in 348 'clusters' for ease of review) which Government departments were then asked to examine. Departments were asked to explain why instruments were introduced; their ongoing relevance; when they were last reviewed; who they impact and how they operate. The findings were that:

- while there has been no systematic documentation of key processes, the stock of Commonwealth regulation appears to have been reviewed regularly for policy relevance
- as a result, the review identified a relatively small number of targets for regulatory review — around eight broad areas, some of which are already scheduled for review
- the most significant finding was that more attention should be directed to revoking redundant regulation, with around 4200 identified as redundant or potentially redundant.

Source: Department of Finance and Deregulation (2011)

Adequate follow-up would appear to be important. In this regard Finance stated that agreement has been reached with all portfolio Ministers to implement the review's recommended actions, and that they continue to monitor progress regularly (sub. DR11, p. 5).

Table G.1 summarises the key strengths and weaknesses of the main stock management tools considered in this appendix.

Table G.1 Strengths and weaknesses of the stock management tools

	<i>Red tape reduction targets</i>	<i>Regulatory budgets</i>	<i>One-in one-out</i>
Discovery — How well does the approach identify areas of regulation that are imposing high costs and distortions that need reform?			
Strengths	<ul style="list-style-type: none"> Estimating a bottom-up baseline provides information on what regulations are imposing high administrative costs 	<ul style="list-style-type: none"> The application has seen the search for burdens triggered by the desire to introduce new regulation A trading scheme across agencies could encourage each agency to assess the burdens its regulation imposes 	<ul style="list-style-type: none"> Provides a discipline agencies to examine stock of regulations to identify regulations that can be easily removed
Weaknesses	<ul style="list-style-type: none"> May be measurement issues associated with burden reduction estimates These schemes are generally narrow in the scope of burdens they consider 	<ul style="list-style-type: none"> Rigid application may lead to removal of net benefit regulation 	<ul style="list-style-type: none"> Likely to lead to focus on smaller, less costly regulations.
Solutions — How well does the approach identify alternatives (removing or amending regulation) that would significantly improve outcomes?			
Strengths	<ul style="list-style-type: none"> Encourages agencies to review their regulation, and remove or amend those that are no longer effective or imposing unnecessary costs 	<ul style="list-style-type: none"> Encourages greater examination of options to combine and replace regulation when new objectives emerge 	
Weaknesses	<ul style="list-style-type: none"> Mostly the options are reduced reporting, streamlined paperwork processes, and on-line options Removal of whole regulations likely to be limited to those that were redundant Difficulties in setting an appropriate target 	<ul style="list-style-type: none"> Narrow in scope May inhibit the introduction of beneficial regulations 	

Continued next page

Table G.1 (continued)

	<i>Red tape reduction targets</i>	<i>Regulatory budgets</i>	<i>One-in one-out</i>
Influence — How influential is the approach in promoting reform?			
Strengths	<ul style="list-style-type: none"> · Appear to drive change and get public attention · Significant burden reductions reported · Potentially also encourages greater attention to such costs in developing new regulation 	<ul style="list-style-type: none"> · Should raise awareness of the costs of regulations and promote cultural change 	
Weaknesses	<ul style="list-style-type: none"> · Business reports minimal impact on perceived burdens 	<ul style="list-style-type: none"> · Uncertain – only recently implemented and appears difficult to establish · Lack of focus on benefits of regulation 	<ul style="list-style-type: none"> · Significant pitfalls could limit its influence · Lack of focus on benefits of regulation
Cost-effectiveness — What is the return on the review effort?			
Strengths	<ul style="list-style-type: none"> · Effective at enhancing the culture of reform across departments 	<ul style="list-style-type: none"> · Lower costs if agencies have a good sense of where burden lies as only have to measure burdens of regulations going in and out 	
Weaknesses	<ul style="list-style-type: none"> · Benchmarking component costs are relatively high. Monitoring and accountability costs may be high 	<ul style="list-style-type: none"> · Substantial measurement issues and costs. Complex 	<ul style="list-style-type: none"> · Dependent on the effort placed into the review process by agencies · May lead to removal of regulations with low burden for the introduction of those with high burden · May lead to ‘gaming’ — agencies waiting until they wish to introduce a new regulation to remove costly or redundant regulations

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H Regulator performance

Key points

- Regulators, in administering and enforcing regulation, will directly influence its effectiveness and compliance costs. They can also help identify regulatory problems that may warrant reform.
- Regulatory policy is giving increasing attention to ways to improve the practices and performance of regulators.
- Regulators' performance, and the overall efficacy of the system, can be enabled or constrained by factors outside the day-to-day control of regulators, including the:
 - tier(s) of government in which regulators are located
 - number of regulators and scope of regulation for which each is responsible
 - extent of their independence and policy making responsibilities
 - resources, enforcement tools and discretion with which they are provided.
- While there is increasing agreement on principles for administering and enforcing regulation, some can be difficult to operationalise. Some good practice guides have addressed this by including case studies or detailed prompts for practitioners. Some regulators have established forums to share knowledge and learn from others.
- Many regulators have adopted risk-based compliance strategies and 'escalation' enforcement models, which can reduce costs and increase overall compliance.
- Other elements of good practice include:
 - effective stakeholder consultation and feedback mechanisms
 - clear and consistent means of interpreting and communicating regulatory requirements
 - streamlining of reporting requirements on business
 - transparency, administrative efficiency and accountability.
- Scope for improvements in regulator practices can be identified through benchmarking studies across a range of regulators and/or regulatory regimes, and more focussed reviews of particular regulators or regimes.
- Oversight mechanisms can provide guidance and incentives for regulators to administer and enforce regulation more cost-effectively. The Regulation Taskforce recommended a suite of such mechanisms in 2006, although the extent and effectiveness of their implementation is presently uncertain.

This appendix is structured as follows:

- section H.1 looks at the links between regulator practices and regulation reform
- section H.2 canvasses some matters relevant to the institutional and governance frameworks for regulators
- section H.3 examines aspects of ‘best practice’ in areas within regulators’ ambit
- section H.4 discusses policies and mechanisms that can be used to improve regulator performance.

H.1 How regulator practices relate to regulation reform

The activities of regulators — those agencies and personnel charged with administering and enforcing regulation — can influence the success of a regulatory reform agenda in two key ways.

First, through their interactions with business and other stakeholders and through their experience with regulation ‘at the coal face’, regulators are in principle well situated to help identify problems warranting regulatory reform. These may be existing laws, rules or requirements that are unnecessary, ineffective or unduly costly to enforce or comply with, or social and economic problems that might warrant additional regulation. With the right mechanisms and incentives in place, regulators can feed this information back to policy makers or, where they have the discretion, modify requirements themselves.

Second, the manner in which regulation is administered and enforced will itself affect the regulation’s benefits and costs. The adoption of leading practices by regulators can make regulation more effective, enabling greater realisation of its underlying objective, or can reduce the costs of attaining a particular level of compliance. By contrast, poor regulator practices can discourage compliance, squander government resources and/or add to business costs and delays. Even where new or reformed regulation is appropriate and well designed, poor enforcement practices can risk rendering it ineffective, or unduly burdensome, or both.

Awareness of such risks has heightened in recent years, and the problem of regulator practices adding unduly to regulatory burdens has been raised in submissions to several studies (for example, Regulation Taskforce 2006; PC 2008f; 2009a; 2009c). In comments to the Regulation Taskforce, the Business Council of Australia said:

In addition to the contribution to the compliance burden made by legislation itself, the approach adopted by the regulators and enforcers of legislation can add considerable compliance costs. In particular, compliance costs can be unnecessarily high where there is a lack of delineation between the roles of regulators, a lack of clarity over their powers, confusion over their objectives in exercising those powers and a lack of coordination between regulators. The attitude of the regulator to the industry under regulation also has a major impact on compliance costs. (Regulation Taskforce 2006, p. 159)

Participants in this study have made similar remarks (box H.1), and a recent survey of senior business executives also raised some concerns (AIG 2011).

Box H.1 Participants' views on the costs imposed by regulators

Department of Innovation, Industry, Science and Research:

According to industry information gathered by DIISR [Department of Innovation, Industry, Science and Research] to inform its submission to the 2008 TGA [Therapeutic Goods Administration] consultation, *Use of Third Party Conformity Assessment Bodies for Medical Devices Manufactured in Australia*, assessment in larger markets ... is often quicker at around 90 days versus around nine months in Australia; and cheaper at around AUD 5000 for the European market versus around AUD 100,000 in Australia. (sub. 6, p. 16)

WSP Group:

... a regulated business will have to work out how to comply with multiple compliance regimes administered by a single government department or regulator. Often, the business will be issued with multiple 'compliance control instruments' such as licences, registration notices, etc. (sub. 1, p. 2)

Property Council of Australia:

... the subsequent high-level commitment by the Council of Australian Governments (COAG) to regulatory reform and removing administrative burdens on business has failed to filter down to regulators. (sub. 7, p. 3)

In addition, the Council also noted that:

Regulator stringency is usually too high. Even when regulation is legitimately needed, it is often applied too broadly, and captures businesses which weren't the intended target... (p. 6)

Australian Chamber of Commerce and Industry:

Even where the policy at the Departmental level is sound, the implementation by the regulator has not been in line with the policy intent of achieving efficiency. The APVMA [Australian Pesticides and Veterinary Medicines Authority] appears to be looking at efficiency solely in terms of cost savings for the regulator and not for industry. (sub. 4, attachment, p. 8.)

Accord Australasia:

Australian regulatory agencies also appear to escape the level of parliamentary and departmental financial and performance scrutiny that is applied to budget-funded agencies. Industry believes that this is due in part to the fact that Australian regulatory agencies are fully cost-recovered. (sub. 8, p. 7)

Australian Services Roundtable:

Greater efforts to fight regulatory myths, creep and myopia that result in regulations being implemented beyond the extent of the original policy intent, covering an increasing volume of businesses and business operations and failing to recognise opportunities for business co-option into policy implementation in ways that enhance the operation of markets, and deliver policy outcomes at lower cost for business and government. (sub. 9, p. 2)

It is becoming recognised that regulation reform agendas have focused primarily on the content of regulation, with less attention being paid to the practices of those who administer the regulation and institutional arrangements and mechanisms for guiding them. As noted recently in the Victorian context:

For many years, the Victorian Government has been active in improving the first stage of the regulatory process — designing regulation — and has become increasingly engaged in the third stage, of reviewing and evaluating regulation. It has paid less systematic attention to administration and enforcement, although there have been recent developments, particularly at the portfolio level. (VCEC 2010, p. 2)

Similarly, at the international level, the Organisation for Economic Cooperation and Development (OECD) has noted:

In virtually all countries, the implementation and enforcement of regulations, once they have been enacted, is addressed rather less vigorously than the development phase. (OECD 2010f, pp. 10-11)

Countries generally considered front-runners in regulatory practice (such as the Netherlands and the United Kingdom, along with Australia) are increasingly turning their attention to regulator behaviour. At the national level here, the 2006 Regulation Taskforce made several recommendations to address regulator performance across the gamut of regulation. At the state level, the Victorian Competition and Efficiency Commission (VCEC) recently inquired into Victoria's regulatory framework addressing, among other things, the implementation, administration and enforcement of regulation (VCEC 2011a and 2011b). The Productivity Commission itself has made recommendations on aspects of regulator performance, or identified 'leading practices' for regulators, in a number of recent studies on particular areas of regulation (for example, PC 2009a; 2009c; 2010a; 2011c). As discussed in chapter 6, the Commission sees considerable value in further research being undertaken into regulator practices and performance across Australia.

Regulator performance depends on the framework in which the regulators operate — including legislative requirements, regulators' powers and any oversight arrangements — and the processes and strategies they adopt within that framework. Available (skilled) resources are also relevant. Accordingly, further research or reviews, and any consequent reforms, may at times need to traverse some of this wider territory.

Against this background, the following sections of this appendix discuss, in turn: matters relevant to the institutional and governance arrangements for regulators; key aspects of good regulator practice; and some mechanisms for promoting and embedding reform in these areas. The discussion draws on a regulatory literature that includes several governmental guides and reports on regulator practices (for example, ANAO 2007; United Kingdom Government (Hampton Review) 2005) and previous studies and reports by the Productivity Commission, the Office of Regulation Review and the Regulation Taskforce).

H.2 Institutional and governance arrangements

Agencies charged with administering and enforcing regulation operate under a range of institutional and governance arrangements. Some key ways in which they can differ, that can have relevance for the efficacy of regulatory administration and enforcement, are the:

- tier(s) of government in which they are located
- scope of regulation for which they are responsible
- extent of their independence and policy responsibilities
- enforcement tools and other resources with which they are equipped.

Tiers of government

Some regulators are creatures of the Commonwealth (for example, the Civil Aviation Safety Authority); some of state and territory governments (for example, the Independent Pricing and Regulatory Tribunal of New South Wales). Local governments also administer and enforce regulation. In some regulatory fields, such as food safety, enforcement may be undertaken by a range of agencies operating at different tiers of government. Moreover, even where laws are enacted at the Commonwealth level, their enforcement may be reliant on regulators operating at the state or territory level. Similarly, the enforcement of some state laws is devolved to local governments.

The OECD has suggested that there may be value in an elaboration of principles for adopting national versus local regulatory administration, to address issues in multi-level regulatory governance (OECD 2010g).

Numerous considerations are potentially relevant for determining an efficient and effective allocation of regulatory enforcement functions within a multi-tiered system of government. They include (but are not limited to):

- the desirability of aligning enforcement responsibilities with impacts, such that responsibility for enforcing a particular law is matched as closely as possible to the jurisdiction which will be most affected by breaches of the law
- the ‘economies of scale and scope’ that are attained, or forgone, by specialising enforcement tasks and pooling expertise, as may more readily occur under a centralised model
- the importance of any compliance costs for businesses that operate in multiple jurisdictions that arise from different enforcement practices across jurisdictions

-
- the scope for, and benefits of, learning from different regulatory approaches and innovation, which may occur naturally under a decentralised model where approaches that prove successful in one jurisdiction can be adopted by others
 - the transition costs entailed in any change of enforcement responsibilities to new bodies or different tiers of government (ORR 1995).

One implication of the number and complexity of such considerations is that there can be no ‘one size fits all’ approach to the issue. Rather, the optimum allocation of enforcement responsibilities between governments is likely to vary between different fields of regulation, being contingent on the particular characteristics of each field. Moreover, in practice issues of jurisdictional sovereignty and even ‘patch protection’ may limit the scope to achieve and sustain an ideal structure. These complexities mean that any reforms to the allocation of responsibilities need to be carefully evaluated ahead of time — and any simple push to centralise (or decentralise) most or all regulators is unlikely to be warranted.

Scope of regulation

At whatever level(s) of government regulators are located, regulatory efficiency is also influenced by the scope of the regulation for which each regulator is responsible.

Regulators are typically responsible for a particular field or sub-field of regulation. Thus, for example, the responsibility for different aspects of financial regulation is assigned to specific bodies, including the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA), the Australian Accounting Standards Board and the Auditing and Assurance Standards Board. ASIC itself administers nine pieces of legislation (or relevant parts of them) with other regulators administering the remaining parts: for example, parts of four Acts dealing with prudential regulation are administered by APRA (ASIC 2011).

At the same time, some regulators may be responsible for enforcing regulation covering a range of fields. For example, ‘environmental health units’ in some local governments are responsible for enforcing food safety, vermin control, infectious diseases and waste management regulation.

There has been reform, recently, to the delineation of regulators in some fields. For instance, prior to July 2010, responsibility for trade measurement was located within specialist trade measurement regulators, with responsibility for other forms of measurement regulation (including, for example, the certification of analytical laboratories) undertaken by another regulator. Responsibility for trade measurement

and other forms of measurement have now been combined within the one body — the National Measurement Institute.¹

While such rationalisation can have benefits, determining the ideal number and delineation of regulators in different fields again turns on a number of considerations, most obviously:

- the ‘economies of scale and scope’ for government that are attained, or forgone, by spreading responsibilities over a range of (specialist) agencies, rather than centring them in a few
- the extent of any difficulties for business in having to deal with a range of different regulators rather than ‘one stop shops’
- the extent to which coordination mechanisms — such as Memorandums of Understanding covering data sharing or joint enforcement activities, or forums of regulators within an industry — are feasible to alleviate problems of overlap or inconsistency associated with multiple regulators.

Policy making responsibilities

The form in which regulatory agencies are constituted and their relationship to the policy arms of government also vary. For example, some regulators (such as ASIC) are constituted as independent statutory authorities, whereas others (such as the Therapeutic Goods Administration) are constituted as units or agencies within government departments. There are also differences in the breadth of regulators’ policy responsibilities. In particular, some regulators are charged solely with administering and enforcing regulation designed by separate policy agencies, while other regulators additionally have responsibilities for developing regulation.

The separation of policy and regulatory functions can have advantages such as reducing the risk of regulatory ‘capture’ which can distort regulation making towards the interests of certain regulated entities. Separation can also reduce the risk that regulators develop agendas of their own or add to regulatory requirements, which may add to the cumulative burden and overall complexity of regulation, without due consideration of other policy goals. Some participants raised concerns about regulators implementing regulation beyond the intent of policy (box H.1), and related concerns were taken up by the Regulation Taskforce (section H.4).

¹ The reform, undertaken as part of the COAG Seamless National Economy agenda, also involved elevating enforcement responsibility for trade measurement regulation from state and territory governments to the national level (NMI 2011).

A challenge associated with the separation of policy and regulatory responsibilities relates to its impact on feedback to government about the costs and efficacy of the regulation. Where regulators themselves can make regulation, staff with experience ‘at the coal face’ may be better placed to help inform the design (or redesign) of regulation. Where such staff are housed in a separate agency, policy makers need to ensure there are effective channels open to harness their knowledge and expertise. At the same time, separation could facilitate greater feedback from external sources, particularly where the ‘clients’ of regulators are more willing to provide feedback on problems to a separate government department than to an ‘all-in-one’ regulator.

Overall, while other considerations such as the size of the regulator are also relevant, there are often good reasons for policy and regulatory responsibilities to be separated. As the Commission noted in its report *Caring for Older Australians*:

One of the key lessons emerging from the broad sweep of regulatory experience is to separate regulatory responsibility from policy responsibility in governance. (PC 2011a, p. 392)

Enforcement tools and sanctions

A theme in the regulatory literature is that an appropriately wide range of tools to enforce (or encourage compliance with) regulation — when coupled with appropriate enforcement strategies (section H.3) — is desirable for efficient regulation. Access to a range of tools allows regulators to tailor their responses to breaches or potential breaches of regulation in a proportionate way. ‘Tools’, in this sense, include not just fines and other sanctions for breaches; they can also include educational initiatives, power to bestow awards for good business practices, licensing and reporting requirements, and different types of inspection regimes.

Some of the tools available to enforce any particular regulation — particularly licensing requirements, and penalties and sanctions for breaches — are typically provided for in the relevant legislation. Policy makers need to ensure that this does not unduly constrain regulators in how they respond to breaches, or preclude the use of some tools that may be necessary for effective (and low cost) compliance strategies.

In this context, discretion is another important facility for regulators. The discretion to ‘waive’ certain requirements, or to not enforce penalties for minor or initial breaches of regulations, may not only reduce costs to both regulators and business but also be a way of winning the cooperation of businesses and attaining a higher level of overall compliance. While discretion can enable more cost-effective administration and enforcement of regulation, a challenge is that its use may be inappropriate in some contexts (for example, where breaches may generate high

risks of costly outcomes) and that it can broaden scope for corruption. (Oversight and accountability mechanisms for regulator practices can help condition the use of discretion to align with the objectives of regulation.)

Resourcing

Leading practice in administration and enforcement of regulation requires adequate resources for staffing, communication, information management and research, and appropriate resourcing of regulators is often raised as a consideration in improved regulator practice. A recent example is the independent review of enforcement by the Victorian Environment Protection Agency (EPA), which called for the EPA to significantly increase the number of environmental protection officers in order to effectively discharge its compliance monitoring and assurance functions and to take a more proactive role to prevent environmental incidents and harm (Krpan 2011).

Of course, high quality staffing and the other activities of regulators have budgetary implications, and it is almost inevitable that regulators will not be granted sufficient funds to fully enforce all regulations for which they are responsible:

Few laws, from those against robbery and reckless driving to those against tax evasion and securities fraud, are fully enforced ... Although regulatory agencies generally lack the appropriations to ensure full enforcement, hardly any government body — the highway department, the Coast Guard, the Bureau of Prisons, and so on — is allocated sufficient funds to fulfil its statutory duties perfectly. (Kagan 1994, p. 384)

There may in fact be good reasons for limitations on the resources allocated to regulators. Even if it were feasible, the full enforcement of regulation (particularly prescriptive regulations) would not always be desirable, because such regulations cannot readily accommodate the many different circumstances and changing conditions encountered in society. In any case, public funding for administration and enforcement involves an opportunity cost, and regulators may not have a greater call on additional public expenditure than other government priorities.

The Australian National Audit Office (ANAO 2007) has argued that the need to manage limited resources can also sharpen incentives for regulators to be efficient and in this way have the effect of reducing compliance costs. However, there is a risk that inadequate resourcing of regulators can lead them to utilise less efficient enforcement tools and/or to focus on strategies that shift costs or place heavier burdens on the regulated entities.

While the level of resources devoted to regulators will ultimately reflect political decisions and budgetary priorities, regulators can only achieve what their resources will allow. Where the resources provided are less than necessary to allow the

effective enforcement of all regulations within a particular regulators' ambit, governments can assist by providing guidance to regulators as to the areas of enforcement priority or, at least, guidance on how judgements about those priorities should be made. (Regulatory oversight mechanisms that can provide such guidance are discussed in section H.4.)

H.3 Regulator practices

While the matters discussed in section H.2 all bear on the potential cost and effectiveness of regulator practices, they lie outside the direct day-to-day control of regulators themselves.

What regulators can control is how they interpret the guidance and responsibilities they are given and how they use the powers, resources, tools and available discretion. While what constitutes 'best practice' in this regard may vary at a detailed level, there is increasing agreement on principles for good practice. Key matters addressed in the literature include:

- compliance and enforcement strategies
- stakeholder consultation and feedback mechanisms
- interpreting and communicating regulatory requirements
- streamlining of reporting requirements on business
- transparency and administrative efficiency.

Compliance and enforcement strategies

Risk-based approaches to compliance and enforcement can reduce costs for businesses and regulators and/or facilitate greater achievement of the underlying objectives of the regulation, which can reduce costs and increase overall compliance. A risk-based approach can have several strands:

- prioritising particular regulations for enforcement — for instance, particularly where an enforcement agency has insufficient resources or means to monitor all regulations within its ambit, it will focus on the most important and may need to eschew some less important ones altogether
- focusing on those classes of businesses or activities presenting the highest risks, when undertaking surveillance or inspections or in specifying business reporting requirements
- undertaking enforcement actions for those breaches presenting the highest risks.

Risk-based compliance and enforcement strategies will of course also benefit from rigorous risk assessment and profiling processes.

The use of these approaches has increased over time. As the OECD (2010g) noted in its recent review of Australia:

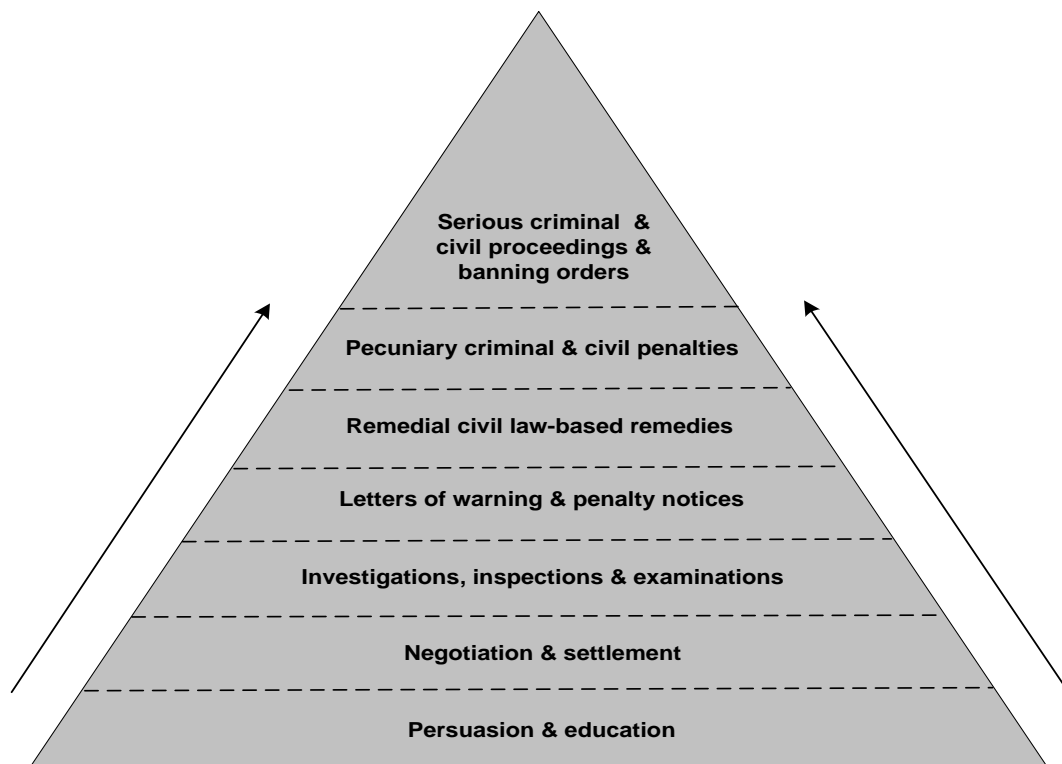
States are taking strong action toward relying on risk-based enforcement strategies. In all States, at least half of business regulators had risk-based enforcement strategies as of June 2007. (p. 69)

In its benchmarking studies, the Commission has found widespread use of risk profiling and risk-based enforcement among regulators in both the food safety and the occupational health and safety fields, but less use in the area of planning, zoning and development assessments (PC 2009b; 2010a; 2011c).

Another important factor in determining a regulator's effectiveness and efficiency is whether it adopts a 'tough' deterrent strategy, a 'soft' advise-and-persuade strategy, or mixed approach. The literature suggests that an enforcement strategy based solely on deterrence would antagonise the many businesses which are willing to comply, as well as risk a subculture of regulatory resistance if the focus on punishing is deemed unfair. On the other hand, a regulator with a pure advise-and-persuade strategy could embolden recalcitrant businesses which intentionally choose not to comply. Moreover, if businesses are seen to 'get away with it' because of lax enforcement, this could in turn have a discouraging effect on compliant businesses. There can also be anti-competitive effects, where businesses complying with the regulation face higher costs than those that do not.

Reflecting the limitations of either approach when used on its own, leading practices often entail a mixed 'escalation' model, where regulators start with a soft approach and increase their toughness in relation to (only) those businesses that continue to fail to comply. These models use what are commonly known as 'enforcement pyramids' (figure H.1), with all regulated entities subject to action at the bottom of the pyramid, and fewer and fewer businesses subject to the higher compulsion and levels of sanction or penalty higher up the pyramid. Importantly, appropriate enforcement pyramids will vary across different fields of regulation — for example, for breaches of regulations that entail high risks of costly outcomes, enforcement efforts may need to eschew some 'soft' elements and move very rapidly to tough sanctions.

Figure H.1 **Example of an enforcement pyramid**



Sources: PC (2010a); adapted from Gilligan, Bird and Ramsay (1999); Ayres and Braithwaite (1992).

The appropriate balance of approaches to enforcement can be contingent on considerations specific to the firm, industry, regulation and regulator in question. These include, for example, the size of the regulated firm, the rate of turnover of firms in a particular industry, the ease of detecting breaches of different regulations, the level of risk or detriment associated with a particular breach of a regulation, and the resources available to the enforcement agency. This implies a limit to the value of any detailed ‘one size fits all’ prescriptions for regulator practice.

Consultation and feedback mechanisms

Having systems in place to promote consultation between a regulator and stakeholders (including business and not-for-profit organisations, consumers and other regulators) has been seen as a key mechanism by which regulators can improve the effectiveness and efficiency of their practices, and identify regulations or requirements that are imposing an unnecessary burden. The quality of this information, including precise indications of the sources of compliance costs, is important for regulators in considering how to minimise the regulatory burden.

Regulators have taken various approaches in seeking information on the regulatory burden (box H.2). Alongside day-to-day consultation mechanisms (including

complaints portals) for regulated entities, establishing business cost panels or undertaking stakeholder surveys may provide more useful feedback to regulators on existing compliance costs and their origins. Regulators can also hold workshops or undertake, or commission, formal reviews to elicit feedback on burdens. Internally, regulators can monitor the timeliness of their dealings with business, such as turn-around times for applications. In a recent Australian survey of business chief executive officers, waiting for a regulatory decision was nominated as the most costly stage of the compliance process (AIG 2011).

Box H.2 Mechanisms used by regulators to identify problematic regulations and practices

Regulators can use a range of mechanisms to communicate and interact with business so as to improve both the stock of regulation and their administration of it.

- A number of regulators have established consultative forums which facilitate consultation and feedback from industry or the community. Examples of regulators using this mechanism include ASIC, the Australian Communications and Media Authority, and the Therapeutic Goods Administration (TGA).
 - *Ad hoc* measures to supplement these – such as business cost panels and stakeholder surveys – can pinpoint the source of compliance cost. For example, ASIC’s 2008 stakeholder survey asked for feedback on the clarity, timing and consistency of its regulatory decisions, and feedback from this was used to inform a number of reforms. A number of regulators have also taken to reporting against indicators of timeliness and predictable timeframes in their administration of the regulations and communications with business.
- Some regulators also have internal mechanisms for complaints, such as the Industry Complaints Commissioner within the Civil Aviation Safety Authority. The Commissioner is a co-ordinating point for all complaints about the authority, and may recommend changes to the authority’s processes.
- Feedback obtained from these mechanisms and processes, or other consultation or complaints processes, can be used to improve the stock or administration of regulation, or be the trigger for a review of the regulation.
 - A recent example is the TGA, which in early 2009 commenced a significant program of business process reforms for the regulation of prescription medicines in Australia based on key elements identified during an industry consultation workshop held in December 2007.
- Regulators may also commission a review of their processes. For example, following earlier external criticism, the Victorian Environmental Protection Authority commissioned an independent review of its monitoring and enforcement processes. The review received submissions from industry and made 119 recommendations, which are now being implemented.

Source: Allen Consulting Group (2008); Krpan (2011); ASIC, ACMA, TGA and CASA websites.

Other elements of good practice

The literature on regulatory performance covers, in substantial detail, a range of other measures to improve the efficiency of regulator performance. These include improvements in administrative systems so that:

- data requests to business are minimised through standardising, streamlining and reducing information and reporting requirements, and reporting is made less onerous, for example through e-reporting (see box H.4 for further detail)
- regulatory requirements are interpreted in a consistent manner, and information on the requirements is clear and easy to find
- waiting times for regulatory decisions are minimised, possibly through introducing ‘silence is consent’ policies (such as in the Netherlands, for example — see appendix K for further detail).

These and other elements of good practice are discussed in more detail in the range of guides and reports that have been released in recent years, as discussed in the next section.

H.4 Regulator management policies and mechanisms

While there is agreement on many elements of what constitutes ‘best practice’ for regulators, it appears that the approach adopted by many regulators has not always followed this. The comments in submissions to this study (box H.1) are just the most recent in a long history of complaint from business. And in past reviews, the Commission and others including the Regulation Taskforce have found that, while some regulators have taken steps proactively to reform their practices, regulator practices could be improved.

There are three broad external means by which regulator practices are conditioned or influenced:

- provision of guidance
- reviews of regulators
- use of oversight mechanisms.

Guidance for regulators on good practice

Many jurisdictions in Australia have released ‘best practice’ (or ‘better practice’) guides for use by regulators (box H.3). These typically cover the sorts of matters outlined in the previous section, albeit in different levels of detail. On the basis that ideal regulator practices vary from field to field and from regulator to regulator, general guides typically focus on general tips, considerations and principles rather than providing detailed direction. For instance, the ANAO (2007) guide states:

In writing the Guide, we recognised that regulators come in all shapes and sizes. They regulate very different types of entities operating in very different industries and sectors of the economy. The Guide, therefore, focuses on better practice principles and characteristics that are relevant to the design and management of administrative operations for all regulators, irrespective of their size, organisational structure or regulatory objectives. (p. i)

Some overseas jurisdictions, including the United Kingdom (box H.3), have also developed guidance to improve the quality of administration and enforcement of regulation. This guidance has focused on: compliance checking and enforcement and use of risk-based approaches; the clarity and accessibility of the regulation to users; the timeliness and predictability of government regulatory services; and feedback mechanisms on the burden of red tape.

Alongside such ‘high level’ guides, bodies within particular regulatory fields may issue more specific guidance. For example, the Heads of Workplace Safety Authorities developed the ‘National Occupational Health and Safety (OHS) Compliance and Enforcement Policy’ to assist OHS regulators in each jurisdiction to implement effective enforcement practices. Some key principles of the policy are regulator consistency (similar workplace circumstances leading to similar enforcement outcomes), proportionality (responses being proportionate to the seriousness of the non-compliance), and transparency (demonstrating impartiality and balance in decisions). The document also highlights the need for responsive regulator enforcement, including using a mixture of tools to encourage business compliance (PC 2010a).

There can be difficulties in translating principles for regulator behaviour into practice. This is partly because some practices will rightly vary from situation to situation, as appropriate actions can be contingent on matters including the nature of the risk being regulated and the institutional arrangements under which a regulator operates, as well as a range of firm- and industry-specific considerations. A further potential limitation of principles is that sometimes they can be too abstract to readily ‘operationalise’.

Box H.3 Some good practice guides for regulators

Australian governments have developed best practice guidance for regulators.

- The ANAO's (2007) *Administering Regulation: Better Practice Guide* emphasised: governance considerations (including managing risk); information management; relationship management (including facilitating communication and efficient consultation); resourcing issues; controlling entry to a market; monitoring compliance; addressing non-compliance; and responding to adverse events. The Guide also included case studies of better practice principles and approaches.
- The Queensland Ombudsman's (2009) *Tips and Traps for Regulators* looks at the role of: knowledge, skills and values; discretion and the role of risk management; investigative practices; systems for effective regulation; regulators working together; communication with the public; regulatory independence; recordkeeping and electronic data capture; complaint management and audits of regulators. The report also contains a set of new case studies that demonstrate aspects of good regulatory practice.
- The New South Wales Better Regulation Office's (2008) *Risk-Based Compliance* sets out the steps in adopting a risk-based compliance approach, including: identifying risks of non-compliance; analysing risks of non-compliance; prioritising risks of non-compliance; identifying and selecting compliance measures; planning for implementation; and reporting and reviewing.
- Consumer Affairs Victoria's (2008) *Better Business Regulation* sets out good practice that relates to the following tasks: develop administrative processes to enable implementation; educate stakeholders about the government interventions; receive and respond to enquiries and complaints; register and license entities; manage ongoing registration/licensing process; monitor and enforce compliance of regulated entities' practices, processes and performance; assess the performance of the government intervention; and review the objectives of the government intervention.

In the United Kingdom, in response to the 2005 Hampton Review, a statutory Regulator's Compliance Code has been developed to encourage proportionate and flexible enforcement by regulators so as to minimise the regulatory impost.

- The Code emphasises the quality of communication about regulatory activities and legal requirements on regulated entities, and information requirements. Where two or more regulators require the same information from the same regulated entity they should share data where this is practicable, beneficial and cost effective.
- Regulators are required to ensure that risk assessment precedes and informs all aspects of their approaches to regulatory activity. They are also required to enable inspectors and enforcement officers to interpret and apply regulatory requirements and enforcement policies fairly and consistently.

Sources: ANAO (2007); BERR (UK) (2007); Consumer Affairs Victoria (2008); NSW Better Regulation Office (2008); Queensland Ombudsman (2009).

To help deal with such problems, some guides — such as the ANAO’s and the Queensland Ombudsman’s (box H.3) — have used case studies to illustrate regulator practices that reflect the principles. In the United Kingdom, the National Audit Office in a recent initiative has developed guidance to implement the Hampton Review principles for national regulators and to assist the spread of good practice in the regulatory community. This guidance includes a set of high level criteria and positive ‘symptoms’ or indicators that assist the understanding of, and compliance with, the principles (box H.4).

The provision of such guidance on best practice can be useful, and may augment regulators’ own knowledge bases, although the extent to which best practice principles are reflected in regulator practices will continue to depend at least in part on the incentives regulators face to adopt such practices.

Reviewing regulators

Improvements in regulator practices and performance can come about directly or indirectly through reviews and studies.

Benchmarking studies

Benchmarking studies (appendix F) can be used to compare aspects of regulation and regulator performance and practices either across different regulatory regimes and/or across jurisdictions for one or more regulatory regimes.

The Commission has completed two benchmarking studies on aspects of regulations and regulatory practice across a range of regulatory regimes and across Australian jurisdictions. One examined indicators of the quantity and quality of regulation; the other examined differences in registration costs and processing times for applications to different regulators (box H.5).

It has also undertaken three field-specific studies — benchmarking some aspects of the regulations and regulator performance and practice in the areas of food safety, OHS, and planning, zoning and development assessments. These have considered a variety of differences in the regulatory requirements as well as administration and enforcement in those fields (box H.5).

Box H.4 **Guiding regulators' use of best practice principles: an approach in the United Kingdom**

In implementing the Hampton Review's set of ten principles for best practice in regulatory inspection and enforcement, the United Kingdom National Audit Office prepared guidance for the use of these principles, in a review of five major regulators. The essence of the guidance is a small set of 'high level questions' to guide the thinking of the review team, and 'positive symptoms' which aim to guide reviewers in what to look for.

As an example, one of the Hampton Review principles is that:

Business should not have to give unnecessary information, nor give the same piece of information twice

For this principle, the 'high level questions' are:

- Is there a clear, genuine purpose for information that is collected and do the benefits justify the costs?
- Are processes in place to make it as easy as possible for businesses to complete forms?
- Has data-sharing with other organisations been explored?
- Has the organisation made use of IT to streamline data-submission processes?

The 'positive symptoms' for the principle are:

- The purpose of the data collection is clear and understood by businesses and used when information is not available from existing sources
- Forms, data requests and record-keeping requirements are clear and targeted and risk-assessment is used to determine the level of information required
- Forms are simple and easy to navigate and include guidance on completion and contact details for further help
- Illustrative examples of record-keeping are developed to ensure businesses do not over-implement legal requirements
- Forms, data requests and record-keeping requirements are regularly reviewed, with feedback sought from businesses on the time taken for completion
- The process for design of forms and data collection is based on cost-benefit analysis, internal challenge (e.g. a gatekeeper) and consultation with businesses
- There is little or no duplication of data requests in the regulator's forms
- Businesses are asked to update information as infrequently as possible
- Where possible, data is collected in the form that businesses do themselves
- The regulator makes good use of IT solutions in data-collection and provides alternatives to paper forms.

Source: NAO (UK) (2008b).

Box H.5 The Commission's performance benchmarking program

Since April 2007, the Commission has completed the following five regulatory benchmarking studies in specific areas nominated by the Council of Australian Governments (COAG).

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

A limitation of benchmarking studies is that, while they can enable the identification of 'leading practices' in one field, these will not necessarily constitute best practice, nor translate well into other fields. Nonetheless, benchmarking reports provide a means of diffusing information on various approaches and their effects, and can provide a more solid information base for considering whether further research or reform is warranted.

Benchmarking regulator behaviour specifically can also be useful, particularly where this can be linked to outcomes such as compliance costs and compliance rates. Such studies could compare regulators across one sector or regime or, where appropriate, more broadly. This may help identify low cost approaches to enforcing and managing regulatory systems. Aspects that could be compared include: resourcing levels; information requirements and how information is collected; education and assistance to increase compliance; assessment of risk and how these assessments feed into monitoring, administration and enforcement practices; fee basis (cost recovery or other); level and nature of coordination and cooperation with other regulators; experience and skill levels of inspector and other regulatory staff; and any powers the regulator may have to respond flexibly according to the risk posed by a particular business type or even, for example by reducing the number of inspections of low-risk businesses. Such review work may inform the development of better institutional models for the efficient delivery of that regulation. Different organisational models, such as ‘super-regulators’ (so that business deals with just one regulator instead of several), or regulator independence, could also be benchmarked to help identify potential gains in efficiency or effectiveness.

Regulator-specific reviews

Regulator practices can also be examined and potentially improved through reviews of specific regulators, either on their own or in conjunction with a review of a particular field of regulation. Such targeted reviews may provide a better opportunity to address the institutional and governance arrangements for effective regulation.

Many Productivity Commission public inquiries have addressed aspects of the practices of specific regulators as part of their consideration of a particular field of regulations, through what have essentially been in-depth reviews (appendix C). As well as being able to examine the practices of particular regulators, in-depth reviews of industry sectors or regulatory fields are the type of review exercise best suited to considering the wider matters of whether regulators should be amalgamated or the appropriate level of government at which enforcement should occur, and these matters have been considered in a number of Commission studies of this kind (PC 2009b; 2010a; 2011c).

Outside the Commission, other regulator-specific reviews include the independent compliance and enforcement review of the Victorian EPA undertaken in 2010 (box H.2). This made recommendations in the areas of: compliance monitoring and enforcement effort, and the adoption of a risk-based and responsive regulatory model; ensuring transparency about decisions and clarity on the EPA's role and its approach to regulation; and building staff expertise and knowledge.

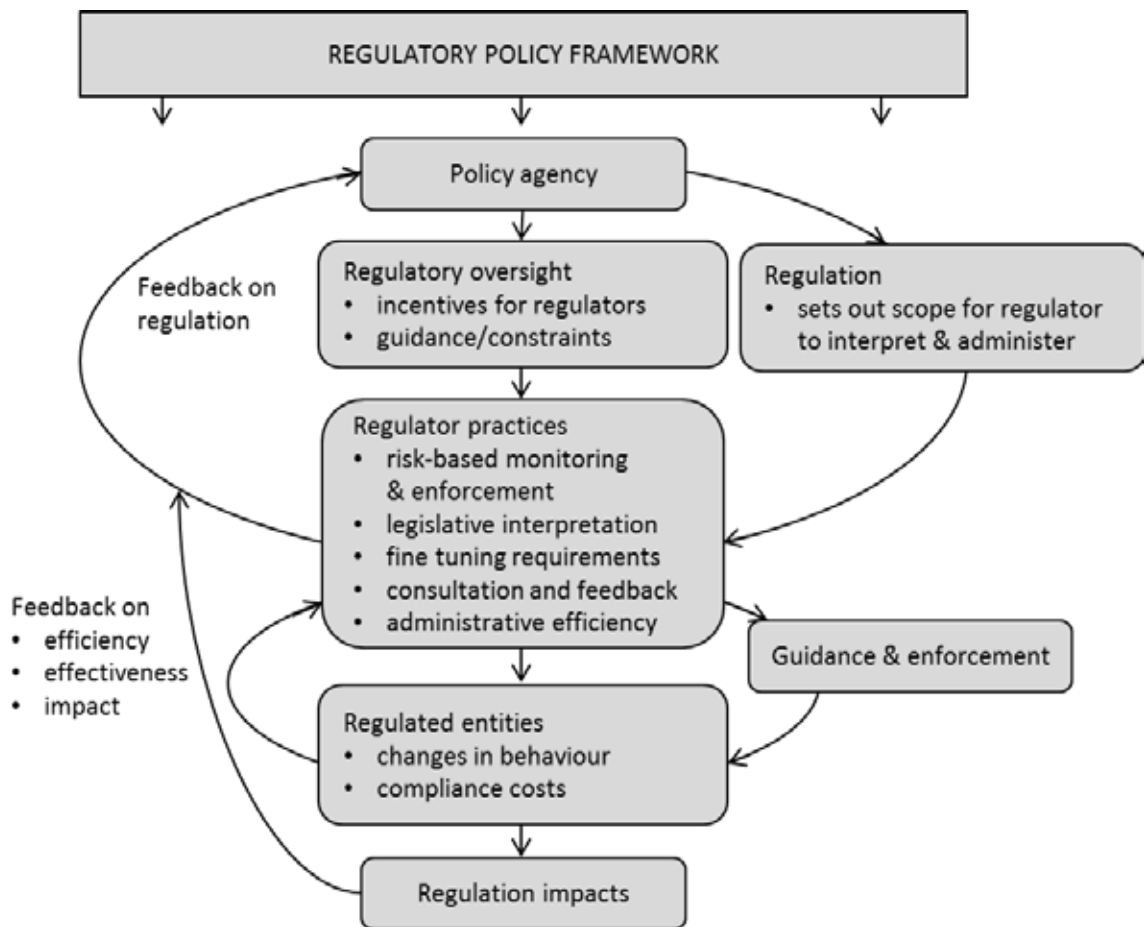
The Commission's suite of reports on regulatory burdens has also provided some scope to consider the practices of specific regulators and, where appropriate, related recommendations. However, as primarily complaints driven exercises, such reviews are not ideal for considering regulator performance in a more systematic way.

Regulatory bodies may also be subject to performance audits by the ANAO or equivalent bodies in other jurisdictions outside the Commonwealth. These may, in investigating the performance of regulators, also examine what processes the regulator has in place. Past performance audits have identified scope for improvement in areas such as systematically applying risk management procedures to address administrative cost effectiveness; measuring and reporting regulatory performance; ensuring consistency in decision making; documenting key operational and regulatory decisions; planning and implementing compliance monitoring programs; and managing enforcement actions (ANAO 2007).

Oversight mechanisms

Oversight mechanisms aim to better align regulator behaviour with good practice by influencing regulators' choices as to the types of approaches they adopt. Figure H.2 illustrates the links between regulator practice — which is key to cost-effective administration of regulation — and regulatory oversight. Oversight mechanisms can provide guidance and incentives for regulators in relation to their administrative practices. They can also influence the regulator feedback mechanisms, which in turn may inform policy and the need for regulatory reform.

Figure H.2 **Regulator practice and oversight within the regulatory policy framework**^a



^a While in this figure regulator oversight is the responsibility of the policy agency, this might not always be the case, especially where the administration and policy-making functions reside within the single entity.

Regulation Taskforce recommendations

The Regulation Taskforce (2006) recommended several measures with the aim of ensuring good performance by regulators, including achieving a more balanced approach to risk. In the Taskforce’s analysis, many of the problems perceived about regulator behaviour, including excessive risk aversion, reflect the incentives regulators face.

The Taskforce’s recommendations were directed to three broad areas: clarifying policy intent; sharpening regulator accountability, through expanded performance reporting and strengthened review and appeal mechanisms; and improving communication and interaction with business (table H.1). (The Taskforce also made specific recommendations on some of these matters in relation to ASIC and APRA — box H.6.)

Table H.1 Regulation Taskforce recommendations to ensure good performance by regulators

Recommendations

- 7.14: Legislation should provide clear guidance to regulators about policy objectives, as well as the principles they should follow in pursuing them. Guidance should be explicit about what balance is required, where trade-offs in objectives exist, and the need for risk-based implementation strategies.
- 7.15: Responsible ministers should highlight those elements referred to in recommendation 7.14 in parliamentary second reading speeches and in the Statements of Expectations that are to be developed following the Uhrig Report.^a
- 7.16: Regulators should develop a wider range of performance indicators for annual reporting
- 7.17: Regulators without mechanisms for internally reviewing decisions should establish them.
- 7.18: There should be provision for merit review of any administrative decisions that can significantly affect the interests of individuals or enterprises.
- 7.19: Regulators should issue protocols on their public consultation procedures. These would need to be consistent with a whole-of-government policy.
- 7.20: A standing consultative body comprising senior stakeholder representatives should be established for each regulator whose decisions can have significant impacts on business and other sections of the community.
- 7.21: In consultation with stakeholders, each regulator should develop a code of conduct covering the key areas of interaction with regulated entities.
- 7.22: Regulators should in general appoint 'relationship managers' to facilitate cost-effective interaction with businesses they have frequent dealings with.
- 7.23: Appointees to regulatory agencies should include a mix of people with experience directly related to the activities being regulated.
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^a The Statement of Expectations is a measure proposed by the 2003 *Review of Corporate Governance of Statutory Authorities and Office Holders* (Uhrig review) to improve the governance of Commonwealth portfolio bodies.

Source: Regulation Taskforce (2006).

The recommendations were accepted in general terms by the Australian Government, although their implementation has not been systematically monitored, nor their effectiveness evaluated. From regulators' websites and other publicly available information, the Commission has identified a number of developments that broadly align with the recommendations, but there remains uncertainty as to how extensively and effectively they have been implemented.

Regarding recommendations 7.14 and 7.15, for example, the Taskforce had intended that relevant legislation and Ministerial 'Statements of Expectation' for regulators provide direction on what balance is required in addressing trade-offs in policy objectives, such as the goal of reducing risk and the goal of lessening compliance burdens. While the Government in its final response to the Taskforce's report said that it agreed to these recommendations and indicated that Statements of Expectations and second reading speeches would need to 'highlight policy objectives of legislation', the response did not discuss whether the balance required

in addressing trade-offs between objectives would also need to be addressed (Australian Government 2006, p. 82). A number of Statements of Expectation have addressed these matters, but not all regulators appear to have been provided with the necessary guidance. A lack of guidance can leave regulators needing to deal with multiple and potentially conflicting objectives in the relevant legislation. (This issue was again raised recently in the Commission's 2011 report *Australia's Urban Water Sector* (PC 2011f). The report gave as an example the legislative requirement on the Queensland Competition Authority to have regard to a total of 18 matters when making a price determination.)

In framing recommendation 7.16, the Taskforce had envisaged that regulators would be required to develop Key Performance Indicators (or 'KPIs') covering their: contribution to relevant policy objectives; efforts to lessen compliance cost burdens; and compliance with their Statements of Intent, Regulation Impact Statement requirements, and consultation and other best practice requirements. In its response to the Taskforce's report, the Australian Government (2006) indicated that it agreed with the recommendation and would ask (what is now) the Office of Best Practice Regulation (OBPR) to review the current suite of Regulatory Performance Indicators (RPIs). The RPIs relate to the regulation development and review processes, rather than the performance of regulators. The OBPR (2009) reported in its 2008-09 annual report against the indicators for those departments and agencies that were required to prepare a RIS in that year, although it has since ceased reporting against them. Meanwhile, while regulators' KPIs vary, a number examined by the Commission do address administrative compliance costs, for example those related to the timeliness of administrative decision-making and subsequent communication with affected stakeholders.

There also appears to be wide use of formal consultation mechanisms, including standing committees, in line with recommendation 7.20. More generally, a number of regulators have taken steps to engage business to identify and address regulatory burdens. For example, in December 2007 the Therapeutic Goods Administration convened an industry consultation workshop that identified key elements of what is now a program of business process reforms for prescription medicines. And as noted in box H.6, in 2008, ASIC commissioned a survey of its business and other stakeholders, the results of which have been used to help guide changes to its practices.

Box H.6 Regulation Taskforce recommendations on guidance for ASIC and APRA

The performance of ASIC and APRA — the two main regulators in the corporate and financial field — was a focus of concern in business submissions to the Regulation Taskforce. While the Taskforce recognised the good work of these regulators, it also saw scope for improvement. Among other reforms, the Taskforce's report included some specific recommendations for oversight mechanisms for these regulators. The recommendations on policy guidance were as follows.

- The Treasurer's Statement of Expectations should provide specific guidance to ASIC and APRA about the appropriate balance between pursuing safety and investor protection, and market efficiency. (Recommendation 5.1)
- APRA and ASIC, in consultation with the Australian Government, should develop additional performance indicators to measure the outcomes they achieve, having regard to all their respective statutory objectives, including efficiency and business costs. These indicators should be developed in the context of the Statements of Expectations received from the Treasurer. (Recommendation 5.2)

Both the Treasurer's Statement of Expectation to APRA and APRA's Statement of Intent offered some guidance in relation to the trade-offs APRA faces. As expressed in APRA's most recent annual report: 'prudential regulation should not pursue a 'zero failure' objective. Rather, the objective is to maintain a low incidence of failure of supervised institutions while not impeding continued improvements in efficiency or hindering competition.' (APRA 2011, p. 78).

In relation to ASIC, the Treasurer's Statement of Expectation recognised the trade-offs in different statutory objectives, though gave less explicit guidance as to how this should be managed. However, ASIC has carried through a consideration of the commercial impact of its regulatory decisions in, for example, its internal guidance on using its discretionary powers to grant relief from the provisions of the Corporations Act and other industry regulation (ASIC 2009).

ASIC also commissioned a stakeholder survey in 2008 (Allen Consulting Group 2008) in part to guide the development of additional performance indicators, and the results of this survey have been used to inform developments such as the setting of business compliance cost reduction targets, increasing online interaction, and administering the law to enhance commercial certainty. This followed the earlier publication of *Better Regulation: ASIC Initiatives* (ASIC 2006), which indicated a number of initiatives then in train or intended. ASIC's current Key Performance Indicators emphasise timeliness in providing guidance and the use of risk-based surveillance in certain areas of enforcement (ASIC 2011).

Sources: Allen Consulting Group (2008); APRA (2011); ASIC (2006; 2009 and 2011); Costello (2007); Regulation Taskforce (2006).

Some other mechanisms

A number of other approaches to regulator oversight and regulatory improvement have been adopted or suggested.

Developments in the United Kingdom, which include a (mandatory) Regulators' Compliance Code, appear among the more ambitious. The Code is a statutory measure (box H.4), and any departure from the Code must be properly reasoned and based on material evidence. Regulators are required to measure (and to report publicly on) their performance under the Code, including their costs to regulated entities. The Government's policy for managing the regulatory stock also includes plans to introduce legislation imposing sunset clauses on statutory regulators, requiring regular, cyclical review of their work and allowing Parliament to vote on abolition, merger, reform or retention of the regulator according to a set timetable.

In Canada, the wide-ranging *Cabinet Directive on Streamlining Regulation* addresses each stage of the regulatory cycle — from design, to implementation and enforcement, to evaluation. The Directive requires federal departments or agencies to minimise complexity and duplication between their own requirements and similar or related regulatory requirements of other federal departments and agencies or provincial/territory governments. This is intended to be achieved federally through service-oriented approaches such as 'single-window' service delivery, and across jurisdictions through arrangements such as the mutual recognition of requirements and consistency in reporting requirements. In addition, the Directive requires that federal departments and agencies responsible for regulation:

- publish service standards, including timelines for approval processes set out in regulations, and identify requirements for approval processes
- ensure that adequate resources and skills are available to undertake regulatory responsibilities, develop regulatory plans and priorities for the coming year(s), and report publicly on plans, priorities, performance, and regulatory review in accordance with Treasury Board guidelines (TBCS 2011; appendix K).

In Victoria, the Victorian Competition and Efficiency Commission (VCEC), in its draft report into the State's regulatory framework (VCEC 2011a), identified several shortcomings in the administration of regulation. These included problems related to the complexity of regulations and processes, the cumulative load from multiple overlapping regulators or duplication in the areas of information collection, reporting and audit requirements, and ineffective enforcement.

Among other reform options, VCEC saw merit in having a robust performance assessment framework for regulators, and that a first step towards this goal could be the development of a framework that allows all regulators to measure their administrative, compliance and enforcement activities against ‘good practice’. VCEC considered that the *Better Business Regulation* guide developed by the Victorian Department of Justice and the United Kingdom’s Hampton implementation reviews could provide useful starting points.

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I Ex post evaluation frameworks

Key points

- Ex post evaluations of regulation reforms need to be ‘summative’ in nature; that is, they should evaluate the results arising as a consequence of regulatory change.
 - That said, there is a role for process audits in improving the quality of implementation, and in identifying a need for a summative evaluation.
- Most evaluations draw on qualitative and quantitative methods and evidence in making an assessment of the impacts of a regulation reform.
 - Quantitative methods add rigour to the evaluation, and can make communicating the findings more effective.
 - Where the analysis relies heavily on qualitative evidence, rigour can be improved through ensuring the full range of views are represented in collecting and testing the evidence.
- Key features of evaluation, beyond testing the logic of reform changes to outcomes, are consideration of:
 - the counterfactual — what would have happened in the absence of the reform. Well-designed performance indicators can build in a counterfactual in the setting of targets
 - indirect effects of the reform in an impact analysis — that is the flow-on and other economy-wide effects as part of the analysis
 - timing of the impacts of the reform — how the benefits and costs arise over time from the initial consideration of undertaking a reform
 - distributional consequences from the reform – who bears the costs or benefits from the reform.
- Good ex post evaluation is a potentially powerful tool that can attest to the value of a reform and provide lessons for future reforms.
 - Evaluations can improve the understanding of the impacts of regulation on risk — both the probability of an adverse event and the impact if it arises. Ex ante perceptions of risk are often distorted.
 - To be more effective, ex post evaluations need to: be resourced in advance; embed data collection where it is not otherwise available; share the findings; and include governance arrangements which support transparent process to test the findings and to encourage their use.

Most approaches to identifying and prioritising areas for regulation reform involve some kind of evaluation of existing regulations — either of those already in place or experiences in other countries or jurisdictions. These are generally referred to as ex-post evaluations. In general, ex post evaluation should examine the links between the regulation and outcomes. Such evaluations, which aim to provide a full analysis of the impacts of the regulation, have been called ‘summative’, ‘results-based’, ‘logic model’, ‘impact assessment’ and ‘benefit-cost’ evaluation. While these may vary in the way they present the findings of the evaluation, they all focus on identifying and testing the causal relationships between a reform and all possible (significant) consequences.

Other, more limited, ex post evaluation approaches include:

- process audits, which evaluate the process undertaken in implementing the reform. Performance audits take an extra step to look at achievement of specified outcomes. Such approaches may also identify areas where a more complete evaluation may be necessary
- performance measurement approaches, that use indicators to examine the performance of the regulation. These approaches can be used to support more detailed benefit-cost evaluation, or expand process audit approaches into performance audits.

Ex post evaluation methods can be qualitative, drawing on interviews and surveys to find common ground in the behaviour and views of the people consulted. Methods can also be quantitative, where survey and other data are used to estimate the costs and benefits of regulation. Many evaluations use both qualitative and quantitative methods. Ideally, the information base would be objective — based on observed behaviour and other outcomes. But subjective data — which draws on the views and opinions — can also provide valuable insights into the impacts of a reform. The right evaluation method depends on the purpose of the evaluation. Ex post evaluations can be used: to provide accountability for the reform investment; for diagnosis of what does not work and how to fix it; and for learning to improve future reform efforts. These uses are not mutually exclusive, but the use will guide the evaluation effort, which needs to be proportional to the potential value of the outcome.

This appendix sets out a broad framework for ex post evaluation of reforms to regulation, or of existing regulations. It uses the term evaluation to refer to summative evaluation, and audit and performance measurement to refer to these types of evaluation. Quantitative methods of evaluation are discussed in greater detail in appendix J.

I.1 A general framework for ex post evaluation

Why undertake ex post evaluations?

Ex post evaluations of regulation reforms are undertaken for a number of reasons (box I.1). But the main task of evaluation is usually to assess the effectiveness, efficiency and appropriateness of a reform.

- Ex post evaluation is a means of finding out about the *effectiveness* of reform — whether it achieves its objectives. Process audits usually seek to assess whether the reform has been implemented — an essential first step in assessing effectiveness. Performance audits and measurement usually seek to establish whether the reform has met specific objectives. These methods report only on whether the reform has achieved these objectives, and not on the broader impacts. Evaluation goes beyond effectiveness measurement as it seeks to report on impacts, including unintended impacts, and net, rather than the gross, effects.
- Audits, performance measurement and evaluation may also aim to assess the *efficiency* of the reform. To do this they have to assess the cost of implementing the reform. Performance measurement may report on the *cost-effectiveness* of achieving the objectives. Evaluations may pose the question of whether the outcomes could have been achieved for a lower cost.
- Where evaluation differs most from audits and performance measurement is that it seeks to assess the *appropriateness* of a reform — did it add to community wellbeing? A reform might have achieved the intended objectives, but the costs of implementation and unintended negative impacts may outweigh the benefits. Evaluation, rather than audit or performance measurement methods have to be applied to assess whether the reform is appropriate.

Evaluation is also important for testing the theoretical basis (or logic) of the reform. Policy should be based on an understanding of cause and effect — a change in policy aims to induce changes in behaviour that have the desired consequence. Good evidence underpinning the theory is central to evidence-based policy (PC 2010c). Ex post evaluations of reforms are an important part of building the evidence base. Undertaking evaluations also provides a learning opportunity for the people involved, and can build analytical skills that are important for good policy analysis.

Box I.1 **Reasons why ex post evaluations are undertaken**

The **European Commission** (EC) defines evaluation as 'judgement of interventions according to their results, impacts and needs they aim to satisfy' (2004, p. 9). The EC views evaluation as a process that culminates in a judgement (or assessment) of an intervention. Moreover, the focus of evaluation is first and foremost on the needs, results and impacts of an intervention. The main purposes for carrying out evaluations are to:

- contribute to the design of interventions, including providing input for setting political priorities
- assist in an efficient allocation of resources
- improve the quality of the intervention
- report on the achievements of the intervention (i.e. accountability).

The **UK Treasury** argue that: 'evaluation findings can identify "what works", where problems arise, highlight good practice, identify unintended consequences or unanticipated results and demonstrate value for money, and hence can be fed back into the appraisal process to improve future decision-making.' (HM Treasury 2011, p. 7)

The **Treasury of Canada** requires that regulatory proposals include a Performance Measurement and Evaluation Plan. This provides a concise statement or road map to plan, monitor, evaluate, and report on results throughout the regulatory life cycle. When implemented, it helps a regulator:

- ensure a clear and logical design that ties resources and activities to expected results
- describe the roles and responsibilities of the main players involved in the regulatory proposal
- make sound judgments on how to improve performance on an ongoing basis
- demonstrate accountability and benefits to Canadians
- ensure reliable and timely information is available to decision makers in the regulatory organizations and central agencies as well as to Canadians
- ensure that the information gathered will effectively support an evaluation.

Sources: EC (2004); HM Treasury (2011); Treasury Board of Canada Secretariat (2009).

As mentioned, ex post evaluations are important for accountability of government. Ex post evaluations provide evidence on the outcomes from a government's regulatory actions. But while accountability is important, the findings from ex post evaluation need to be applied to get the greatest value from the investment in evaluation. The information generated could feed into fine tuning the reform being evaluated, or repealing the reform if it turned out not to have delivered as expected.

The information could also lead to a search for better ways of achieving the objective of the regulation, but at a lower cost. And it should be used to better inform future reform efforts, including the analysis in regulation impact statements (RIS).

The distinction between evaluation and performance measurement and audit is important. While these latter approaches have a role to play in assessing progress, and to a lesser extent, outcomes of regulation reforms, evaluation is the only approach that gets to the core of whether a reform has delivered benefits. This distinction is also noted by the European Commission (EC) in their evaluation approach (box I.2).

A broad evaluation framework

To evaluate the efficiency, effectiveness and appropriateness of a reform the evaluation framework has to be ‘summative’. That is, it should provide information on inputs, outputs, outcomes, impacts and net benefits, and seek to describe and test the causal links between them.¹

These links tend to play out over time, with reforms in regulations leading to changes in inputs and outputs that then lead first to direct outcomes such as changes in behaviour. These outcomes can be economic, social and environmental in nature. As these changes feed through, there can be feedback loops and spill over effects. These include dynamic effects such as those that arise from changes in, for example, savings and investment decisions, as well as the working through of resource reallocation in response to relative price changes. Impacts describe the full set of changes in all outcomes over time. The net benefits describe the total value of these impacts to the people who are affected, directly and indirectly, by the reform.

Government agencies have more control over the outputs of a reform than over the outcomes. These depend not just on policy change, but on the context in which the outputs arise. A different context can mean different outcomes. Different contexts are not just alternative external scenarios. This is important to recognise, especially when a regulatory change is applied in different contexts, such as jurisdictions, industry sectors, and socio-economic groups.

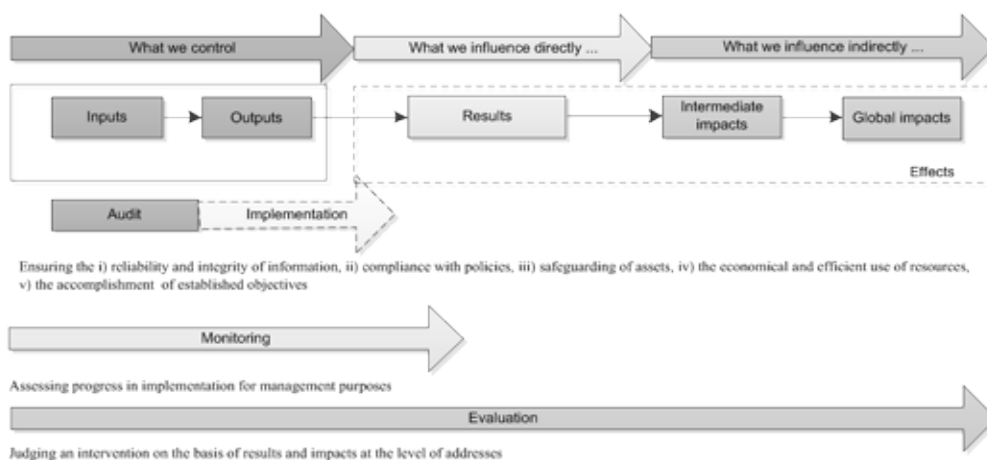
¹ Slight differences in terminology in the evaluation literature are common, for example, the EC use ‘results’ rather than ‘outcomes’. These terms are defined in figure I.1.

Box I.2 European Commission definitions of evaluation approaches

Performance monitoring consists of identifying objectives and indicators for each policy area and activity and reporting on the attainment of these objectives. This system is designed to provide regular feedback on the implementation of activities (i.e. what outputs have been produced, at what cost (i.e. inputs), over what time period and by whom) and hence a means of assessing the performance of the Commission. Performance monitoring does not however usually collect data about the results and impacts occurring outside the Commission as a consequence of its activities. Furthermore, it does not provide answers as to why an activity does or does not attain its objectives, or indeed the relevance of these objectives, neither does it address the question of how performance can be improved. These questions are addressed through exercises of an evaluative nature.

Audit, in the public sector, covers a broad range of activities ranging from the traditional financial audit, which concentrates on inputs and outputs, to performance audit, which may encompass some features of an evaluation. A comparison of the scope of evaluation, monitoring and financial audit is presented schematically in the diagram below.

The Commission differentiates **evaluation** and audit, but recognise that overlap can arise as both evaluation and audit can be used to assess performance. Evaluation and performance audit involve the study of implementation processes and their consequences to provide an assessment of economy, effectiveness and efficiency of an organisation and/or its activities. However, performance audit tends to be more focused on the implementation of an activity and its immediate effects, while evaluation is centred first and foremost on assessing performance in respect to an intervention's effects. When evaluation examines implementation it normally tries to explain how the results and impacts of an intervention were conditioned by the implementation mechanisms. Furthermore, a broader range of issues fall under the practice of evaluation including an examination of an intervention's relevance, utility and sustainability.



Source: EC (2004).

The direct outcomes from the same regulatory change may differ for different regions, sectors and for producers, workers and consumers. In the United States of America, US Executive Order No. 12866, which sets out the requirement for the benefits of a proposed regulation to justify its cost, explicitly includes ‘distributive impacts’ and ‘equity’ as components of net benefits (Gayer 2011). Most evaluation methods seek to include information on the distribution of outcomes.

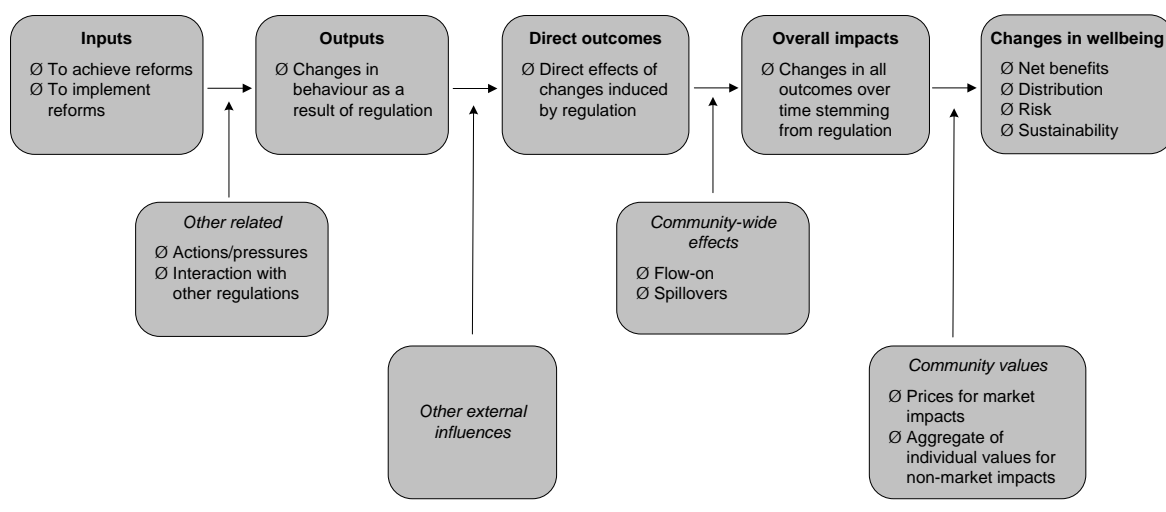
Changes in distribution can be thought of as a particular dimension of outcomes. Different distributions of any outcome, whether it is consumption of health services, or protection of personal safety, may have different values to society. The ‘community value’ on any distribution depends on the social norms and values of the people in the community.

Another dimension of outcomes is risk and uncertainty in relation to the outcome over time. Most people are risk averse and place a value (willingness to pay) on reducing the risk of adverse outcomes. These adverse outcomes could be environmental or social as well as economic. There is also potentially value in reducing uncertainty, in part as an input into better decision making, but also for the inherent psychological reaction people have to uncertainty. In addition, many people care the outcomes for future generations. These impacts on uncertainty about outcomes affect wellbeing, and can be summarised, albeit very roughly, as concerns about sustainability. How to bring impacts on risk and distribution into an evaluation are discussed later in this appendix.

Building on the evaluation framework set out in the Review of Government Services (SCRGSP 2009), figure I.1 adds in the concepts of context, economy-wide flow on and dynamic effects, and distribution and risk to the familiar inputs-outputs-outcomes evaluation framework.

Evaluations may complete all the sections in this broad framework. Some may stop at direct outcomes because the flow-on and spillover effects are either minimal or inherently positive. But this assessment should be based on good evidence from past evaluations and testing of the theories that underpin the framework logic. This same framework is applied in ex ante evaluations, where the main difference is that the probability that each link will occur has to be factored in to find the expected impacts. The framework has also been applied as a program or intervention design tool (box I.3)

Figure I.1 A broad evaluation framework



Box I.3 Logical frameworks

The first ‘Logical Framework’ was developed in the late 1960s by the United States International Development Agency. Since then the approach has been widely adopted by development agencies and others as a planning and design tool for aid projects and other interventions. The method requires the planner to set out the logic of the intervention, explaining how the proposed activities will achieve the explicit objectives. One of the important features of the logical framework approach is that it sets out the assumptions about the context for the reform (external environment) and conditions under which implementation is expected to be effective, or so called ‘success factors’. A second important feature is the selection, ex ante, of verifiable indicators that can be used to monitor progress and the ‘success factors’ as the reform is implemented. Various methods to collect the indicators may be used, and the indicators can be both qualitative and quantitative.

The Logical Framework covers much of the same ground as a regulation impact statement in that it has to set out the problem, establish objectives, consider alternatives to achieving the objectives, and define the activities and inputs that will be used. As mentioned, the approach then sets out the assumptions on which the logic of the approach is based and establishes indicators for each of the: activities; expected outputs and outcomes; and broader objectives. As such, the approach is ideal for designing and embedding good ex post evaluation.

Source: NORAD undated. <http://www.ccop.or.th/ppm/document/home/LFA%20by%20NORAD%20Handbook.pdf> AusAID AusGuideline Activity design, 3.3 The Logical framework Approach, <http://www.ausaid.gov.au/ausguide/pdf/ausguideline3.3.pdf>

A critical characteristic of evaluation of a reform is that it reports changes from the counterfactual — the no reform case. While conceptually simple, the practical application of this can be challenging (see appendix J for a discussion on empirical approaches to determining the counterfactual). Trying to identify change from a counterfactual is just as important in qualitative analysis. This makes how questions are framed very important. For example, the ‘most significant change’ methodology takes a structured approach to collecting the narratives of people affected by a reform that tries to control for other sources of change (Davies and Dart 2005).

The other characteristic of good evaluation is the explicit recognition of the time profile of the outcomes from reforms — impacts are the time series of changes that result from a reform, and include the input costs as well as the direct and subsequent outcomes.

It should be noted that there is nothing about this broad evaluation framework (figure I.1) that requires quantification of the measures (although quantification can help impose rigour in the analysis). What the framework does require is evidence of links between each of the parts of the change spectrum. This evidence can be empirical or provided through narratives. What matters for the evaluation is that the evidence is tested and the confidence in the results can be assessed.

Summary measures used in evaluation

The evaluation framework set out in figure I.4 should provide information to support a wide range of evaluation measurement needs. There are many different sets of summary measures that might be considered. The measures report on specific aspects of the impacts in a way that helps to answer questions. For example, the Australian National Audit Office (ANAO 2009) lists appropriateness, effectiveness, efficiency, integration, performance assessment and strategic policy alignment as relevant dimensions of expenditure programs. AusAID’s Office of Development Effectiveness (AusAID 2006) lists relevance (were the objectives right?), effectiveness (were the objectives achieved?), efficiency (was it value for money?), impact (what are the long term effects, positive and negative, intended and unintended), and sustainability (will benefits, particularly in institutions and systems, be sustained?) as the summary measures used in evaluations of development assistance programs.

The EC guidelines for evaluation set out 10 summary measures for reporting evaluations. However, the EC does not include ‘relevance’ and ‘coherence’ as

measures that ex post evaluation would report. Box I.4 expands this EC list to include some other commonly used summary measures.

Box I.4 Commonly used summary measures in evaluation

The EC's 10 dimensions and other common dimensions (in brackets) include the following.

- **Relevance** — The extent to which an intervention's objectives are pertinent to needs, problems and issues to be addressed.
- **Coherence** — The extent to which the intervention logic is not contradictory/ the intervention does not contradict other interventions with similar objectives.
- **(Appropriateness)** — A combination of relevance and coherence.
- **Economy** — The extent to which resources are available in due time, in appropriate quantity and quality at the best price.
- **Effectiveness** — The extent to which the objectives set are achieved.
- **Efficiency (cost-effectiveness)** — The extent to which the desired effects are achieved at reasonable (least) cost.
- **Sustainability (impact)** — The extent to which positive effects are likely to last after an intervention has terminated.
- **Utility (appropriateness)** — The extent to which effects corresponded with the needs, problems and issues to be addressed.
- **Consistency (impact)** — The extent to which positive/negative spillovers onto other economic, social or environmental policy areas are being maximised/minimised.
- **Allocative/distributional effects (impact)** — The extent to which disproportionate negative/positive distributional effects of a policy are minimised/ maximised.
- **(Impact)** — The full set of outcomes (positive and negative, intended and unintended) that arise over time as a result of the intervention.
- **Acceptability** — The extent to which stakeholders accept the policy in general and the particular instrument proposed or employed.

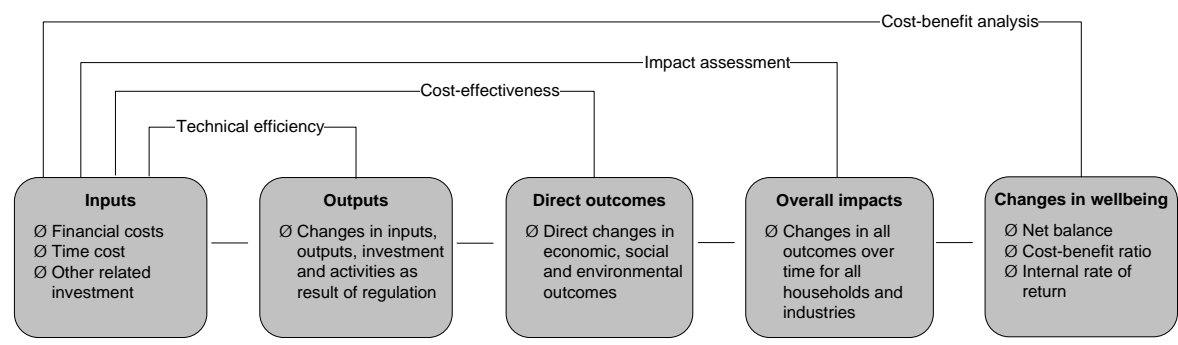
Source: EC (2004).

As illustrated in figure I.2, evaluation should provide information on each element — inputs, outputs, outcomes, impacts and net benefits. If measured in comparable units each of these can be used as input to quantitative evaluations.

Some common summary measures used in economic evaluations are added to the framework in figure I.2. The efficiency with which inputs are converted to outputs is known as technical or production efficiency. It is related to, but slightly different from the term 'economy' described in box I.4 as 'economy' would be necessary, but not sufficient, for technical efficiency. The cost-effectiveness measure is the same

as that used in box I.4 where unintended effects are not considered. A broader cost-effectiveness measure would take into account negative impacts (costs) as well as the positive impacts (benefits from the intended outcome). For example, the costs for firms to implement a regulation, which are an input to the reform, are also one of the impacts of the reform. Outcomes resulting from distortions introduced by the regulations, such as reducing the range of products that comes at a cost the firm and consumers, could also be considered costs, although these are rarely included in the evaluation.

Figure I.2 Summary measures in a benefit-cost evaluation framework



Impact assessment usually aims to provide a balance sheet of all costs and benefits over time. The cost side of the ledger includes the input costs as well as outcomes that have a negative impact. The benefit side of the ledger includes all the outcomes that have a positive impact as they arise over time. Each entry in the ledger can be quantitative or qualitative — what matters is that each entry is evidence-based. Figure I.3 provides a stylised version of the benefit-cost ledger for a regulation reform.

Quantification of impacts is required for a cost-benefit analysis. To provide a cost-benefit ratio the outcomes on both sides of the ledger have to be converted to a common metric (usually a monetary amount) and a discount rate applied to reflect the different value placed by the community on the timing when certain types of outcomes occur. The net present value (NPV) of the net benefit is an estimate of the overall allocative efficiency of the reform. If a net benefit is positive then the reform has improved the wellbeing of the community. If the NPV is negative, then the reform has detracted from community wellbeing.

Quantification of all the impacts of a regulation reform (or any other policy or expenditure intervention) is likely to be an impossible task, and it is more common to only quantify the economic outcomes. However, a good evaluation will consider other outcomes for which there is only qualitative evidence along with the economic outcomes. A common approach is to consider how big the (qualitative) benefits have to be to justify the quantified costs, and whether there is sufficient

evidence of these benefits to more than compensate for the cost of the reform. A list of summary measures commonly used in economic evaluations is provided in table I.1.

Figure I.3 A stylised benefit-cost ledger



Table I.1 Summary measures used in economic evaluations

<i>Measure</i>	<i>Relationship measured</i>	<i>Types of measure</i>
Technical or production efficiency	Inputs to outputs	Output units to input units: Often units of output to dollar value of inputs
Effectiveness ^a	Outputs to direct (intended) outcomes Usually at a given point in time	Extent to which objectives have been achieved. Often presented as a qualitative measure (very, somewhat, not very, not at all effective). Can be a measure of outcomes achieved relative to a benchmark as a percentage of benchmark or of target
Cost-effectiveness	Direct outcomes relative to inputs	Outcomes units to input units. Often units of outcomes to the dollar value of inputs
Impact assessment	Final outcomes Time series often reported as snapshots at points in time	Quantitative and qualitative measures of outcomes in units of outcome.
Benefit-cost ratio	Net value of final outcomes to costs of inputs	Discounted value of final outcomes expressed in a common metric relative to discounted value of input costs expressed in the same metric (dollars)
Internal rate of return	Discount rate at which the net present value of costs and benefits is equal to zero	
Net present value	Discounted current value of the benefits less costs	

^a Not included in the figure I.2 as it is not a comparative measure, but so commonly used it is included in this list.

Evaluation of regulation reforms

While proposals for new regulation that impacts on business and the community are often evaluated ex ante as part of the regulation impact assessment process, there are relatively few examples of ex post evaluations of regulation reforms. Most evaluations are limited to process reviews and performance measures rather than a full evaluation that can assess the full impact of the reform.

In Australia, most reforms end up being evaluated as part of the next wave of reform — and ex post evaluation of the impacts of an existing regulation form a core part of most in-depth reviews of regulation. Exceptions include the review of National Competition Policy (NCP) undertaken by the Commission (PC 1999; 2005b; 2005c), and various statutory reviews of regulation that are embedded in the legislation (see appendix E for examples). The NCP reviews applied a quantitative evaluation methods (discussed further in appendix J), however most embedded reviews take a more qualitative approach to assessing the benefits and costs of the reform.

The Commission's framework for assessing the impacts and benefits of the COAG reforms recognises that the assessment of some reforms may be limited to determining their cost-effectiveness, in large part because of the inherent difficulties and uncertainties in assessing the benefits (PC 2010b; box I.5).

In most countries it is much more common to use ex post evaluations to assess expenditure programs than for regulation reform (OECD 2010f). The main exception is in the United States of America, where the Office of Budget and Management (OBM) reports annually to Congress on the benefits and costs of federal regulations. Early this year, they reported the costs and benefits of 106 major regulations over the period 2001- to 2010, finding that the combined value of benefits (estimates in the range of \$136 to \$651 billion in annual benefits) greatly exceeded the cost (estimated in the range of \$44 to \$62 billion in annual costs) (OBM 2011).

There is no systematic follow up of the ex ante regulation impact assessments with an ex post evaluation in Australia. Such examination of the reliability of ex ante evaluations is rare in other countries (OECD 2010f). Such analysis is, however, rather revealing (box I.6). In general, comparisons find systematic overstatement of the likely compliance costs because of failure to take adaptation into account savings, and over statement of the effectiveness of the regulations in achieving the objective. This later finding is often called optimism bias.

Box I.5 **The conceptual framework for evaluating the COAG reforms**

The conceptual framework underpinning the Commission's analysis makes a distinction between direct and economy-wide impacts. Direct impacts are the changes that can be traced directly to the reforms. The main types of direct economic impacts of the reform are changes in:

- productivity – changes in the productivity of labour or and other inputs
- prices – changes in unit prices
- workforce participation – changes in the engagement of people in the workforce
- population – change is life expectancy and other demographic variables.

Economic impacts can also arise through changes in human capital and natural resources that then affect productivity, prices, participation and/or population.

Direct impacts may also result in changes in social and environmental conditions that are not captured by market activities.

The economy-wide impacts represent both the direct and indirect effects, such as changes in productivity and prices in one sector and how these influence production activities in another, on household income and hence expenditure. These indirect 'feedback' or flow-on effects include impacts on:

- resource allocation – for example, as labour and capital move between productive uses, income and hence consumption patterns change
- transition or adjustment costs – for example, down time as workers move to a new location, occupation or industry
- longer-term effects – for example, after adjustment of physical and human capital, and natural resource endowments.

The evaluation also needs to distinguish between reforms according to their stage of development and implementation.

- Realised reforms have been implemented and impacts are accruing.
- Prospective reforms have been implemented, but impacts have yet to occur.
- Potential reforms have yet to be implemented.

An evaluation of potential reforms is an ex ante evaluation, that can be used to assess the potential net benefits from future reforms. Evaluation of realised reforms is an ex post evaluation, while evaluation of prospective reforms has elements of both ex ante (probability of impacts) and ex post (actual costs and possibly outputs are known).

Source: PC (2010b).

Box I.6 Comparisons of ex ante and ex post evaluations

One of the few systematic studies that compared the impacts found in ex post evaluations with the ex ante evaluation estimates was undertaken by Resources for the Future in the United States. The study compared 21 federal regulations for which both ex ante and ex post evaluations were available. Shapiro and Irons (2011) report that:

Government cost estimates of 13 regulations were significantly overstated when compared to actual costs, while the cost estimates for only three regulations were significantly understated. An update of this analysis by one of the researchers confirmed this general conclusion: Cost predictions used by government agencies tend to be too high. (p. 3)

One reason why costs might be overestimated is that faced with new regulations firms adapt and innovate to find lower cost ways of meeting the regulations. The tendency for compliance cost calculators to over-estimate the costs may be one reason why perception surveys do not tend to report significant cost reductions despite large cost savings estimated with red tape reduction targets.

Other studies have found that there tends to be an optimism bias in regards to the effectiveness of the regulation.

Source: Shapiro and Irons (2011).

There are growing calls for a more systematic approach to ex post evaluation that will facilitate comparison with ex ante evaluations. This would eventually provide information to assist in improving ex ante evaluations of regulation. Moreover, ex post evaluations can point to areas where improvements can be made, and where demonstrating a high return to reform effort can bolster the support for further reform.

Good evaluations tend to be resource-intensive exercises. The quality of an evaluation depends on the availability of good information, both before and after a reform has been implemented. In the absence of this primary data, the quality of the evaluation depends on the reliability of the theoretical models of the causal relationships that are applied to assess the impact of the changes induced by the reforms. Ideally these models have been well tested against evidence, and would have been utilised in developing the reform, and in establishing robust performance measures.

Even with good data evaluation can be hard to do well. For example, identifying what has changed relative to a counterfactual (the without reform case) is less common than it should be. The Centre for European Evaluation Expertise (2006) reports on cost-effectiveness evaluations, mainly in relation to expenditure programs, and has noted that very few of these evaluations have established a counterfactual. In some cases this runs counter to the review body's own guidelines.

For example, the World Bank requires a rigorous quantitative specification of a counterfactual situation for an evaluation to be described as an ‘impact evaluation’. However, a review in 2002 found that only about a quarter of their evaluations met this criteria.

Ensuring the full range of costs and benefits are recognised and can be measured can also be challenging, particularly where there may be unintended costs and benefits. In a meta-evaluation of the cost-effectiveness of its evaluations, the Centre for European Evaluation Expertise (2006) found that few considered deadweight loss, and most just focused on program expenditure and not the other costs associated with the program. Given these challenges, increasing the number of ex post evaluations undertaken will need to be supported with development of skills and capabilities in evaluation.

I.2 Performance measurement approaches

Performance measurement is applied to a wide range of situations, including as a business tool by firms, in contracts between firms and government, and within public agencies of which reporting on the consequences of regulation reform is only one.

Performance measurement approaches have three main elements. The first is the set of indicators, where the indicators should be chosen to reflect the range of possible outputs and outcomes. The second element is how the indicator information is presented. This determines how the information is interpreted and passes judgement on the success or otherwise of a reform. Both the indicators and how the information is presented determine the usefulness of the performance measurement system — whether it is ‘fit for purpose’. The third element is the governance arrangements around setting up a performance measurement system, collecting indicator information and reporting this information.

This section looks at examples of each of these three elements in performance measurement approaches to evaluations of regulations. The Council of Australian Government (COAG) performance measurement system provides a good example of the use of this approach in monitoring and reporting on regulation reform (box I.7). Examples from other applications of performance measurement are also provided where this demonstrates a feature of performance measurement that might be applicable to evaluation of regulation reform.

Box I.7 **The COAG Reform Council**

The COAG Reform Council (CRC) was established by COAG to strengthen public accountability as part of the arrangements for federal financial relations. It independently advises COAG on the performance of governments in delivering the various elements of the COAG Reform Agenda. The CRC:

- monitors, assesses and publicly reports on whether predetermined outcomes and performance benchmarks have been achieved under the six National Partnerships
- reports to COAG on the performance of the Australian Government and the States and Territories in achieving the outcomes and performance benchmarks specified in 24 key National Agreements
- assesses the performance of the Australian Government and the Basin States under five bilateral *Water Management Partnerships* under the *Agreement on Murray-Darling Basin Reform*
- advises COAG on the aggregate pace of activity in progressing COAG's agreed reform agenda
- advises COAG on options to improve COAG's performance reporting framework
- reviews the consistency of capital city strategic planning systems with the new national criteria.

Performance benchmarks range from meeting implementation milestones (such as enacting legislation by a particular date) to improving outputs (such as increasing hours of teacher aide assistance) and improving outcomes (such as reducing the incidence of type 2 diabetes).

The main COAG agreement on regulation reform is the National Partnership Agreement to Deliver a Seamless National Economy (SNE). The CRC reports annually on progress against the performance benchmarks for this agreement, which consist entirely of meeting implementation milestones. The CRC's most recent performance report on the SNE reforms (for 2009-10) was delivered to COAG on 23 December 2010 and made public on 11 February 2011.

Source: COAG (2008); CRC (2010b)..

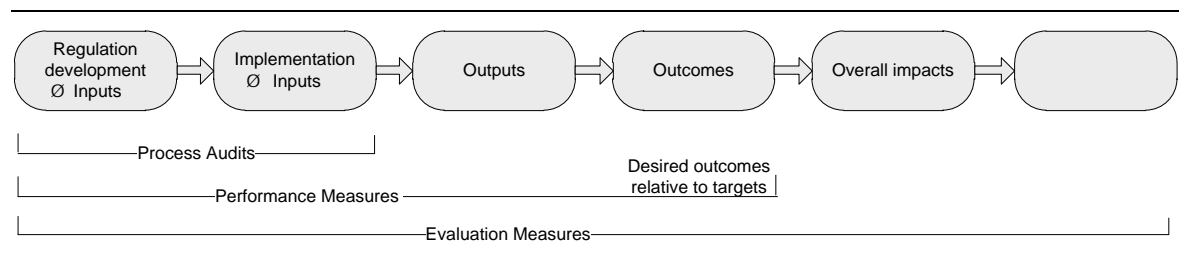
The selection of indicators

A performance measurement approach can focus on monitoring indicators of process, progress, inputs, outputs and or outcomes. Performance measurement may include any or all of these types of indicators and can include a number of indicators that provide valuable input into undertaking a 'benefit-cost' evaluation. The relevance of the performance indicators for such evaluation depends on the underlying relationship between the change in the regulation and that indicator.

Indeed, the usefulness of performance indicators depends on the extent to which they do reflect causal relationships with the changes resulting from the reform.

As indicated in figure I.4 there are strong links between the evidence needed in evaluations and indicators used in performance and process audits. The indicators used for process audits will ideally follow the steps in the process that is being evaluated. Performance indicators are ideally based on a clear logic model of the way in which a reform works to achieve its intended outcomes, from the inputs used through to the impacts of the reform on well-being (figure I.1).

Figure I.4 Performance indicators, process audits and ‘benefit-cost’ evaluation



Where performance indicators are selected using an inputs-outputs-outcomes framework they may be able to provide a number of the economic evaluation measurements (table I.1). Measures of technical efficiency, effectiveness, and cost-effectiveness may be possible if the right data is collected along the impact spectrum from inputs to overall impacts. Box I.8 contains some examples of indicator along the impact spectrum.

Box I.8 Performance indicator example — World Bank

The World Bank has outlined some indicators that could be used for a climate change adaptation program designed to minimise the impact of climate change on farmers.

- Input indicator — providing equipment and training for community collection of local climate data.
- Output indicators — the number of communities that have created and maintained a local weather station, and the number of farmers with access to climate forecasts.
- Outcome indicator — the percentage of farmers with increased trust in weather data and climate projections.
- Impact indicator — diminished variability in farming yields over an extended period.

Source: World Bank (nd).

Indicators are often used in evaluations of reforms that have social and environmental impacts. One of the challenges for good evaluation of social and environmental is finding reliable and agreed measures of these types of outcomes. There is growing interest in measuring progress from a wellbeing perspective, and a more diverse range of measures that can be used to monitor non-market outcomes that are valued by the community are being promoted (for example, ABS (2011); OECD (201); Stiglitz, Sen and Fitoussi (2009)). These effort should improve the collections of data available in the future to assess the social and environmental impacts of reforms.

Regardless of the nature of the impact being measured, whether an input cost, reform output, direct outcome or outcome resulting from flow-on or spillovers, there are a range of criteria for what makes a good indicator (box I.9).

Box I.9 Characteristics of a good indicator

The Treasury Board of Canada Secretariat (2009), for example, observe that good indicators should be:

- objectively verifiable
- relevant and valid
- prioritised and limited in number
- balanced and comprehensive
- meaningful and understandable
- timely and actionable
- cost-effective to measure.

The ABS sets out the characteristics of a good social indicator as:

- reflective of a social issue
- available as a time series to allow comparison through time (and between social/geographic groups)
- meaningful and sensitive to change
- summary in nature (but not overly so)
- able to be disaggregated
- intelligible and easily interpreted
- able to be related to other indicators
- where possible, focus on outcomes for the dimension of progress (rather than on say, the inputs or processes used to produce outcomes)
- be supported by timely data of good quality

Source: ABS Measuring Wellbeing (4160.0); Treasury Board of Canada Secretariat (2009).

Some performance indicators are measures of the variable of interest, for example the number of children attending school as a measure of whether children are engaged in and benefiting from school. (Although this indicator may not reflect if they are benefitting.) Others are proxy indicators, such as enrolment as a proxy for attendance. This may or may not be a good proxy depending on whether enrolment is likely to be highly (perfectly) correlated with attendance.

Where possible, performance indicators should be presented as quantities, such as raw numbers, averages, percentages, rates, ratios, or indexes.

One of the challenges in selecting performance indicators for summative evaluations is that they should reflect the change from the counterfactual — what would have happened to the indicator in the absence of the reform. ‘Good’ indicators are defined as a change from a baseline, so the extent to which the indicator captures the change from the counterfactual depends on how well the baseline captures this counterfactual (see appendix J for a discussion of how this can be done quantitatively).

One example where performance indicators have been used is in the evaluation of the COAG National Education Agreement (box I.9). Five expected outcomes were agreed to, and a range of indicators are used to measure performance in meeting the outcomes.

Presenting the results

There are a number of methods for presenting indicator information that assists in its interpretation. These include ‘traffic lights’, ‘balanced score cards’ and Goal-Attainment-Score (GAS) systems. In all these methods the actual indicator is assessed relative to a target.

For traffic light approaches, the target is set out as the criteria to achieve a green, amber or red rating. The COAG Reform Council (CRC) assessment of the Seamless National Economy initiative uses this approach (section I.3). In this example, green means the indicator was met, red means the indicators was not met, and amber indicates that the indicator was met late, or only partially met, but that it is not expected that this would lead to jurisdictions being unable to meet future milestones.

Balanced scorecards involve attaching targets to a number of indicators, and measuring performance against these targets. For example, under COAG’s National Agreement on Literacy and Numeracy, targets are set for a range of performance indicators, and the CRC assess whether jurisdictions have met these targets (CRC 2011).

Box I.10 Performance indicators used in the COAG National Education Agreement

The overarching objective of the COAG National Education Agreement is that ‘all Australian school students acquire the knowledge and skills to participate effectively in society and employment in a globalised economy’. In order to assess whether this objective is being met, five expected outcomes, each with their own performance indicators have been set. The COAG Reform Council measures the performance of each jurisdiction against the following indicators.

1. All Children are engaged in and benefiting from schooling.

The indicator used to measure performance against this outcome is the proportion of children enrolled in and attending school.

2. Young people are meeting basic literacy and numeracy standards, and overall levels of literacy and numeracy are improving.

The literacy and numeracy of years 3,5,7 and 9 students is subject to national testing.

3. Australian students excel by international standards.

The proportion of students in the top and bottom levels of international testing is measured.

4. Schooling promotes social inclusion and reduces the educational disadvantage of children, especially Indigenous children.

Four performance indicators are used to measure progress towards this outcome: the proportion of Indigenous and low socio-economic (SES) status children enrolled and attending school; literacy and numeracy testing for Indigenous and low SES students; the proportion of Indigenous students completing year 10; and the proportion of the 20 to 24 year old Indigenous and low SES population having completed at least year 12 or a certificate II.

5. Young people make a successful transition from school to work and further study

Three indicators are used to measure progress towards this outcome: the proportion of the 20 to 24 year old population that has completed at least year 12 or a certificate II; the proportion of people undertaking further education or training within six months of completing school; and the proportion of 18 to 24 year olds engaged in employment, education or training at the certificate III level or above.

Source: CRC (2010a).

Under the GAS approach, the results of individual indicators are added up based on selected weights. Under both balanced scorecards and GAS systems, achievement is measured relative to a target. The differences lie in how these targets are determined and how the achievements relative to targets are weighted to get an overall assessment of performance. Hence the setting of targets is central to performance measurement systems (box I.11).

Box I.11 Guidance on setting targets – Canadian Treasury

Performance targets consist of projected indicator values for quarterly, semi-annual, or annual performance periods. The target for the regulatory proposal should relate to the analysis (for example, cost-benefit analysis and risk assessment) that supported the decision to regulate in the first place. Targets can also be set for achieving certain levels of performance in the longer term. Target measurements can be used as interim information about how particular indicators are working. Such information can also be useful for annual reporting and budgeting exercises. Suggested guidelines for setting targets include the following:

- setting targets based on previous performance (i.e., the level at which performance is no longer deemed a ‘problem’)
- setting targets using the performance level achieved by the most successful performance to date
- setting targets using the performance level achieved by averages of past performance
- setting targets using performance levels achieved by other jurisdictions or by private firms with similar activities
- making sure that the targets chosen are feasible given the program’s budget, staffing, and anticipated influence
- identifying developments — internal and external — that may affect the program’s ability to achieve desired outcomes.

Source: Treasury Board of Canada Secretariat (2009).

I.3 Process audit approaches

Process audits are ‘formative’ evaluations and, as such, do not examine the causal links between action and outcomes. Process audits do not aim to measure project results, rather they examine whether appropriate steps have been taken according to what was agreed or intended, such as whether stakeholders were consulted, reviews were undertaken and legislation was enacted.

Process evaluations rely on the assumption that good process delivers good outcomes. The core question is, ‘what has been done?’. This says nothing about what outcomes have been achieved, so the underlying assumption is that adherence to the process will generate desired outcomes. This may be the case, however the verification of this relationship can only be made through a ‘summative’ evaluation.

Where have process audits been used?

Publicly available examples of process audit approaches are limited, as they are commonly undertaken by agencies as part of management oversight rather than for public accountability. One publicly available example is evaluations undertaken under the COAG Seamless National Economy initiative — which examines whether jurisdictions are meeting agreed milestones. In addition, the Australian National Audit Office (ANAO) undertakes performance audits of regulator processes. The Productivity Commission has also previously used process indicators in benchmarking studies.

COAG evaluations

Under the Seamless National Economy initiative, the CRC evaluates reform efforts against agreed criteria. These criteria are generally based on process — for example, whether legislation has been drafted and agreed to, or whether specified reforms have been completed.

Jurisdictions are required to report to the CRC on their progress in meeting the agreed milestones. The COAG Reform Council uses this information, as well as other publicly available information, to form an assessment of whether the milestone has been partially, fully, or not met (box I.12).

Based on whether jurisdictions are meeting the milestones, the CRC also examines the risks in each reform area. For example, in its 2009-10 report, the CRC noted that, due to some jurisdictions not agreeing to model national Occupational Health and Safety (OHS) regulations, there was a risk that there would not be a national OHS framework. In the area of chemicals and plastics regulation, the CRC noted some inconsistencies between the implementation plans proposed by the jurisdictions.

Box I.12 Evaluation of the Seamless National Economy

The COAG Reform Council (CRC) monitors and reports on milestones for progress of governments against the 27 deregulation priorities in the Seamless National Economy reform agenda. Each National Partnership is underpinned by an implementation plan which articulates the policy outcomes sought in each reform area and, where possible, identifies key milestones for jurisdictions in progressing each reform.

The council's assessment of performance is evidence-based and draws on a range of inputs, including:

- detailed progress reports and formal comments provided by jurisdictions
- additional information from jurisdictions requested to assist the assessment process (such information is treated as an addendum to jurisdictional progress reports)
- independent research on legislative and regulatory activities of governments, based on publicly available information.

Tables are used to provide a visual representation of the CRC's assessment of progress against individual milestones. A commentary is also provided on progress and risk assessment. The tables use a green-amber-red representation of progress against individual milestones (white cells indicate that there is no milestone for the relevant jurisdiction).

Jurisdictions are required to provide detailed progress reports to the CRC on their progress against the key milestones in the implementation plan within three months of the end of each financial year using a common template. The template is provided to jurisdictions at the end of each reporting period, and is based on the most current version of the implementation plan at the time of distribution.

In the CRC's most recent report on the deregulation priorities, it was suggested that where appropriate:

- new interim or final milestones are set in cases where reforms are off track
- extra interim milestones to monitor key steps towards the final objective
- milestones be revised if not consistent with other COAG agreements.

The CRC also suggested the reporting framework could be strengthened to:

- specify accountabilities accurately in the implementation plan — so that it is clear which jurisdictions required to report
- clear specification of deadlines for each milestone, and in setting such deadlines take account of the time it takes for sequencing of implementation where one jurisdiction takes the lead
- for implementation plans to be reviewed and updated before the end of the next reporting period, to ensure a clear basis for public accountability before the end of the reporting period.

Source: CRC (2010b)

ANAO evaluations

The Australian National Audit Office (ANAO) undertakes frequent reviews of the administration of regulation. While such reviews may investigate the performance of regulators, they also focus on what processes the regulator has in place. For example, in its audit of the Australian Broadband Guarantee (ABG) program, the ANAO (2011) stated that the scope of the audit was to:

... assess if DBCDE had effectively managed the ABG program, and the extent to which the program was achieving its stated objectives. The audit examined DBCDE's activities supporting the planning, implementation, monitoring and performance reporting for the ABG program from its commencement in April 2007 to June 2010. (p.16)

These audits assess the regulator across a range of criteria. They generally contain recommendations on processes the regulator can implement to improve their administration of the regulation — for example, in the ABG program audit, the ANAO recommended strengthening the performance reporting of the relevant department (box I.13).

Box I.13 ANAO review of Australian Broadband Guarantee Program

In 2011, the Australian National Audit Office (ANAO) completed an audit of the administration of the Australian Broadband Guarantee Program. The criteria for the audit included examination of the Department of Broadband, Communication and Digital Economy's (DBCDE) activities in relation to:

- program planning and implementation
- assessment of customer eligibility and registration of service providers
- compliance and monitoring
- performance measurement and reporting.

The process for the audit included interviews with staff, testing of the customer registration processes, reviewing the department's testing of services, and analysis of databases.

The ANAO suggested that the DBCDE has established effective management strategies, and had sound processes for registering providers, assessing customer eligibility and monitoring and compliance. In addition, risk assessments were deemed to be more strategically focussed.

However, the audit did identify some shortcomings. In particular, the ANAO noted that the department had not reported against key performance indicators and whether the program objectives has been achieved. The ANAO recommended that this process be enhanced.

Source: ANAO (2011).

Productivity Commission benchmarking of process

The Commission has also used some indicators based on regulation process in its study into benchmarking the quality and quantity of regulation (PC 2008). These indicators were selected to reflect each jurisdiction's approach to the administration of regulation and consultation, the RIS process, and mechanisms for ex post evaluation. These indicators aimed to provide an indication of the quality of regulation (box I.14).

Box I.14 Benchmarking quality and quantity process indicators

The Commission's study into benchmarking the quality and quantity of regulation provided information on a number of process indicators. With regard to the administration of regulation, these indicators included:

- the availability of online information regarding licensing and applications
- whether regulators have binding time limits for the approval of applications
- whether enforcement strategies and/or outcomes are published
- whether regulators adopt risk-based enforcement strategies
- whether regulators have external or internal review mechanisms

The Commission also provided information on process indicators with regard to the flow of regulation. These indicators included:

- consultation — including mandatory public consultation requirements and the timing of consultation
- whether regulation is subject to a regulation impact statement and/or an impact assessment, and whether these are made public
- whether a mechanism is in place to prevent regulation from proceeding where it does not comply with RIS requirements
- whether there is a requirement for 'plain English' drafting of regulation
- whether sunseting or other ex post evaluation mechanism are in place.

Source: PC (2008).

The Commission noted that, ideally, benchmarking of the quality of regulation would be an evaluation of the compliance costs imposed on business for meeting comparable objectives. However, this was deemed impractical, and process indicators were used as:

Likely cost effectiveness is related to the extent to which compliance costs are identified and measured as part of the process of designing the regulation, the extent to which businesses are consulted during the development of the regulations and have the opportunity to comment and influence the design, and the application of independent oversight to encourage effective application of good process. (PC 2008, p. 19)

What indicators have been used?

The validity of process-based approaches rest on the robustness of the indicators used. A robust indicator will have a link between meeting the indicator and ensuring good regulatory outcomes. In general, the approach to choosing appropriate indicators is similar to the approach that should be undertaken for performance-based approaches (as outlined in section I.2). For example, the indicators chosen should be relevant, prioritised, meaningful and cost-effective.

In some cases, a range of milestones have been set, with performance evaluated against these milestones. This was the case in the Seamless National Economy reforms, with a set of indicators agreed to prior to the commencement of the reform agenda by COAG. The indicators chosen generally required the achievement of a milestone by a set date. Such milestones included assessing whether regulations were developed, whether implementation plans had been drafted, and whether reforms had been completed (box I.15).

Process audits are supported by a range of best practice guides. For example, the ANAO's guide to administering regulation contains a number of processes that regulators can follow to meet 'best practice', such as adopting risk-based enforcement strategies. This can be used by the ANAO (or regulators) to evaluate the processes used by regulators in administering reforms (box I.16).

How useful are process audit approaches?

Evaluating a regulation or reform based on the processes undertaken is at best a partial measure of the overall effectiveness of a reform as it does not investigate the effectiveness of the reform based on the results achieved. The absence of, or a poor result in, a process indicator also does not necessarily indicate that the regulation is imposing unnecessary burdens (and vice versa).

However, process audits do offer some advantages. Where the indicators are well-chosen, such evaluations could be used to highlight reforms that may be more likely to impose burdens, or suggest changes to the implementation or administration processes to enhance the effectiveness of the regulation. Importantly, process audits are likely to be less resource intensive than both evaluation and performance audits, as information required is likely to be limited to an assessment of whether a set milestone has been achieved. Process audits also provide valuable information for an evaluation — which, among other things, has to establish both the cost of undertaking the reform and that the reform was implemented and outputs achieved.

Box I.15 Seamless National Economy indicators

The COAG Reform Council (CRC) has used a range of area-specific indicators in assessing reform progress. Some examples are provided below.

Occupational health and safety

During the 2009-10 year, four milestones were set for OHS reforms that:

- the Workplace Relations Ministers' Council (WRMC) agree to a model OH&S bill by September 2009
- Safe Work Australia commence developing model regulations by October 2009
- Safe Work Australia commence developing model codes of practice by late 2009
- WRMC report on progress in June 2010.

The CRC noted that Western Australia and New South Wales had not agreed to the WRMC model bill. Otherwise, the milestones were largely achieved.

Consumer law

Three milestones were set for consumer law in the 2009-10 year, that:

- the Commonwealth begin drafting the Australian consumer law by the end of 2009
- the Commonwealth undertake public consultation on the draft Australian consumer law between April and June 2010
- the Commonwealth complete the RIS for the Australian consumer law by June 2010

All three milestones were classed as completed.

Chemicals and plastics

Three milestones were set for chemicals and plastics regulation for the 2009-10 year, that:

- all jurisdictions complete 'early harvest' reforms by June 2010
- COAG agree on implementation plans for relevant Productivity Commission recommendations
- all jurisdictions report to COAG on progress by June 2010.

The CRC noted that most of the milestones were met, though the Commonwealth had not fully implemented all of its 'early harvest' reforms.

Source: CRC (2010b).

Box I.16 ANAO better practice guidelines

The *Administering Regulation Better Practice Guide* (ANAO 2007) creates a framework, including principle and better practice, that regulators can use to create regulatory processes that are best suited to meet the objectives of the regulation. The guide is not specific to any particular regulation, so the frameworks rely on processes that are likely to lead to better practice.

For example, guidance is provided on how to monitor compliance by creating a risk-based monitoring strategy, conducting monitoring activities and making an assessment of compliance. Addressing non-compliance follows a graduated response from education to penalties. These requirements could be ticked off in a process audit.

The *Better Practice in Annual Performance Reporting guide* (ANAO 2004) sets out principles for reporting performance. If these principles are adhered to, the final outcome (the annual report) should be better practice. Whether an agency has adhered to the principles could be measured using a process audit approach.

For example:

- are standard definitions used throughout the report?
- do outcomes, administered items and departmental outputs reflect key results?
- do intermediate outcomes define progress toward other outcomes?

Source: ANAO (2004; 2007).

Some complex issues in evaluation

The discussion of evaluation methods above has alluded to the challenges in evaluation in terms of collecting qualitative and quantitative evidence of impacts — the change from the counterfactual. But it largely focused on only one dimension of impact — the overall observable outcomes of regulation reform. There are at least two other dimensions of impact that may be important to evaluate — the change in the distribution of outcomes, and the change in risk of outcomes. Assessing the impact on distribution and risk add complexity to ex post evaluation and can require additional methods.

In addition to distribution and risk, social and environmental outcomes can pose challenges for evaluation. Where these outcomes are observable they can be measured in terms of whatever unit makes sense, and the problem is limited to estimating the value of the outcome in the absence of market prices. Where the outcome is intrinsic or intangible, finding evidence of the outcomes is more challenging.

This section looks at some of these challenges for evaluation. The challenges are greater for evaluations that seek to quantify the impacts. But they also apply to finding robust qualitative evidence of impacts.

Evaluating ‘non-market’ impacts

Most impact assessments distinguish between economic, social and environmental outcomes only to the extent that they tend to draw on different fields of research and measurement to assess the causal links between the policy change and the relevant outcome. Outcomes, and their distribution, are reported in units that reflect the type of outcome being measured. For example, health outcomes could be measured in terms of changes in quality adjusted life years (QALYs), changes in life expectancy, or number of post-operative infections. Environmental outcomes might be measured as the changes in the area of threatened species habitat protected, emissions of a pollutant, or river flow rates at certain times of the year.

Most economic outcomes, too can be expressed in terms of ‘volumes’ (number of cars sold, hours worked, bananas imported), but are more often expressed as ‘values’ because of the availability of market prices of output. One advantage of the value measure is that it can also reflect quality differences in the outputs — at least to the extent that such differences are valued. Where there is no market price for the output, as is often the case with government services, the value can be estimated using the value of the inputs that went to produce them. Similarly, the value of volunteer services and household services has been estimated using the likely wage that would have been paid to a person performing the same kinds of services in the market (PC 2010e).

The CBA summary measures (benefit-cost ratio, internal rate of return and NPV) require that all significant costs and benefits can be quantified. This can be done by measuring the volume of the outcome in whatever unit is appropriate, and estimating the value of this outcome. Where the outcomes do not have market prices, a ‘willingness to pay’ estimate can be used to put a value on the outcomes.

A number of methodologies have been developed to evaluate non-market outcomes. A variant of CBA, social return on investment (SROI), provides a way of putting values on social outcomes by using market prices of activities that are of ‘equivalent value’ to the social outcome (see for example, SROI Network (2009)). Social accounting provides a framework for reporting on the impact assessment (see for example, Robbie and Maxwell (2006)). Multi-criteria analysis adopts a system of weights to derive a single overall score where each outcome is assessed against a

target criteria. Discussion of these evaluation methods is given in appendix B of the Commission's study on the *Contribution of the Not for Profit Sector* (PC 2010e).

Whether a reform is successful or not may be readily apparent from the benefit-cost ledger presentation of the findings of an impact assessment. It may be sensible to reduce the economic aspects to a single number to facilitate comparison with the measures of social and/or environmental impacts. However, if these impacts fall on both sides of the benefit-cost ledger it may then be important to take the next step of finding out how the community values the different outcomes. There are various methods for estimating these values, including hedonic pricing, contingent valuation and choice modelling. These approaches are discussed in appendix J.

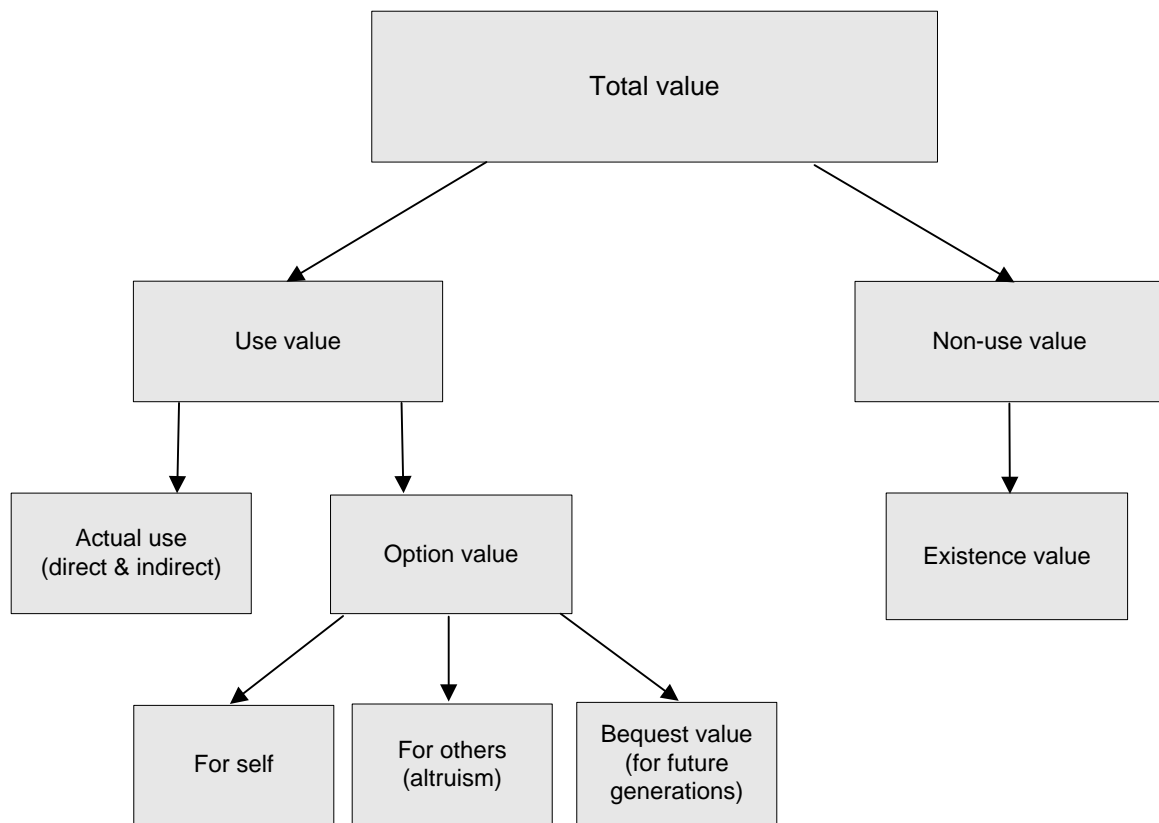
Intangible or intrinsic impacts

The value of something can be defined as being the extent to which people would be prepared to sacrifice something else in order to obtain or safeguard a quantity of it (DTLR 2002). People may be willing to sacrifice consumption to live in a safer environment, or a society that looks after the less affluent. Conceptually, the value of something reflects its use and non-use values (figure I.5). Use values comprise the current direct and indirect benefits people derive from something and the value of having the option of future use (for themselves, others or future generations). Non-use values arise in contexts where an individual is willing to pay for something even though they make no direct use of it, may not benefit indirectly from it, and may not plan any future use for themselves or others. Non-use value (also referred to as passive use value or existence value) can be thought of as a special case of a pure public good. For this type of 'good' to have value, people must at least be aware of it and be able to discern if there is a change in the quantity and/or quality of it. For example, people may prefer to live in a more equal society as it gives them and others greater opportunities (a use value) or because they believe it is morally the right thing (a non-use value).

The importance of including non-use value when estimating the value of an outcome rests on the contention that:

The enjoyment of life need not have as its limit things that can be seen and touched. Consumption, even as economists think about it, should extend to include the simple fact of knowing that a wilderness, endangered species, or other object in nature exists. Formally, the variables in a person's "utility function" would not only comprise the amounts of food, clothing, and other ordinary goods and services consumed but also the various states of knowledge each person has of the existence of social and physical characteristics in the world. Implicitly at least, consumers would be willing to pay something for this form of consumption; hence the efforts by economists to estimate existence values in dollar terms. (Nelson 1997, p. 500)

Figure I.5 **Components of total value**



Data source: DTLR (2002).

It is possible to design measures that can provide some evidence on the achievement of these kinds of outcomes. For example, a desirable outcome might be for people to feel more confident about the future, to be more tolerant to ethnic minorities, or to feel that their cultural heritage is respected. Proxy measures such as behaviour change that reflect changes in attitude provides one way to identify impacts. Attitude surveys, while providing subjective data, are another method of testing to see if a reform has resulted in change.

There remains a lively debate about the feasibility, or even desirability, of reducing these social and environment effects of a reform to a single number, which reflects the stream of costs and benefits over time, and the validity of estimating intrinsic outcomes such as existence values. For example, Carson, Flores and Meade (2001) observe:

Three camps hold fundamentally different positions on passive use value. They are: (1) passive use values are irrelevant to decision making, (2) passive use values cannot be monetized, and thus, can only be taken account of as a political matter or by having experts decide, and (3) passive use values can be reliably measured and should explicitly be taken into account. (p. 175)

Evaluating the impacts on distribution

Distributional impacts matter for two reasons. The first is that distribution has consequences for investment in resources including in human and social capital. Over time this affects the opportunities for producing economic, social and environmental outcomes and hence sustainability (whether defined in economic, social or environmental terms). Distribution also matters because most people care about the ‘fairness’ and ‘equity’, including intergenerational equity.

As discussed above, the community (the people in it) have preferences for the distribution of some outcomes. In part this might be because this affects their own outcomes (a use value), it can also be because they believe there is some ethically or morally right distribution (a non-use value). At a community level, a social norm exists where the distribution of preferences for a particular distributional outcome is clustered around a non-zero value. These values are also likely to vary across countries. As Boarini et al. (2006) argue in an OECD paper:

Overall, while inequality can have a significant impact on well-being assessment relative to conventional income measures, its size crucially depend on the degree of aversion to inequalities that prevails in different societies. (p. 26)

Clearly there are some outcomes where there are quite well accepted social norms, and others where no general consensus, and indeed very conflicting views, can be held. For example, while there may not be any ‘social norm’ in regards to the distribution of consumption of large screen televisions, there may well be in terms of distribution of access to the internet, or to education.

Just as there are some outcomes for which distribution seems to matter more to the community, there are some groups in the community that generate more concern. In particular, there is greater concern over people who already are disadvantaged in some way, or who are vulnerable. This is apparent in the emphasis on social inclusion, which requires consideration be given to the impact of policy on people who face multiple disadvantages. The Australian Government (2009) *Compendium of social inclusion indicators*, provide some breakdowns of measures by different groups that can experience disadvantage. These include people living in rural and remote areas, and people living with a disability.

Including distribution impacts in evaluation requires:

- identifying which outcomes have distributional dimensions that matter to the community
- for these outcomes, identifying which groups in the community are likely to be affected and the relative importance placed on the impacts on these groups

-
- assessing the changes in the outcomes for these groups.

In practice, this will generally involve assessing whether groups considered vulnerable or disadvantaged are negatively affected by the changes. Approaches to estimating the distributional impacts of changes in economic outcomes are discussed in appendix J.

Evaluating the impacts on risk and uncertainty

Much regulation is motivated by the desire to reduce the risk of ‘high cost’ events. Hence the reduction in risk achieved by the regulation is an important outcome for an evaluation to assess. This might be through direct action to address a source of risk. But it could be through better risk allocation — where risk is allocated to those best placed to minimise it at least cost. It can also be through risk shifting — where risk is ‘shifted’ to those better able to bear the risk, which often turns out to be the government, and by definition the taxpayers. Regulation may also seek to increase the likelihood of desirable events, and the issues discussed are as relevant for evaluating regulations with this kind of objective, although the discussion below is couched in terms of risk reduction and mitigation of events imposing costs rather than benefits.

Risk can be characterised by the frequency of the event (its probability) and the magnitude of the costs imposed by the event. Where regulation is aimed at reducing the magnitude of the costs and the event happens with a relatively high probability, evaluation is fairly straightforward as the change in cost associated with an event should be observable. However, the achievements of mitigation policies are only observed if the event occurs. In the absence of an event arising, as may often be the case with low probability events, the effectiveness of the mitigation policy cannot be assessed directly and proxy measures must be used. For example, measures of preparedness, such as tests of early warning systems, provide a proxy for the desired outcomes of fewer people being exposed to a hazard should it arise. The same is true of regulations that play out over a long period of time. For example, it is challenging to evaluate the effects of a policy that aims to mitigate the impacts of climate change.

Regulation often seeks not just to mitigate the effect of a event that could arise, but to reduce the probability of the event. For relatively high frequency events, it should be possible to assess the effect of the regulation on the frequency of these events. An example might be the number of cases of food poisoning over a year, although care is needed to account for where the policy affects the reporting rates.

It is the low probability events that cause the greatest problem for evaluation. This is because the observation of an event arising (or not arising) provides little information on the change in the probability of the event. (Do two '100 year' floods in one decade really mean these are 5 yearly events, or just bad luck for those in the flood affected area?) Again, proxy measures that relate to causal factors provide the only information on which to base ex post evaluation of the effect of the regulation on the probability of the event.

Even if the evaluation can find useful measures of the change in the magnitude of the outcomes and the probability of the event, there are several other issues that need to be considered. First, the value of a reduction in risk is rarely equal to the change in the expected cost of an event. If people are risk averse, they will value that reduction in risk by more than the change in the expected cost. The more risk averse they are the greater the 'premium' they are willing to pay to avoid the risk. This premium should be taken into account in the impact assessment. Second, as with all evaluations, the effect of the regulation on other outcomes, including other risks, should be taken into account in the impact assessment. Third, the analysis should look at the incremental changes in risk for the additional cost (marginal analysis) as part of assessing the options for reducing risk.

The effect of risk aversion for evaluation methods

There is an extensive and growing economic literature on the effect of risk aversion on economic behaviour. Indeed, growing risk aversion in the community is seen as one of the primary causes of the growth in regulation (Regulation Taskforce 2006). This suggests that the 'price' the community is willing to pay for a reduction in risk has risen. This is not very surprising given substantial growth in real incomes. But just how big the community premium is for different kind of risks is an empirical issue. This depends on perceptions of the impacts of the event should it occur and on estimates of the probability that it will occur. Expected losses are notionally the product of the consequence and frequency of the risky event, however, people may be impacted differently by these two elements. They may also systematically under- or over-estimate probability and impact.

A number of researchers have examined the issue and concluded that the community's 'price' on risk is an unreliable measure of the underlying risk. Sunstein (2005) argues that the qualitative aspects of risks affects people's assessment of the probability of the risk. For this reason Sunstein argues that using 'willingness to pay' values in a cost-benefit analysis of a regulation can lead to sub optimal decisions. Wiener (2007) has described how perceptions of risk depend on how 'available' the risk is. An 'available' risk is something that people can easily

comprehend (such as airline accidents), but are not familiar with (unlike car accidents). Unavailable risks are those that lie outside of most people's comprehension (like climate change). Various tests suggest that people tend to have less concern (under-estimate the probability) of unavailable risks, have excess concern about 'available' but relatively infrequent risks, and insufficient concern about familiar and more regular risks. If the expressed levels of concern are reflected in willingness to pay to avoid risk, these findings suggest that the community, if left to their own devices, will under invest in risk reduction for extreme risks, over invest for unusual risk, and under invest in reducing common risks.

This raises broader issues of risk analysis for ex ante as well as ex post evaluations of the impacts of regulation. On the one hand, if people are more averse to some risks than others, it seems sensible to reflect this in the 'price' for a reduction in risk. However, if people systematically underestimate some risks and overestimate others, governments should be wary about regulations that aim to reduce already unusual, but 'available' risk, especially if they impose high compliance costs or other burdens.

This supposes that the regulation can actually reduce the risk without other consequences. These consequences could be large and over time could include, for example, less tolerance for risk leading to more regulations, loss of societal resilience, greater attempts to shift risk and ossification of institutional structures.

A holistic approach to risk evaluation

Graham and Wiener (1997) provides a number of case studies in regulation that highlight the trade-offs in protecting health and the environment. These are not just regulatory and compliance cost-risk trade-offs, but point to the risk-risk trade-offs that can arise. A common example is the change in behaviour that can arise when it is felt that government regulation has removed, or substantially reduced, a risk. This is seen in playground accident rates, where parents are less vigilant because playground designs are required to reduce apparent hazards (risk homeostatis). It can be seen in the finance system, where regulation of capital adequacy requirements reduced the vigilance of the shareholders to monitor the behaviour of management.

This illustrates the need for all evaluations to be aware of the impact on the probability of a whole range of possible impacts. In regard to risk, it is not just the probability or impact of the target event that has to be taken into account, but changes in the risk of other impacts. For example, increasing labour market

flexibility can improve overall employment, productivity and income levels, but may raise the risk for some workers about whether they will retain their job.

Guides to ex post evaluation

A number of countries and agencies have established guidelines for undertaking evaluations of regulation. Many of the guides, such as the Office of Best Practice Regulation (OBPR) *Best Practice Regulation Handbook* (OBPR 2010), focus on ex ante cost-benefit analysis for use in undertaking RISs.

There are fewer examples of guidelines for undertaking ex post evaluations of regulations. The European Union (EU) followed up its 1997 *Evaluating EU expenditure programmes, ex post and intermediate evaluation* guidelines with a revised set of guidelines in 2004, *Evaluating EU Activities: A Practical Guide For The Commission Services* (EU 2004). These guidelines cover planning, organising and co-ordinating evaluations as well as the evaluation process (design, conduct and reporting). The UK *Magenta Book* (HM Treasury 2011) provides guidance on policy analysis. The Canadian Government's *Performance Measurement and Evaluation Plan Handbook for Regulatory Proposals* (Treasury Board of Canada Secretariat 2009), sets out the obligations of regulatory organisations for measuring, monitoring and evaluating the extent to which their regulatory programs achieve the intended outcomes and review and adjustment when they do not. These guides tend to set out processes that agencies should follow rather than provide detailed methods of evaluation that should be used.

While relatively few guidelines have been developed explicitly for ex post evaluation of regulation, there are numerous guidelines for undertaking cost-effectiveness analysis, impact assessment and cost-benefit analysis of public investments, particularly in infrastructure and R&D, and expenditures (most notably in social policy areas).²

Principles for a good practice evaluation framework

A good practice evaluation framework will satisfy the criteria set out in box I.17.

² See for example in development expenditure programs the *World Bank Impact Evaluation Handbook* (World Bank nd) and for evaluation agricultural R&D, CGIAR (2009) *Defining and Refining Good Practice in Ex-post Impact Assessment: Synthesis Report*.

Box I.17 Criteria for good practice evaluation framework

The key criteria for a better practice evaluation framework include the following.

- The causal links are set out for verification in the evaluation.
- Unintended consequences as well as the intended ones can be identified.
- Changes are identified from a counterfactual — what otherwise would have happened in the absence of the reform is fully considered in the analysis.
- There are clear rules about attribution — the extent to which the results can be attributed to a particular reform when part of a package of reforms.
- It is clear what data and information is needed to allow the results of the reform to be identified.
- The assumptions that are used in the analysis of results are explicit.
- The evidence collected can be independently verified.
- The extent of uncertainty over the findings of the evaluation are considered and reported.

These criteria can be used to assess the quality of an evaluation regardless of whether it is qualitative or quantitative in nature.

Qualitative evaluations, which are based on the collection and analysis of narratives, can still satisfy these criteria through the use of rigorous methods. The most important of these is triangulation — where confirmation of the narrative is achieved by looking at the views on the links and counterfactual from different perspectives.³ Rigour in quantitative evaluations is discussed in detail in appendix J.

In addition to the above criteria (that need to be satisfied to ensure that the findings of an ex post evaluation are accurate), there are other broader standards that guide all evaluations. An example of the kinds of broad standards that should be met in undertaking all types of evaluations, including process audits and performance measurement, is given in box I.18.

3 One such example is the Delphi method of consultation. The Delphi method is where experts are asked for written opinions on a topic, from which areas of common ground are identified and areas of disagreement are re-circulated for the experts to either justify their position, accede to the merits of another or pose a new alternative. This is, in theory, repeated until consensus is reached. It is not only a discovery technique but a learning mechanism, where participants are introduced to different ideas and ways of thinking about a topic (McGeary 2009).

Box I.18 Evaluation Standards – Canadian Evaluation Society

- Utility Standards — The utility standards are intended to ensure that an evaluation will serve the information needs of intended users.
- Feasibility Standards — The feasibility standards are intended to ensure that an evaluation will be realistic, prudent, diplomatic, and frugal.
- Proprietary Standards — The propriety standards are intended to ensure that an evaluation will be conducted legally, ethically, and with due regard for the welfare of those involved in the evaluation, as well as those affected by its results.
- Accuracy Standards — The accuracy standards are intended to ensure that an evaluation will reveal and convey technically adequate information about the features that determine worth or merit of the program being evaluated.

Source: Canadian Evaluation Society (2008).

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J Quantifying the impacts of regulation and reform

Key lessons

- Quantification can add rigour to the assessment of the effects of reform, because the search for evidence and the tools applied require clear definitions of impacts and the assumptions that underlie the estimates of costs and benefits.
- Not all impacts of a reform can be quantified. In such cases, some quantification can still provide valuable information alongside qualitative evidence.
- Quantification encourages the consideration of the counterfactual — what would have happened in the absence of the reform. Some methods are more explicit in defining the counterfactual than others.
- There are a number of tools that can be used to quantify the costs and benefits of reforms. All have advantages and disadvantages. Approaches should be chosen to provide the information decision makers require.
 - Perceptions surveys reflect the views of the surveyed population. While inherently subjective, triangulation can assist in confirming changes.
 - Cost accounting approaches are well suited to evaluating administrative and compliance costs, but are not designed to identify flow-on effects of reforms.
 - Econometric approaches can identify the net impacts of a reform on variables of interest, but are highly dependent on the availability of suitable data.
 - Partial equilibrium models describe the relationships between the variables that change directly in response to the reform and the target variables. Economic partial equilibrium models might look at a specific industry to estimate the effect on investment and/or innovation that results from reforms. The models may then be used to estimate the effect of these changes on industry inputs, output and profitability over time.
 - General equilibrium (GE) models capture the main relationships between inputs and outputs in the economy, and are used to estimate the flow-on effects to other sectors in the economy from changes at an industry level or to the availability and quality of the resources (labour, capital and land). Partial equilibrium models are generally used to estimate the ‘shocks’ that are fed into a GE model.
- Some methods for quantification are costly, particularly where new data has to be collected. Often quantification methods are relatively imprecise, and extra effort may not be able to significantly reduce the error margin. The use of the information generated by the evaluation, the potential for reducing errors, and the cost of doing so (relative to the potential benefits of reform), should be taken into account when designing an evaluation.

This appendix is organised as follows:

- Section J.1 describes some of the strengths of ex post quantification, and some limitations
- Sections J.2 to J.7 describe a number of different approaches to quantifying the effects of regulations and reforms
- Section J.8 summarises the approaches and compares the situations in which the different approaches are likely to be more suitable.

There are relatively few examples of quantitative ex post evaluations of regulation in Australia or overseas. Ex post evaluation of expenditure programs is more common, but even here, there are relatively few evaluations that assess all significant impacts of an expenditure program. This appendix presents evidence where available, and in other cases relies on principles to assess aspects of the various approaches. In some cases, the approaches are described using examples of ex ante evaluation. These examples demonstrate how the tools are used, albeit using a different evidence base.

J.1 Some strengths and limitations of ex post quantification

Appendix I set out a number of reasons for evaluating the effects of reforms including: understanding the impacts of reforms; testing the theoretical basis for reforms; holding governments to account for their decisions; and motivating and informing future action. There are a range of approaches that can be used to evaluate the effects of reforms. Qualitative evaluations are generally based on the impressions and opinions of people who are affected by reforms. Evidence tends to be anecdotal, and care must be taken to draw robust conclusions. Quantitative evaluation attempts to measure the effects of a reform against a counterfactual (what would have happened in the absence of the reform) using empirical evidence.

The objectives of regulation are to change behaviour, either by encouraging desirable behaviours, or restricting undesirable behaviours. Regulations impose several types of costs on government, businesses and the wider community, and also deliver many types of benefits (box J.1).

Box J.1 **The costs and benefits of regulation**

This report uses a taxonomy of the costs of regulation that includes five types of costs.

- *Administration costs to regulators* — such as the costs of administering regulatory regimes (although in some cases these costs are passed on to businesses through cost recovery arrangements) and the opportunity cost (other things they could be doing with the time and political capital).
- *Administrative costs to businesses* — such as paper work and reporting time.
- *Substantive compliance costs* — such as investment in accounting systems or equipment and training.
- *Economic costs to business* — such as dead weight losses from distortions, lower investment and reduced innovation.
- *Other distortions* — such as unintended social and environmental effects of regulation and benefits foregone if the regulation is ineffective.

Within each of these categories, regulations can impose a range of types of costs. Different approaches are better suited to evaluating different types of costs.

The potential benefits of regulations are many and varied. They can include encouraging competitive markets, and protecting consumers, employees and the environment. The benefits of reform often include reductions in some or even all of these costs. The benefits of reform may also arise from achieving the intended outcomes of the regulation where the regulation had been less effective than intended. Benefits may also include a reduction in the risk (probability) of specific impacts, or of uncertainty, for particular segments of the community. Estimating such impacts of reform is particularly challenging.

Regulation reforms can have several types of impacts, including direct effects, dynamic effects, flow-on effects and spillover effects. These can be intended or unintended consequences of a reform (box J.2). Reforms can change both the sources and the magnitude of the costs and benefits of regulations. Reforms can also change the distribution of costs and benefits — who faces which types of costs, and where and when the benefits accrue. The net effect of a reform (whether it delivers a net benefit or cost to the community) depends on the balance of the costs and benefits of reforms.

Box J.2 The impacts of regulation reform

The impacts of regulation reforms include:

- direct effects — direct effects of reforms on target groups, such as a change in behaviour (includes administrative costs and substantive compliance costs)
- dynamic effects — reforms can influence innovation and change the pattern and quantum of investment through the economy, affecting resource endowments into the future
- flow-on effects — reforms can lead to changes in the prices of resources (such as labour and capital), hence changes in the way they are distributed through the economy. These effects can be intended or unintended
- other ‘spillover’ effects — other effects, both direct and indirect, that are usually unintended.

These effects are normally long-lasting. In addition, regulations can have other temporary effects, including:

- implementation costs — the costs to government and businesses of implementing reforms
- adjustment costs — transitional effects that arise as part of the process of economic change, such as underemployed resources.

These effects (which can be positive and negative) feed through to community wellbeing. Cost–benefit analysis seeks to identify, quantify and compare the positive and negative effects.

Comparison in a common metric

Quantitative evaluation makes it possible to compare the effects of reforms in a common metric. Usually, the impacts of reforms are converted into dollar values (discounted where necessary to account for impacts that arise over time). In some cases this is relatively straightforward, but in other cases it can be complex and potentially controversial. For example, compliance cost calculators (section J.3) can be used to estimate the administrative and substantive costs of regulations. Estimating broader economic distortions might require the use of more complex modelling tools (section J.5). And where regulations have effects that do not have market prices as measures of value (such as preserving environmental assets or improving people’s health), other tools might be required to estimate the value of these types of costs and benefits in dollar terms (section J.7). Such estimates can be controversial. For example, putting a value on a more equitable distribution of income, or the choice of a ‘social’ discount rate, are often highly contested.

Where there are a variety of options, expressing the effects of reforms in a common metric makes it easier to compare the options against sound decision criteria. The alternative to quantitative analysis would be to attempt to make a subjective judgement about the trade-offs between various types of costs and benefits. Quantitative approaches should be more transparent, and should make decision makers more accountable for the judgements they make.

Evaluating reforms against a counterfactual

Qualitative approaches to evaluating reforms often rely on people's impressions. Where there is a lack of observational data on changes in behaviour the answers people give to questions like 'Has this reform made things better or worse?' and 'Was the reform justified?' depend on their points of view and their prior assumptions. The answers people give tend to be unreliable because it can be difficult for them to identify and isolate the effects of a particular reform. A more worrying implication of using qualitative approaches is that noisy, well-organised special interest groups can exercise a disproportionate influence on the evaluation of reforms that have benefits that are widespread (but for each beneficiary are relatively small). Quantitative approaches can strip out some of the biases inherent in qualitative analysis, and can impose disciplines on the evaluation. However, quantification too may not be based on actual observations, but on subjective assessments, such as business perceptions of cost. While this can still be useful, like qualitative evaluations, subjective sources of data require greater testing to ensure they are reliable and representative.

A key strength of quantitative approaches is that they can be used to define a counterfactual — an estimate or set of estimates of what would have happened in the absence of a reform. Evaluating the effects of a reform against a counterfactual is important because reforms generally happen in the context of broader changes. For example, businesses expand and contract and the structure of the economy changes over time. And external shocks (such as the current high terms of trade) lead to changes in the way resources are allocated throughout the economy. Formally defining a counterfactual makes it possible to estimate the effects that can be specifically attributed to a particular reform compared to what would have happened in the absence of a reform.

A simple example of using a counterfactual is a survey of regulatory burdens (section J.2). If a regulator wanted to evaluate the effects of a reform that changed the requirements for firms to keep records of certain types of transactions, it could survey them to ask 'Has the regulatory burden got better or worse as a result of the reforms?' Alternatively, it could survey firms before the reforms to ask them how

many hours per week each firm spends on regulatory compliance, and then conduct the same survey after the reforms had taken place. All else equal, the difference between the responses would give an indication of the change in the regulatory burden. Using a more quantitative approach provides a clear counterfactual, so the effects of the reform can be evaluated empirically.

More sophisticated approaches (such as economic modelling) entail more formal definitions of the counterfactual. For example, in modelling approaches, the counterfactual is defined by setting the parameters and variables in the model to a particular set of values that are intended to represent the world without the reform. Some parameters are then changed to represent the reform, and the effects on the model as a whole are observed.

Numbers can be influential

Because quantitative analysis can be done transparently and rigorously and the effects of reforms can be expressed in a common metric, the results can be influential in encouraging reform. For example, economy-wide modelling was used to make the case for microeconomic reforms in the 1980s and 1990s. Trade liberalisation and National Competition Policy were controversial reforms at the time, but by using quantitative tools to show the benefits (or potential benefits) of reforms, governments were able to advocate for welfare-enhancing reforms that have benefited the Australian community in the longer term.

Quantification can be costly — the case for proportionality

Policy evaluations can be time-consuming and resource-intensive. In general, the more widespread the effects of reforms, the more complex the tools necessary to evaluate them and the higher the costs of the evaluation. Given the potential for high costs, the guiding principle in carrying out an evaluation should be ‘proportionality’ — doing only as much analysis as is necessary to get a robust answer to the relevant questions.

When deciding to evaluate a reform, the first task is to identify the question that is being asked. For example, is the goal of the evaluation simply to determine if the policy has been implemented as intended? Or is there interest in the effects of the reform on administrative and compliance cost burdens, or on wider economic distortions? Deciding which types of costs and benefits are of interest provides a guide to determining which approaches to take in the evaluation.

Clearly this poses a challenge for regulatory evaluation — how do you know if a regulation is worthy of a full evaluation, without doing the evaluation in the first place? One approach is to use rules of thumb to gauge whether regulations are likely to be having material effects. Some jurisdictions have such rules in place to determine whether a full evaluation is worth pursuing (box J.3).

Box J.3 Rules of thumb — when to do a full evaluation

Victorian Government

The Victorian Government has a target to reduce the regulatory burden by \$500 million per year by 2012. In order to assess progress against this target, it is necessary to estimate the effects of regulatory reforms. However, only material changes to regulatory burdens are included in the measurement of overall burden reduction. The Victorian Government's manual for measuring the effects of regulatory change states that it is only necessary to measure the effects of regulatory changes if there is *prima facie* evidence that:

- the change in administrative burden brought about is greater than \$250 000; or
- the change in the sum of the regulatory burdens is over \$500 000 (taking into account a limited range of burdens).

Danish Business panels

The Danish Government used 'business panels' — surveys of firms and focus groups to gauge the possible burdens of proposed regulations. While the panels were used for ex ante analysis of reforms, the example is relevant for ex post evaluations. The rule of thumb for determining whether a business panel was justified was to estimate the annual administrative burden imposed by the regulation for each firm (in hours) and multiply that figure by the number of affected firms. If the total administrative burden across all firms was estimated to exceed 2000 hours per year, a business panel would be conducted. So, if a regulation was proposed that would affect 100 firms, and they would have to spend one hour per week on administering the regulation (52 hours per year), the total administrative burden would be estimated at 5200 hours, and a business panel would proceed. Jacobs & Associates (2007) suggested that it was usually clear whether or not a regulation would exceed the threshold.

Sources: Victorian Department of Treasury and Finance (2009b); Jacobs & Associates (2007).

J.2 Surveys and micro-studies of business

Surveys and micro-studies of business are undertaken by governments and other bodies (such as business peak bodies) to reveal businesses' perceptions of the burdens and effectiveness of regulations, and changes in the burden following regulation reform (box J.4).

Box J.4 Examples of surveys and micro-studies

Perceptions of regulatory burdens in Victoria

A telephone survey of over 1000 organisations in Victoria was conducted for the Victorian Competition and Efficiency Commission to study business perceptions of regulations. Matters covered included: identifying the most burdensome regulations for each organisation, and the activities that impose burdens; identifying regulatory overlaps; and questions about changes in the size and complexity of the regulatory burden over time.

New South Wales Business Chamber Red Tape Survey

This is an annual survey by the New South Wales Business Chamber. It is similar in content to the Victorian survey, with an additional question on the number of hours businesses spend complying with regulatory requirements.

Danish Business Panels

Established by the Danish Government in the 1990s, since replaced with the Standard Cost Model (section I.3). The Business Panels consisted of firms that were surveyed and participated in focus groups to help the Danish Government gauge the effects of proposed reforms.

Source: Wallis Consulting (2011).

What do they measure?

Surveys and micro-studies generally focus on the administrative and substantive compliance costs of regulation. In some cases, the survey questions are qualitative. For example, Victorian organisations were asked if they had dealt with regulations in the past three years that had imposed ‘any unnecessary burden or costs of their organisation’ (Wallis Consulting 2011). In other cases, surveys include questions that quantify the burden. For example, the New South Wales Business Chamber (2010), in its Red Tape Survey, asked participants how much time they spend each week in compliance with regulatory requirements. Recently Australian Industry Group (AIG) conducted a perceptions survey of Australian CEOs to identify what areas of, and issues with, regulation were the most burdensome, and to quantify the costs they face (AIG 2011). AIG estimated that:

on average, the outsourcing cost of regulatory compliance tasks amounts to 3.2 per cent of total annual expenses. Together, these direct costs represent close to 4 per cent of total annual expenses. Businesses on average deal with 8 separate regulatory authorities and in addition to their outsourced costs, spend 13.3 hours per week complying with regulatory requirements ... The average compliance time varied between businesses in the manufacturing, services and construction sectors. Manufacturers report the lowest

compliance time (12.1 hours), followed by businesses in the service sector (15.6 hours), and the construction sector (20.7 hours). Larger (100 employees or more) businesses spend relatively more time (27.2 hours per week) compared to medium (16.8 hours) or small businesses (7.3 hours) on compliance related activities. (p.7)

Some surveys also attempt to identify trends in regulatory burdens over time, by asking participants if they consider that overall regulatory burdens have increased or decreased over a given time frame. This could include whether burdens have changed following a regulatory reform.

Other types of questions are geared mainly toward identifying areas of regulatory burden (such as the areas of particular concern to firms in particular industries). Few studies appear to ask about the benefits of regulation, however, the Commission is aware of at least one example of a study that sought to identify the benefits of regulation and the characteristics of good regulation (UK Department for Business, Innovation and Skills 2009).

What are the advantages of surveys and micro-studies?

The advantages of surveys and micro studies include that they can:

- be used to benchmark regulatory burdens over time
- provide insights into the distribution of the costs of regulation (for example, whether smaller businesses report a greater regulatory burden)
- be carried out at low cost — Jacobs & Associates (2007) stated that the budget of the agency that administered the Danish business panels was approximately €0.5 million per year
- help to identify particularly burdensome regulations.

These advantages would only apply if the survey instrument is well-designed and asks the right questions. Also, the results of surveys will only reflect the true effects of the regulations if participants constitute a representative sample, so the survey reflects the range of viewpoints.

What are the limitations of surveys and micro-studies?

The surveys and micro-studies that the Commission has identified generally provide limited quantitative information on the costs and benefits of specific reforms. Instead, they give a broad overview of businesses' subjective perceptions of the regulatory environments they face. So while they have their place in the regulatory reform process, they are limited in their usefulness as a tool for ex post evaluation.

One important challenge that arises in using surveys and micro studies to evaluate the effects of reforms is that it is difficult to evaluate reforms against a valid counterfactual. Firms responding to surveys can find it difficult to distinguish changes arising from regulation reform from other changes in their regulatory environment, or their operating environment more generally.

When are surveys and micro-studies useful?

Surveys and micro-studies are likely to be most useful as a tool for tracking business perceptions of the regulatory burdens they face. They can also be a good first step for identifying burdensome regulations. As tools for ex post evaluation of specific regulatory reforms their usefulness is limited, although they can be used as part of a triangulation process (appendix I).

J.3 Compliance cost calculators

Compliance cost calculators are accounting tools that are used to estimate some of the costs of regulation to businesses. They use evidence from case studies of businesses, surveys, and information on the average labour costs of particular types of employees, and assumptions about the regulatory burden of particular instruments.

What do they measure?

Compliance cost calculators account for different mixes of administrative, substantive and economic costs of regulations faced by businesses. Some also account for fees and charges levied by governments, which could be a proxy for the administration costs to government, if the fees and charges are levied on a cost-recovery basis. Compliance cost calculators do not quantify the broad economic distortions that can be caused by regulations. The ‘Standard Cost Model’ focuses exclusively on administrative costs. The ‘Regulatory Cost Model’ and the Office of Best Practice Regulation’s (OBPR) Business Cost Calculator are somewhat broader.

Compliance cost calculators are often based on the concept of a ‘normally efficient business’. This is a hypothetical construct that is intended to reflect a business that has ‘normal’ capacity to deal with regulatory obligations.

Examples of compliance cost calculators

The 'Standard Cost Model'

The Standard Cost Model (SCM) was developed by the Government of the Netherlands as a method for estimating the administrative costs of regulations. The SCM focuses on information costs, such as the costs of preparing and reporting information to demonstrate compliance with regulations. Substantive compliance costs and economic costs (box J.1) are not accounted for in the SCM.

The methodology of the SCM is relatively straightforward. The time taken to complete a regulatory obligation is estimated, and multiplied by the wage rate of the employee(s) who would complete it. This is then multiplied by the number of times per year the task must be carried out, and then multiplied by the total number of firms that face the obligation. This provides an estimate of the administrative costs of the regulation.

The Victorian Department of Primary Industries (2007a) used the SCM to estimate the reduction in administrative costs arising from changes to record keeping requirements for veterinarians. It found that the reforms had delivered savings of around \$1.7 million (box J.5).

The Office of Best Practice Regulation's Business Cost Calculator

When new regulations are proposed by Australian Government agencies, they must complete a Regulation Impact Statement (RIS), including estimates of compliance costs (unless the impacts are of a minor or machinery nature). Compliance costs must be estimated using the OBPR Business Cost Calculator (BCC), or an equivalent that is approved by the OBPR. The BCC is also used by some state and territory governments to measure progress against red tape reduction targets (appendix G).

The BCC is an IT tool derived from the Standard Cost Model. Eight types of regulatory compliance tasks are included in the BCC. These include administrative costs (record keeping, publication and documentation and procedural tasks) and substantive compliance costs (education, permission, purchase costs and enforcement) and 'other' tasks. Economic costs are not accounted for in the BCC. The analytical approach is similar to the SCM, although with a broader range of costs taken into account (box J.6).

Box J.5 Victorian agricultural and veterinary chemical reforms — evaluation using the Standard Cost Model

In 2007 the Victorian Government changed a regulation relating to requirements for veterinarians to keep records of the use of agricultural and veterinary chemicals. The Victorian Department of Primary Industries used the Standard Cost Model to estimate the change in administrative burdens arising from the reforms. The estimated change in administrative costs was based on:

- time taken — based on interviews with seven practitioners who had been affected by the reforms and were asked ‘to reflect upon the time it took them to complete the administrative activities under the previous regulations and under the current (new) regulations’ (Victorian Department of Primary Industries 2007a). (Hence, the effects of the reforms were assessed against a counterfactual of ‘no change’ to the previous regulations.)
- veterinarians’ average wage rate (hourly)
- frequency — the number of times the ‘average’ firm would complete the obligation each year
- population — the number of firms affected.

Based on these data, the savings in administrative costs was estimated to be around \$1.7 million per year.

	<i>Time taken (minutes)</i>	<i>Wage rate (\$/hour)</i>	<i>frequency</i>	<i>population</i>	<i>total cost per year</i>
Previous requirement	6.4	96	880	800	\$6.6m
New requirement	4.7	96	880	800	\$4.9m

Source: Victorian Department of Primary Industries (2007a and 2007b).

Box J.6 Basics of the Office of Best Practice Regulation's Business Cost Calculator

When the Office of Best Practice Regulation's Business Cost Calculator (BCC) is used to carry out ex ante evaluations of proposed reform, the process followed involves:

- setting out the regulatory options (for example, ban a product, restrict access to licensed users or take no action)
- identifying the actions that would have to be taken for each of the regulatory options (such as providing information, keeping records and purchasing equipment)
- identifying the total number of firms in the industry, and the percentage likely to face obligations for each action
- estimating the number of staff that would have to perform the action for each affected business, the number of times per year they would have to act and the time taken for the activity
- enter the labour costs (manually, or using an in-built wage calculator).

Based on this information, the BCC calculates the estimated cost to each affected firm and to the industry as a whole, of each of the activities that would be required under each of the regulatory options.

This approach could easily be applied to ex post evaluations of the costs of regulation. Indeed, where reforms have taken place, the information that is entered into the BCC could be more accurate than the information used for ex ante evaluations (because it could be based on real-world experience, rather than estimates of the possible effects of proposed regulatory options).

Source: OBPR (nd).

Regulatory Change Measurement in the Victorian Government

The Victorian Department of Treasury and Finance (2009b) has published a manual that sets out the approaches agencies must take to measure changes in regulatory burdens. Three types of costs are within the scope of the measured burden:

- 'substantive compliance costs' — costs that directly lead to the achievement of the regulatory outcomes. These often include capital and production costs
- 'administrative costs' — costs incurred by entities to show compliance with a regulation and by the government to administer the regulation
- 'delay costs' — expenses and losses arising from two types of delays brought about by regulations
 - 'application delays' — the time taken to complete an application (such as applying for a license or permit)

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- ‘approval delay’ — the time taken by a regulator to communicate a final decision on an application. The time taken can prevent regulated entities from undertaking activities.

In the Commission’s taxonomy of the costs of regulation, delay costs are included in economic costs.

Substantive compliance costs and administrative costs are calculated in a similar way to the SCM — number of firms multiplied by the cost of meeting a requirement (labour or capital cost) multiplied by the frequency of the requirement (how many times per year). The method for calculating delay costs depends on the type of delay and how it imposes costs. For delays that lock up capital (such as planning approvals that impose delays on property developers), the delay cost is calculated using the cost of the capital and the interest rate (as a proxy for the opportunity cost of the delay). Where regulatory delays lead to labour being left idle, the delay costs include the costs of labour (wages and other on-costs).

The Bertelsmann ‘Regulatory Cost Model’

The Bertelsmann Regulatory Cost Model (RCM) was developed for the German Government. It is based on similar principles to the SCM, but takes into account a broader range of costs. The process of the RCM is to identify the ‘individual statutory duties’ that firms must complete to satisfy regulatory obligations. Only duties that require action on the part of the firm are included. Duties to tolerate certain activities (such as allowing employees to access personnel files) or to abstain from certain activities (such as dumping waste into rivers) are not included, even though they may impose costs on firms.

The regulatory obligations that are measured through the RCM are:

- information duties (the obligation to provide information)
- payment duties (such as taxes and the obligation to bear certain costs)
- cooperative duties (the duty to cooperate with obligations)
- supervisory duties
- training duties
- target fulfilment and other fulfilment duties (the obligation to achieve certain objectives) (Frick, Ernst and Riedel 2009).

For each type of duty, the personnel, material and financial costs of the obligation are estimated.

The RCM takes into account the ‘business as usual’ costs of businesses. These are the costs that would have been incurred by the firm even in the absence of the statutory duties. The method used to estimate these costs is based on interviews and questions about firms’ perceptions of their business as usual costs. Specifically, firms are asked to estimate the personnel, material and financial costs associated with a regulatory obligation, and are then asked ‘What portion of each cost ... would be incurred even without the statutory duty?’ (Frick, Ernst and Riedel 2009, p. 55). Estimates of costs that are derived in this way are subject to uncertainty arising from the possibility of misperception, and could be under- or over-estimated. Once the costs of the regulatory obligations have been estimated, the business as usual costs are subtracted from this figure to estimate the total regulatory costs to businesses.

The RCM approach also includes a method for estimating the opportunity costs of regulation. Opportunity costs are estimated as the profits that are foregone as a result of regulatory obligations. They are calculated by multiplying the additional expenses of regulations by the prevailing market interest rate (specifically the Euro InterBank Offered Rate). Opportunity costs are calculated for a single year. So if complying with a regulation is estimated to impose additional expenses of \$100 000 per year, and the interest rate is 7 per cent, the opportunity cost would be estimated as \$7000. This is probably a crude proxy for the actual opportunity cost of regulation, but if a consistent methodology is used, it would make it possible to compare estimates of the opportunity costs of various regulations.

The RCM also includes an approach for evaluating, but not quantifying the ‘irritational effects’ of regulation — the annoyance or irritation felt by the party that has obligations under a regulation. Firms are asked whether they understand regulation, whether they find it feasible, whether they accept the objective of the regulation, and whether they perceive the regulation to represent a significant burden. While it is not possible to measure the irritation businesses feel with having to comply with regulations, it is possible to rank their responses for different regulations to discover which are leading to the greatest annoyance.

While RCM includes a broader mix of costs than the SCM, it does not include all of the costs of regulation. Some of the costs that are excluded from the RCM approach include: the legislative costs (the costs of enacting regulations); administrative enforcement costs (the costs incurred in enforcing regulations, although if these costs are passed on through cost recovery measures, they will be captured as ‘financial costs’ to regulated parties); and costs to the national economy (distortions).

What are the advantages of compliance cost calculators?

Compliance cost calculators are well suited for estimating the administrative and substantive compliance costs and, in some cases, some of the economic costs of regulations. The approaches described above include different combinations of these types of costs, although they generally use similar approaches to data gathering and estimating the costs.

In a formal sense, compliance cost calculators meet many of the criteria for a good evaluation framework (box I.17):

- the causal links are clearly set out (a particular task imposes a particular set of costs)
- it is clear what data are needed to identify the effects of reforms (and in many cases the data requirements need not be onerous)
- the assumptions used in the analysis can be made explicit
- evidence can be independently verified (although some of the data used to estimate costs may be based on perceptions and assertions that could be difficult to quantify).

Compliance costs calculators can be used to evaluate the effects of reforms against a counterfactual, and to attribute changes to reforms, although in a dynamic environment it can be challenging to attribute changes in compliance costs to particular reforms.

What are the limitations of compliance cost calculators?

Compliance cost calculators have limitations in their focus, their evidence base and their ability to identify the distribution of costs. Also, they do not account for the benefits of regulation. (However, if reforms leave the beneficial aspects of regulations unchanged, while reducing compliance costs, the net effect is a benefit to the community.)

The range of costs taken into account varies among the compliance cost calculators. However, in the calculators identified in this appendix, administration costs to regulators are only included if they are passed on to regulated entities through cost recovery. Broader economic distortions are not covered.

Compliance cost calculators are often populated with evidence from surveys and focus groups (although in some approaches the analysis is based on a ‘synthetic’ business). This suggests some challenges. First, businesses might not be able to separately identify the costs of particular activities. Instead, they might have a ‘feel’

for how many hours per week they spend in total on regulatory compliance activities. This can make it difficult to identify the costs of specific regulations, and the ‘pressure points’ for further reform. Second, if samples are not representative or responses are widely dispersed, the values used as inputs into the calculators might not accurately reflect the true costs of regulatory compliance.

Compliance cost calculators are often based on the idea of a ‘normally efficient business’, which is taken to represent the ‘average’ business affected by a regulation. The implicit assumption is that the distribution of businesses (ordered according to the costs they face in complying with regulations) is approximately normal distributed or at least symmetric. In reality, this is probably not the case. There could be systematic differences in the way businesses deal with regulatory obligations, and the distribution could be skewed. (For example, there could be a large number of businesses that face very low costs of regulation, and a small number that face high costs, or vice versa.) The ‘normally efficient business’ assumption would not accommodate this reality, and could lead to inaccurate conclusions about the costs (and benefits) of reform.

When are compliance cost calculators useful?

Compliance cost calculators can be used to evaluate the direct benefits of reforms that arise from reductions in compliance costs (or the costs arising from increased compliance costs). They are not useful for evaluating changes from reforms that involve dynamic effects, flow-on effects (through the reallocation of resources) or other ‘spillover’ effects.

Compliance costs calculators are a useful tool when the main area of interest is the effects of reforms on compliance costs. They are most likely to provide useful information about the effects of reforms when:

- a significant number of organisations are affected by compliance and administration costs (and the costs are material)
- the burdens of compliance and administration costs are regarded as a significant element of the total costs of regulation
- the activities that impose the costs can be clearly identified
- information about the labour, materiel and other financial costs of regulations (before and after reforms) are available, or can be estimated with confidence
- the distribution of compliance costs across the affected businesses is symmetric and ‘short-tailed’, so that average costs provide a reasonable empirical proxy for total costs. (Long tails would indicate that regulations impact disproportionately on some businesses.)

J.4 Econometric analysis

Econometrics is a set of statistical tools that can be used to determine whether there is a mathematical relationship between two (or more) variables, what effect the variables have on each other, and the robustness of the relationship. Econometrics provides a way to test whether relationships set out in economic theory are likely to hold in practice, by applying real-world data to theoretical models. Econometrics is a data-driven approach to evaluating reforms, so the availability and quality of data are key considerations in deciding whether econometrics is a feasible approach to evaluate a particular reform (box J.7).

Box J.7 The role of data in econometric analysis

Econometric techniques can be applied to several types of data.

- *Cross section data* are observations of the values of two or more variables at a single point in time. An example of cross section data is the income of sample household in a region at a given point.
- *Time series data* present the values of a variable over time. An example of a time series is the average household income in Australia over the period 2005–2010.
- *Panel data* combines elements of cross section and time series data. Panel data sets contain observations of multiple variables over time. An example of a panel data set is a set that included observations of the incomes of a sample of households in Australia over the period 2005–2010 (such as the Household Income and Labour Dynamics in Australia (HILDA) data set).

Econometric tools can be used to analyse the relationships between variables. However, the results of econometric analysis depend on the quality of the data. For econometric analysis to produce results that are robust and unbiased, the data must be available and accurate, and must have several statistical properties.

In many cases, the effects of reforms are not readily captured by the variables available. Dee (2005) gave the example of reforms that brought particular sectors under the umbrella of the *Trade Practices Act*. The impacts of such a reform are likely to be difficult to quantify. For the purposes of economic modelling, the effects of such reforms are often proxied by tax-like instruments or ‘productivity shifters’. Creative (but sensible) use of proxies can help to understand the potential impacts of reforms that are difficult to quantify.

What does it measure?

Econometric methods can be used to estimate three things.

1. Does one variable exert an influence on another variable? (For example, on average, does increasing a person's level of education affect their earnings?)
2. What is the direction and magnitude of the relationship? (What is the increase (or decrease) in earnings for each additional year of education?)
3. Is the relationship robust? (Can the hypothesis that education does not affect earnings be comprehensively rejected using statistical techniques?)

In econometrics, there are two types of variables. The *dependent* variable (on the left-hand side of the equation) is the variable that is thought to be systematically affected by changes in other *independent* variables. Any number of independent variables can be included in the analysis (subject to data availability) (box J.8).

Econometric methods can be used to measure the marginal effect of changes in the independent variables on the dependent variable(s). Where an econometric model includes several independent variables (a multivariate analysis), the statistical techniques 'hold constant' all the variables except the one that represents the reform to provide an estimate of the direction and magnitude of the effect of the reform on the dependent variable. For example, it might be found that increasing a person's education level from year 11 to year 12 leads to an average 13 per cent increase in their earnings (compared with the counterfactual of a year 11 education). It is not necessarily the case that there is any one person for whom this is true. Rather, this is the average marginal effect on the sample of individuals of the change in education levels.

In the case of regulation reform, the choice of a dependent variable would depend on the objectives of the reform. For example, if the objective was to increase labour productivity in a particular industry, the dependent variable would be an indicator of labour productivity. If the objective was to reduce the incidence of workplace injuries, the dependent variable would be the incidence of accidents at firms affected by the reform or a suitable proxy.

Box J.8 **Econometric analysis of regulatory reforms — example**

Rungsuriyawiboon and Coelli (2006) examined the effects of United States regulators moving away from rate of return regulation of utilities in favour of incentive-based regulation (such as retail price caps). Rate of return regulation had been thought to provide an incentive for utilities to over invest in capital, leading to higher retail prices. Incentive-based regulation would allow firms to retain any additional profits they earned above the regulated retail price caps. It was hypothesised that this would provide an incentive to increase efficiency.

Rungsuriyawiboon and Coelli used a variety of econometric techniques to analyse the effects of regulatory structures on productivity in electricity generation. Their analysis was based on firm level data on electricity generation and costs (fuel, labour, maintenance and capital) over a 13 year period (1986–98). Their results led to the conclusion that the move to incentive-based regulation had not had the hypothesised effects on efficiency.

It should be noted that the conclusions were based on the assumption that there were no other systematic influences that could have been correlated with the policy change that was examined. If this assumption was not accurate, the results could have been biased through ‘omitted variable bias’. Where these kinds of assumptions exist, econometric techniques can be used to test whether they are reasonable.

The results of this research demonstrate one of the strengths of econometric analysis — the ability to empirically test the underlying theory behind reforms.

Source: Rungsuriyawiboon and Coelli (2006).

What are the advantages of econometric analysis?

Appropriately structured, econometric analysis satisfies the criteria for a good summative evaluation framework that were set out in appendix I (box I.17):

- the causal links between regulatory reforms and the dependent variable are clearly set out in the model, and can be empirically tested
- by holding all other variables constant and estimating the marginal effect of a reform, changes can be identified against a counterfactual, and can be clearly attributed to policy variables
- data requirements are clear from the structure of the model (although in the real world, model structure will often be influenced by the availability of data)
- assumptions are explicit in the structure of econometric models (although the assumptions implicit in statistical techniques may not be explicit or fully tested)
- evidence can be independently verified (provided data are made available)

-
- uncertainty over the results can (and should) be considered and reported through sensitivity analysis and statistical testing.

Another key strength of econometric analysis is that it can account for external factors that influence outcomes of interest. Often it is difficult to isolate the effects of reforms from other factors (such as time trends, economic growth or changes in the composition of the economy). Well-specified econometric models can account for these factors. Controlling for other factors makes it possible to more accurately estimate the marginal effects of reforms, and also to identify other factors that have influenced the dependent variable (some of which may be policy-relevant).

As well as providing estimates of the direction, size and strength of the relationships between variables, econometric analysis can provide guidance on the reasons for the results, and on areas for further analysis. For example, if a reform affects large and small businesses, an econometric model could be specified in a way to identify whether different sized firms faced different impacts (for example, using dummy variables). This could help to identify ‘hot spots’ for further attention.

Finally, econometric analysis can be used to test the underlying logic for reforms. This helps to build the evidence base for future reforms, and also to hold policy makers to account through empirical evidence.

What are the limitations of econometric analysis?

Econometric analysis is a data-based approach where results are influenced by the structure of the model and the assumptions inherent in the modelling framework. These factors point to some of the limitations of the approach.

A key limit to the use of econometric analysis is generally the availability and reliability of data. It is necessary to have time series data from before and after the reform in order to estimate the effects of the reform on the dependent variable. If the data are biased or inaccurate, the results might not reflect the true relationships between variables. In some cases this difficulty can be addressed by collecting data as part of a reform package. However, data collection is often costly, and can impose additional administrative costs on parties that are subject to regulation. (Also, the collection of data as part of the reform package may of itself engender biases because of the selectivity of the collection.)

Another important limitation arises from the purpose of econometrics, which is to identify and quantify the relationships between a dependent variable and one or more independent variables. This limits the usefulness of econometrics for identifying the unintended consequences of reforms on other variables. A related

limitation is that econometrics quantifies how a change in an independent variable leads to a change in the dependent variable. Because econometric models are typically expressed in a reduced form of underlying theoretical relationships, it does not necessarily identify intermediate steps or transmission mechanisms.

A further challenge is that regulatory reforms seldom occur in isolation. Economic trends, technological change and changes in the structure of firms and industry can have significant effects on business performance, and the effects of reforms might be lost in the statistical ‘noise’. Econometric analysis can only correctly attribute the effects of reforms if all of the main factors that influence the dependent variable are included in the model.

This leads to another limitation. Econometric analysis is only informative to the extent that the most appropriate statistical modelling framework is chosen. Econometric models contain inherent assumptions about the nature of the data and the relationships between variables. There are ways to empirically test these assumptions, and this can help to determine the most appropriate modelling framework to use. It can also provide further information on research question (box J.9).

Equally important is the need for the model to include all factors that have a significant influence on the variable of interest. For example, using a static (that is, cross-sectional) framework might not provide sufficient information on the effects of a regulatory reform. Time series or panel data might provide more useful conclusions. Likewise, leaving out key variables can result in a model that has little explanatory power or biases in the estimates so they are not a useful basis for decision making.

Another risk is that models might be developed without sufficient understanding of the relevant economic theory. Modern software packages make it possible to easily and quickly ‘mine’ data to find relationships between variables, but without some theoretical basis, these relationships may provide little insight into the costs and benefits of regulation reforms.

Even where data are available and a theoretically valid model has been specified, statistical issues can complicate the analysis. For example, even where good data are available, it is likely that some relevant variables will be missing. This can limit the explanatory power of models, and lead to biased results. Unless the common biases are tested for, and the appropriate statistical techniques are used to correct for the biases, the results of the analysis might not be accurate.

Box J.9 Testing the assumptions in econometric models

Cai (2010) used econometric analysis to investigate the factors that drive the labour supply choices of married women in Australia. There are a number of factors that are thought to influence a woman's labour supply choices, including their age, education, whether they have children and their non-labour income. All of these factors were observed in the data that Cai used in the analysis. However, there are other factors that can influence labour supply choices, including:

- *unobserved individual heterogeneity* — people can have individual characteristics, such as work ethic or a preference for leisure over work, that are not observed in the data, but influence their labour supply decisions. If unobserved individual heterogeneity is present, specific econometric approaches must be used to control for the influence of heterogeneity on the results
- *transitory shocks* — people experience non-permanent changes (such as illness) that influence their labour supply decisions. These shocks can be uncorrelated over time (that is, your health status in one year is not related to your health status in the next year), or correlated (the two are related). The presence of correlated transitory shocks would have implications for the choice of modelling frameworks.

Cai was aware that these issues could lead to biases in the results of certain types of models. In order to test for their presence, he estimated four different models, using the same data. Some of the approaches were based on the assumption that there was no unobserved individual heterogeneity and that transitory shocks are not correlated over time. Other model specifications relaxed these assumptions. By estimating several models, Cai was able to determine whether the assumptions had an effect on the results, and to choose the model that appeared to make the most realistic assumptions about the nature of labour supply decisions. This kind of approach can be extended into other areas where there is concern that the assumptions that underpin econometric frameworks might have a significant influence on the results of the analysis.

Source: Cai (2010).

A further potential limitation is that econometric analysis is based on assumptions about the distribution of the data (typically that it is normally distributed). If data are not distributed as required in the model specification, estimates of the relationships between variables might not be statistically valid. Also, 'outliers' (data points significantly outside the average range for a variable) can give important insights into the effects of reforms, but their effects might not come through in econometric analysis.

A final limitation of econometric analysis relates to the way results are interpreted and communicated. In some cases, the results of econometric analysis are clear and interpretation is straightforward. In other cases results are more complex. As noted earlier, numbers can be influential in the policy making process. However, if they

are incorrectly interpreted, or communicated without the relevant caveats, decision makers could reach the wrong conclusions (although this issue is much more general than just for econometric analysis).

When can econometric analysis be used to quantify the effects of reforms?

Econometric analysis can be used to evaluate the direct effects of reforms on the target groups. However, the approach does not lend itself to estimating the dynamic and flow-on effects of reforms beyond the dependent variable, or other ‘spillover’ effects.

There are three key considerations to take into account in deciding whether econometric analysis would be a useful part of an evaluation of a reform. The first is to ask whether there is a theoretical basis to believe that there might be a relationship between a reform and a particular indicator. If so, it might be possible to specify an econometric model to test the existence, strength, direction and robustness of this relationship.

The second consideration is data — are good quality data available (or could they be collected at reasonable cost)? If the right data are not available, econometric analysis is not a viable option.

The final consideration is whether the organisation doing the evaluation has the expertise to carry out the econometric analysis (including testing for statistical issues that could lead to erroneous conclusions and to correct for them). This also includes the ability to interpret, understand and communicate the results of the analysis accurately.

J.5 Modelling

The approaches described so far can be used to evaluate the direct effects of reforms. However, reforms (particularly large-scale reforms) can have other effects as well (box J.2). They can lead to flow-on effects through a reallocation of resources in the economy as people and businesses deal with the direct effects of policy change. And over time, the dynamic effects of reforms on investment and innovation can influence the future structure of the economy. To identify and evaluate these effects requires a more detailed analytical framework — a model.

Models are a tool that economists use to construct a counterfactual. They are used to estimate how the effects of a reform trace through a particular industry, market or

the economy as a whole, compared to how the things would have looked in the absence of the reform. At the simplest level, a model is just a set of assumptions about how the world operates and how policy affects a particular variable or variables of interest (box J.10). Models can be defined mathematically to enable quantification of particular effects. This can include economic variables (such as output, consumption and national income) and non-monetised variables such as the environment and human health. More recently, economic modelling is increasingly incorporating insights from behavioural sciences.

Regardless of what type of model is used, all modelling involves a degree of abstraction from reality. Nevertheless, where models capture the key relationships, they can shed light on some of the potential (or actual) effects of reforms.

Box J.10 A ‘model’ does not have to be a set of equations

Dee (2005) gave an example of a Senate Select Committee hearing on the proposed Australia-United States Free Trade Agreement (AUSFTA). A Senator drew a distinction between three types of evidence:

- modelling evidence
- historical and comparative evidence
- pragmatic evidence — the opinions of people who would conduct trade under the agreement.

The Senator suggested that because modelling evidence was inconsistent — different modellers come up with different results — it could be discounted. Instead, the Senator preferred to rely on historical and comparative evidence, and pragmatic evidence. The relevant historical evidence was taken from the experience of the North American Free Trade Agreement (NAFTA). After NAFTA was signed, trade and investment between the signatories increased. Hence, it could be inferred that the AUSFTA would lead to increased trade and investment.

Although the Senator purported to reject modelling evidence, as Dee (2005) pointed out, the Senator was in fact using a model:

Their model was one that said that the growth of trade and investment flows between NAFTA partners had nothing to do with the growth in the size of the partner economies. Or if growth of the partner economies did matter, it was not enough to fully explain the growth of trade and investment between them. Finally, the formation of NAFTA was the definitive explanation for this trade and investment growth, despite the availability of other explanations (e.g. proximity, reductions in trade costs), and despite aspects of the NAFTA agreement (e.g. its rules of origin) that could be expected to constrain trade growth and divert investment flows. (pp. 1–2)

Source: Dee (2005).

What models measure

Partial equilibrium models include a huge spectrum from relatively simple models concerned with the effects of reforms on a particular economic variable (such as output, employment or labour productivity within an industry), to very complex models that map direct changes through to variables of interest. They can be used to estimate the effects of a reform on those variables, but are usually not designed to capture flow-on effects to other sectors of the economy.

General equilibrium models are a tool used to trace the second and subsequent round effects of reforms. They are designed to analyse how changes in one industry, market or region lead to a reallocation of resources (across regions, industries and different time periods). They can be used to disaggregate the broader effects of reforms. The results of partial equilibrium modelling can be used as an input into a general equilibrium model to trace the broader distributional effects of a reform across the economy. The Commission has made extensive use of computable general equilibrium (CGE) models, such as the Monash Multi-Regional Forecasting (MMRF) model (box J.11) in both ex ante and ex post evaluation of regulation reforms.

Box J.11 The Monash Multi-Regional Forecasting model

The Monash Multi-Regional Forecasting (MMRF) model is a multi-regional general equilibrium model developed by the Centre of Policy Studies (CoPS) at Monash University. Within the model each state and territory is treated as a separate region, and over 50 industry sectors are present in each jurisdiction.

The model contains explicit representations of intra-regional, inter-regional and international trade flows based on regional input-output data developed at CoPS. It also includes detailed data on government budgets (state, territory and Commonwealth).

Second round effects are determined on the basis of the model's input-output linkages, assumptions about the economic behaviour of firms and households, and resource constraints. Important elements of the theoretical structure of MMRF include:

- producers respond to changes in the competitiveness of Australian industry
- demand for Australian exports responds to the export price of Australian products
- producers alter their use of labour, produced capital and agricultural land in response to changes in the relative cost of these factors
- households vary consumption of commodities in response to changes in household income and relative prices of goods consumed
- productivity improvements reduce resource costs.

Source: PC (2010b).

Which variables are of interest and hence the type of model used depends on the reform. For example, the Commission used a partial equilibrium model of the urban water sectors in Melbourne and Perth to evaluate the potential effects of various water policy settings on consumer welfare (box J.12). The Commission used CGE modelling to evaluate a number of effects arising from the National Competition Policy (NCP) reforms, including the effects of productivity changes on employment and output in various regions and industry sectors and household income groups (box J.13).

Box J.12 Modelling water policy options

The Commission (PC 2011d) developed a partial equilibrium model of the urban water sectors of Melbourne and Perth to quantify (on an ex ante basis) the welfare effects of various policy options over time. The policy options that were modelled included water restrictions, policy bans and investment mandates on some forms of supply augmentation, and uniform retail pricing of water over time. Several types of variables were included in the model:

- water market variables and parameters — storage levels, consumer demand (for households and commercial use), the marginal price of water and the price elasticity of demand for water
- environmental parameters — inflows into dams, which could take either low, medium or high values, calibrated against historical data on inflows
- supply technologies — variables and parameters relating to the investment in and supply from dams, desalination, rural urban trade, water recycling, aquifers and household tanks
- water restriction variables — binary variables related to water storage levels.

By including environmental variables (inflows into storages), the model was able to provide guidance on the effects of various ‘states of nature’ that are outside of the control of policy makers and not influenced by market forces. The Commission’s results indicated that a flexible ‘real options’ approach to investing in water supply technologies would have the largest expected net benefit to the community.

Source: PC (2011d).

Box J.13 Evaluating the effects of National Competition Policy and related reforms

The NCP encompassed a broad range of reforms to extend competition into previously protected areas of the economy. It included revisions of the *Trade Practices Act 1974*, reforms of public monopolies, reviews of anti competitive legislation (across state, territory and federal governments) and infrastructure reforms (in electricity, gas, water and road transport). The Commission was asked to report on the impact of the NCP and related reforms, including distributional effects and effects on rural and regional Australia (PC 2005b).

The depth and breadth of those reforms, and the ongoing changes in the economy that were not related (directly) to those reforms made it difficult to disaggregate the effects of the NCP reforms on productivity from other changes. However, as an indicator of the possible benefits of the NCP reforms, the Commission used a variant of the Monash Multi-Regional Forecasting model to estimate the benefits of observed increases in productivity in infrastructure sectors that were subject to NCP reforms. It found that increases in productivity in these sectors had led to increases in gross domestic product (GDP), although not all of the increase in productivity could be attributed to the reforms.

The Commission evaluated employment effects, the impacts of reforms on rural and regional areas and environmental impacts. The report clearly set out a number of the costs and benefits that could have arisen from the NCP reforms that had distributional effects (for example, lower electricity prices could have benefited many farmers). Also, the Commission used the Monash Multi-Regional Forecasting model to estimate the effects of NCP reforms on employment in infrastructure industries in 57 regions, once the effects of the reforms had flowed through the economy in full. The modelling showed that over time, the net effect of the NCP reforms on some regions was forecast to be positive, while the effects would be negative for others. However, compared to other factors, the NCP reforms were found in most cases to have led to relatively small changes.

Source: PC (2005b).

To use a model to evaluate the effects of a reform, the model is calibrated to a ‘baseline’ scenario, where the values of parameters and variables are set in a way that is intended to reflect the world before a policy change. (This is the counterfactual against which the change is evaluated.) The model is then re-estimated with some variables and parameters changed in a way that is intended to represent the effects of the reform on the model (a ‘shock’ in modelling terms). Shocks can be estimated using econometric analysis (box J.14), through other modelling exercises, or through informed judgement. Once the shock has been administered, the results from the model are compared to evaluate how the change has affected variables of interest.

Box J.14 Using econometric analysis to generate ‘shocks’

The ‘shocks’ applied to computable general equilibrium models to estimate the effects of policy changes can be derived from econometric analysis of particular markets.

For example, Laplagne et al. (2007) and Forbes et al. (2010) used data from the Household Income and Labour Dynamics in Australia (HILDA) data set and several econometric models to estimate the effects of educational attainment and health conditions on labour force participation and wages (as a proxy for productivity). The two papers found that higher levels of education are associated with higher levels of labour force participation and higher wages, while persistent health conditions are associated with lower levels of participation and lower wages.

The results of the Laplagne et al. (2007) and Forbes et al. (2010) analyses did not quantify the effects of any particular reform. Instead, they provided estimates of the effects of different states (education and health) on labour market indicators (participation and wages). The results could be used to estimate the effects of reforms that increase educational attainment or reduce the prevalence of certain health conditions. As an extension, the results could be fed into a broader model of the economy to estimate the effects of policy changes on national indicators (such as national production, income and employment).

Sources: Laplagne et al. (2007); Forbes et al. (2010).

The time dimension

Modelling can use a ‘comparative static’ framework to evaluate the effects of regulations and reforms. This approach involves comparing ‘before’ and ‘after’ cases to understand the effects of the ‘shock’. This approach can give useful insights into the effects of reforms, but it does have some limitations. Some modelling approaches attempt to explicitly account for the time dimension in reforms. This can involve descriptive approaches, or more quantitative approaches.

For example, the Commission’s analysis of the effects of the NCP reforms on rural and regional areas included a detailed description of the ‘baseline’ — the long-term economic trends that had affected rural and regional areas. These included: changes in the structure of the economy, with the gross domestic product (GDP) share of agriculture declining; declines in the world prices of agricultural commodities; and rising incomes leading to migration away from inland rural areas. It also presented data on trends in population, employment and income in rural and regional areas, compared to metropolitan areas. These data showed that the counterfactual of ‘no NCP’ would likely have included relative decline in employment in rural and regional areas. However, the comparative static approach did not need to model these explicitly, as it estimated a change from baseline, regardless of what this

baseline looked like. This approach is limited if the changes in the baseline variables interact with the changes resulting from the reform to enhance or dampen the effects over time. In order to take this into account, a dynamic model is needed.

Dynamic approaches explicitly account for time within the models. This is done to enable models to show how the effects of shocks flow over time and how changes in the baseline affect the outcomes of reforms over time. Such models can also describe how markets or economies would change over time in the absence of reforms (if the assumptions in the baseline scenario were to hold) (box J.15).

Box J.15 The ‘dynamic’ Monash Multi-Regional Forecasting model

The standard applications of the Monash Multi-Regional Forecasting model have been based on comparative static analysis — two scenarios are modelled to show the ‘before and after’ effects of a shock. For its work on the *Impacts and Benefits of COAG Reforms*, the Commission has opted to use a ‘dynamic’ version of the model. The dynamic version of the MMRF model differs from the comparative static approach because time is explicitly accounted for in the model.

Using the dynamic approach, the ‘reference scenario’ shows how the economy is expected to change over a set period of time (say ten years). The model is then run, and shocks applied to generate a ‘policy scenario’ to forecast the likely changes over the projection period.

The dynamic approach makes it possible to explicitly take into account possible changes in the structure of the economy and how the changes might interact with reforms. It can also be used to estimate a ‘transition path’ — how the reforms will flow through the economy over time, and how sectors and regions will be affected by the changes at different points.

Source: PC (2010b).

Distributional issues

As well as estimating the size of the effects of reforms, models can be used to evaluate the distributional effects of reforms (who bears what costs and benefits). To expand the results to include regional or household distributional effects requires an additional step. As the CGE model provides information on wages for categories of labour and the costs of various goods and services, this information can be applied to the various categories of households. The impact on each type will depend on the effects of the reforms on their sources of income and their consumption bundles. Microsimulation models can be used to generate detailed estimates of household impacts. However, at a more aggregated level, impacts on household income groups can be estimated. The Commission used this approach in

its evaluation of the NCP reforms, which included an analysis of the distributional effects on regions and households of productivity-enhancing changes (box J.16).

Box J.16 Quantifying the distributional effects of productivity growth

The Commission used a variant of the Monash Multi-Regional Forecasting (MMRF) model to estimate the effects of observed changes in productivity on national output (gross domestic product (GDP)). Productivity improvements and service price 'rebalancing' in the infrastructure sectors in the model were forecast to lead to an increase in GDP of around 2.5 per cent, once all the changes had washed through the system, compared to a 'no change' base case.

In turn, the model was used to estimate the effects of the GDP increase on household purchasing power (around a 1.2 per cent increase, mainly due to price and productivity changes in the electricity and telecommunications sectors). The difference between the changes in GDP and purchasing power reflect two results from the modelling. First, the policy changes were projected to lead to an increase in net exports, leading to a reduction in the terms of trade. Second, investment was projected to increase.

To estimate the distributional effects of these changes, the Commission disaggregated the increases in purchasing power to household groups (quintiles), using data from the 1993 Australian Bureau of Statistics *Household Expenditure Survey*. It found that all households would experience increased purchasing power, with higher and middle-income households experiencing larger gains.

The modelling of the distributional effects was based on the assumption that governments would redistribute additional revenue arising from the growth in GDP in a 'neutral' fashion. If governments used the increased revenue to fund a more progressive tax and transfer system, the increase in purchasing power of lower-income households would have been higher than the Commission estimated, and the increase for higher-income households would have been lower.

Source: PC (2005b).

What are the advantages of modelling?

Compared to the other approaches described above, the main advantage of modelling is that it can be used to evaluate more of the impacts of reforms. In particular, general equilibrium modelling can be used to identify and quantify unintended consequences arising from flow-on effects. Partial equilibrium models can provide a much more detailed assessment of the policy transmission mechanisms, including transitional effects. In formal terms, modelling meets many of the criteria for a good summative evaluation framework that were set out in appendix I:

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- the causal links are set out and can be tested through the evaluation
 - assumptions can be made explicit
 - both intended and unintended consequences of variables in the model can be identified and evaluated
 - changes can be identified against a counterfactual
 - changes can be attributed to specific ‘shocks’
 - the data requirements are clear
 - evidence can be independently verified (although a degree of expertise is required to understand, interpret and replicate modelling results)
 - the extent of uncertainty in the findings can be considered and reported.

A key advantage of modelling is that it imposes a discipline on policy analysis. All models should be tested as far as practicable against reality, with the key relationships between variables of interest identified and included in the model. To achieve this, assumptions must be clearly stated and formally defined, and data must be identified, compiled and checked before models can be run. This process of formalising the assumptions made in the exercise encourages deeper analysis of the relevant issues. A related advantage of modelling is that forecasts produced using models can be tested against reality. This can help to determine which models are more accurate and useful for certain types of tasks, and can help in calibrating models for future exercises.

What are the limitations of modelling?

As with econometrics, the chief limitations of modelling arise from the fact that it is a data-based, assumption-driven approach. If the data are not reliable and/or the assumptions that are the basis of models do not adequately capture the underlying relationships, the results will risk not reflecting the real-world effects of reforms.

A related limitation is that the effects of regulation reforms are often diverse and can not all be captured through modelling exercises (this limitation is common to all of the approaches described in this appendix). Likewise, encapsulating the effects of a reform in a ‘shock’ can be difficult or impossible. As a result, some of the important effects of reforms might be missed in modelling exercises.

These limitations mean that care needs to be taken in interpreting and reporting the results of analysis that are generated using models. Interpretation should clearly lay out the assumptions and data that constitute the model, and the way policy changes

have been represented in modelling exercises. Results should be reported with caveats that reflect the limitations of the models.

A final limitation of modelling is that it can be costly. Large models are expensive to develop, maintain, use and interpret (although once they have been built, ‘benchmark’ models can be adapted to evaluate numerous policy questions). Particularly costly elements of a modelling exercise include: developing shocks for CGE models (often this requires detailed analysis, including modelling of particular markets); and building in additional variables to account for particular effects.

When is modelling useful?

As a tool for ex post evaluation of regulation reforms, models are most useful for identifying economic costs and benefits arising from reforms where these include changes to broader economic distortions. Models can also be useful in disaggregating the effects of regulations and reforms to identify who is likely to benefit or experience losses.

Modelling usually draws on direct estimates of the compliance and administration costs of particular regulations. Although here too, models, such as the Standard Cost Model, can be applied to estimate these costs, which can be fed into a partial equilibrium model as a shock to industry costs or productivity. A model can then be used to estimate how the effects will flow through the sector to other parts of general equilibrium.

Where it is considered that reforms might be introducing (or removing) economic costs or distortions, modelling might be the best approach to quantifying these effects. However, as is the case with econometrics, modelling is only likely to be useful if:

- a model exists (or can be developed) that is based on sound theory and incorporates the key relationships
- good quality data are available
- the evaluation can be carried out by people who understand the model and can interpret and explain the results and implications of the model.

There are some further principles that apply to CGE modelling (but can equally be applied to other types of modelling and econometrics) (box J.17).

Box J.17 Some rules for using computable general equilibrium modelling

If modelling is to be used to evaluate the effects of regulatory reforms, the model should:

- be capable of being applied to analyse public policy
- be transparent, documented and publicly available
- have been publicly refereed
- have sound theoretical underpinnings
- have a database that reflects the structure of the Australian economy
- have sufficient industry detail for the policy being analysed
- provide information on the effect on states and territories (sometimes statistical divisions)
- provide sufficient detail on government expenditure.

J.6 Meta-analysis

Meta-analysis is a technique for examining the results of several evaluations to identify common features and trends. It can include qualitative and quantitative techniques, including regression analyses of the results of evaluations to test hypotheses. Meta-analysis can be used as an evaluation tool in its own right (for example, to examine the effects of various active labour market programs (box J.18)). It can also be used as an input into other types of analysis (such as to estimate shocks for CGE modelling, or to parameterise models).

Meta-analysis has its place in policy evaluation, but is limited as a tool for ex post evaluation of particular reforms. It can be a relatively low-cost method that takes advantage of work that has already been done to reach broad conclusions on the effects of various types of reforms and to help policy makers to learn from previous reforms. Used in this way, it could constitute a useful part of the process for evaluating policy options and designing reforms.

One limitation is that meta-analyses are generally not based on analysing a single reform. Rather, a meta-analysis might be used to examine the effects of a range of reforms in a similar area, such as labour market programs or infrastructure reforms, often drawing on studies from different jurisdictions or countries.

Another limitation is that it is difficult to use meta-analysis to evaluate reforms against a defined counterfactual. Where studies are drawn from a variety of jurisdictions over a number of years, it is not possible to identify a single counterfactual. Instead, meta-analysis can be used to make conclusions about the average effects of various factors across the studies.

Box J.18 Active labour market programs: a meta-analysis

Card et al. (2010) carried out a meta analysis of econometric evaluations of active labour market programs to determine which types of programs were most effective over different time frames. Their analysis included 97 studies that evaluated the effects of active labour market programs. The studies covered labour market programs in Australia, New Zealand, Europe, the United States, South America and Israel.

By analysing the results of the studies (including using econometric techniques to test various hypotheses), Card et al. were able to make several conclusions about the effects of active labour market programs. Specifically, they concluded that public sector employment programs are the least likely to yield positive outcomes. Job search assistance programs yield positive outcomes, as do training programs (although more in the medium term than in the short term).

Card et al. also drew some conclusions about the design and conduct of the evaluations. They found that the variable used to measure the outcome of the study has an influence on the results. Studies that used registered employment as the 'outcome variable' were more likely to yield positive results than studies that used employment or earnings. They also found that the publication status of the evaluation was not related to the sign (positive or negative) or statistical significance of the estimate of the effects of the program.

Source: Card et al. (2010).

J.7 Quantifying benefits and costs that are difficult to measure

The approaches set out above can be used to estimate costs and benefits that can be valued in economic terms. This allows a straightforward comparison of costs and benefits, and makes it possible to determine whether a reform has delivered a net benefit to the community (benefits exceeding costs). However, not all of the effects of reforms are easily measured in financial terms. This can be an issue when the objectives of regulation are to protect the environment and people's health, in cases where inputs are provided at non-market prices (such as volunteer work), and where the distribution of outcomes is of importance.

There are numerous examples of areas where costs and benefits can be difficult to quantify. However, even when this is the case, some attempt should be made to account for the effects of regulations and reforms. The alternatives are to ignore these types of effects (which would effectively mean valuing these effects at zero), or to give them an unspecified, or even infinite value (‘no reform is worth pursuing if there is any reduction in environmental water flows’ or ‘any cost is worth paying to reduce the incidence of diabetes’).

To incorporate these types of non-market impacts into cost–benefit analysis, it is necessary first to evaluate them in direct terms (such as ‘tonnes of pollution abated’ or ‘workplace injuries prevented’) and then estimate the money value of these effects. There is a wide variety of tools that can be used to estimate these kinds of values, although describing all of them is beyond the scope of this study. Two common approaches are ‘revealed preference’ and ‘stated preference’ (box J.19). Even where these types of approaches can not provide quantitative estimates of all of the costs and benefits of reforms, the attempt at least provides some discipline on the analysis, and encourages the analysts to ask the right kinds of questions.

An example of an approach to quantifying effects that are difficult to value is the Commission’s report into the not-for-profit sector (PC 2010e). Many of the inputs to the sector are not traded, or are provided at below market prices, and the outputs may be intangible and difficult to measure in financial terms. To deal with these issues, the Commission developed a framework to evaluate the inputs, outputs and outcomes of the sector (box J.20). While it was not possible to quantify the entirety of the contribution of the sector, the Commission’s approach at least led it to ask the right questions and focus attention on the most important areas.

In some cases, the difficulty in evaluating the costs and benefits may arise more from a lack of will than from any inherent barrier to measurement. For example, in its study of bilateral and regional trade agreements (PC 2010d), the Commission was unable to obtain estimates of the costs incurred by the Department of Foreign Affairs and Trade in the course of negotiating the agreements (box J.21).

Nevertheless, ex post evaluations can often be done in a way that takes these kinds of effects into account, either quantitatively or qualitatively. The fact that some effects are difficult to measure does not justify avoiding ex post evaluation, or failing to take these types of effects into account.

Box J.19 Estimating the value of the environment, life and health

Economists have developed several techniques for estimating the value of the environment and the value of human life and health for policy analysis. The most common approaches to estimating the value people place on life and health are known as ‘stated preferences’ and ‘revealed preferences’.

Stated preferences

Stated preference techniques involve asking people what they would be prepared to pay to achieve an outcome such as protecting an area of wilderness, or preventing one hypothetical death from illness or injury. Responses are used to estimate the average value that people place on the environment, life or health in a particular context.

Stated preference techniques can be relatively easy to use (requiring only a survey), but they also have limitations. The main drawback of this approach is that people seldom think about the environment or human health in dollar terms, so they don’t have a point of reference for their statements about how they value these things. A second weakness relates to how the question is ‘framed’ — people who respond to these types of questions generally believe that they will not be required to pay for the value they say they place on the environment or preventing a death or illness. This could lead them to give answers that are higher than their actual preferences, because there are no direct consequences from overstating their valuation.

Some of these concerns can be addressed by using ‘choice modelling’. Participants are presented with a set of options known as ‘choice sets’ (one choice set is the status quo). Each choice set includes the same attributes (for example, environmental attributes), but in different quantities. Participants choose their preferred choice set. Statistical techniques are used to estimate the relative value people place on each attribute.

Revealed preference

Revealed preference techniques use observations of people’s behaviour to impute the value that people place on the environment, life and health. They can be less prone to bias than stated preference techniques, but can only be applied where reliable data are available. A range of tools can be used to estimate people’s preferences. For some environmental issues, researchers use information on house prices to estimate the value people place on living close to a national park (or the reduction in value from living close to a landfill). They can observe the contribution people make to repairing environmental damage (such as the number of hours contributed by volunteers on Clean Up Australia Day). Another approach (the ‘travel cost method’) is to observe how far people are prepared to drive to reach a location with environmental values, and impute from the costs of time and transport how much people value the experience.

To estimate the value people place on life and health, researchers can use data on the wage premiums demanded by people who work in risky jobs. This gives an indication of the value that people place on the risk of illness, injury or death in specific contexts.

Source: PC (2006b).

Box J.20 Measuring the contribution of the not-for-profit sector

As part of its report into the not-for-profit (NFP) sector, the Commission developed a framework for measuring the contribution of the sector. The contribution of the sector is difficult to measure because many of the inputs (such as volunteer work) are not provided at market prices, and many of the outputs do not have an obvious market value (for example, NFP organisations provide relief from social isolation, and can assist in building community cohesion, neither of which is easily measured).

The Commission's approach was based on 'impact mapping'. Four factors were taken into account:

- inputs (measures of the resources used, such as the number of hours of labour provided by NFP organisations)
- outputs (indicators of the level of activity undertaken, such as the number of visits made to clients of NFP organisations)
- outcomes (direct costs and benefits to the activity participants)
- impacts (longer-term net benefits to the participants, and other costs and benefits to the broader community).

Measures of inputs and outputs give an indication of the activities and processes of NFP organisations. Outcomes and impacts relate to the benefits delivered by NFPs. Differences between the outputs of NFPs make it difficult to aggregate the benefits of the NFP sector as a whole, and so are better suited to evaluating the contribution of individual organisations.

Reforms to the NFP sector could affect all of these measures of the contribution of the sector. For example, reforms that led to similar outcomes and impacts as had existed before the reform, but reduced the inputs needed to deliver them could be said to have increased the efficiency of the sector.

Source: PC (2010e).

Box J.21 Estimating the costs of negotiating trade agreements

As part of its study of bilateral and regional trade agreements, the Commission sought information on the costs to government of negotiating such agreements. In response to a request for information, the Department of Foreign Affairs and Trade (DFAT) stated:

DFAT is not in a position to provide estimations of these costs as trade work is completely integrated into the work of the department and cannot be separately identified and costed. (PC 2010d , p. 111)

While policy reforms do often constitute the core work of a department or agency, it is common practice for agencies to publish estimates of costs. The Commission (PC 2010d) stated that it found it:

... difficult to reconcile DFAT's position regarding the estimation of expenditure on one of its key functions. The preparation of cost estimates of this nature, including the allocation of joint costs among different functions, with caveats where necessary, is a common practice in the public sector. (p. 110)

The Commission recommended that:

To enhance transparency and public accountability and enable better decision making regarding the negotiation of trade agreements, the Department of Foreign Affairs and Trade should publish estimates of the expenditure incurred in negotiating bilateral and regional trade agreements and multilateral trade agreements. These should include estimates for the costs of negotiating recent agreements. (p. 112)

This type of evidence could contribute to more thorough ex post evaluation of the cost and benefits of reforms.

Source: PC (2010d).

J.8 Summing up the approaches

Quantitative analysis of the effects of reforms has many benefits. It can show what has worked, given the policy objectives, and what has not, and reveal some of the unintended consequences. It can feed into future decision making, and guide further research into areas where there could be gains from reform or where there are risks. Perhaps most importantly, quantitative approaches impose a discipline on the analysis of reforms, and encourage researchers to ask the right kinds of questions to help to evaluate the effects of the reform against a defined counterfactual.

Each of the approaches set out in this appendix can play a role in quantifying the costs and benefits of reforms. The approaches vary in complexity, cost and rigour, and none is capable of quantifying all of the effect of reforms. All have been successfully used to contribute to analyses of regulatory reforms in the past.

The key lesson to come from examining these approaches is ‘horses for courses’ — choosing the approach that is suited to estimating the types of costs and benefits that are of the most relevance, and balancing the costs of doing the analysis against the benefits of knowing the effects of the reforms. While there are no firm rules about whether it is worthwhile to carry out a quantitative analysis of a particular reform, there are some suggestions that emerge from the analysis of the different approaches:

The first step is to consider the types of costs and benefits that could have been generated by the reform.

- On the cost side, consider the effects of reforms on administrative costs to regulators and businesses, any substantive compliance costs, economic costs and other distortions.
- On the benefits side, consider the effects of reforms on the community as a whole, including competition considerations, environmental, health and broader social effects.

In both cases, bear in mind the possible distributional effects — to whom are the benefits and costs likely to accrue? And — how are they distributed over time?

The next step is to use ‘rules of thumb’ as a guide to whether the reform is likely to have produced significant costs and benefits. If it seems that the effects could have been significant, it could be worth undertaking a quantitative evaluation to gain a greater understanding of the effects of the reform. At this step, it is worth considering the costs of the various approaches, and the benefits of doing the evaluation. Only proceed if the benefits of doing the evaluation are likely to exceed the cost.

If a quantitative evaluation is likely to be justified, the next step is to choose the appropriate evaluation method.

- If it is considered that the main effect of the reform was to change the compliance cost burden of a particular regulation, and the reform did not have the potential to introduce broader distortions, the appropriate tool is probably a compliance cost calculator.
- To evaluate the effect of a reform on a sector or activity, econometrics or partial equilibrium modelling can be useful. Whether these approaches should be used depends on whether quality data are available, and also on whether there is a theoretically-justified basis to believe that an empirical relationship exists between a reform and an indicator variable.

-
- In the case of reforms that have broad, economy-wide effects, modelling (such as CGE modelling) can be used to identify and disaggregate the effects (for example, quantifying the effects of a reform on households in different income groups). As with econometrics and other modelling tools, the availability of relevant and reliable data are a crucial factor in the decision to use economy-wide modelling.

For each of these approaches, an important part of the evaluation process is the interpretation and communication of the results. Numbers can be influential in policy debates, so care should be taken to present empirical results in the right way. Inevitably, the results of quantitative analysis reflect assumptions made in the evaluation process and are restricted by the availability of data. Any such limitations should be acknowledged, and the policy implications discussed.

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K How do different countries manage regulation?

Key points

- Regulatory policy has evolved from a focus on deregulation to a broader concern with the management of regulation. This covers the institutions, processes and tools in a regulatory system which operate around the regulatory cycle.
- While many governments have adopted regulatory impact assessments (which includes an ex ante evaluation) to manage the flow of regulation, several are now focussed on ways to better manage the stock.
- Countries have adopted different approaches to reducing the *quantity* of the regulatory stock as well as improving its *quality*.
- A 'good' regulatory system will have institutions, processes and tools which act to 'join up' the four stages of the regulatory cycle in order to achieve more appropriate, effective and efficient regulation.
- In most of the countries reviewed in this appendix, a central agency monitors the flow of regulation, but arrangements vary with regard to the institutions which oversee and monitor the stock of regulation.
 - There is generally greater clarity around the roles and responsibilities and the processes for managing the flow of regulation than for the stock.
 - Transparent processes are used more for the flow than for the stock, though some countries (Canada and the United States of America) have recently rebalanced arrangements.
 - The Netherlands has used a 'reducing regulatory burdens' lens to focus efforts in managing both the stock and flow of regulation.
- Canada and the United States of America, and to a lesser extent the European Union, have recently established specific requirements in their regulatory systems to undertake ex post evaluations of significant regulations. In the United Kingdom (UK) sunset requirements and the 'one-in one-out' rule provide incentives for evaluations.
- The Netherlands and the UK have adequate risk-based approaches to compliance checking and enforcement.

As the other appendixes have provided detailed examples of applications of the tools for managing and reviewing the stock of regulation, this appendix focuses on describing the regulatory systems selected countries use within the context of a regulatory cycle, with particular attention paid to evaluation and review processes.

The structure of this appendix is as follows:

- section K.1 — describes what is meant by a regulatory cycle and a regulatory system, and some desirable features
- sections K.2 to K.7 — provide a summary description of systems for managing the stock of regulation in: Canada; the European Union (EU); the Netherlands; the United Kingdom (UK); the United States of America (USA); and Australia. The description is organised around three main elements of regulatory systems:
 - *organisations, administrative structures and processes* — these include central agencies, specialist agencies, policy agencies and regulators together with responsibilities for who does what and when and the accountabilities via formal oversight and/or public scrutiny
 - *consultation and communication* — these include the types and levels of public engagement in each part of the regulatory cycle
 - *regulatory stock and flow tools* — for example, regulation impact statements (RISs), programmed reviews and the like
- section K.8 — briefly summarises the different approaches of regulatory systems in these countries.

K.1 Regulatory ‘cycles’ and ‘systems’

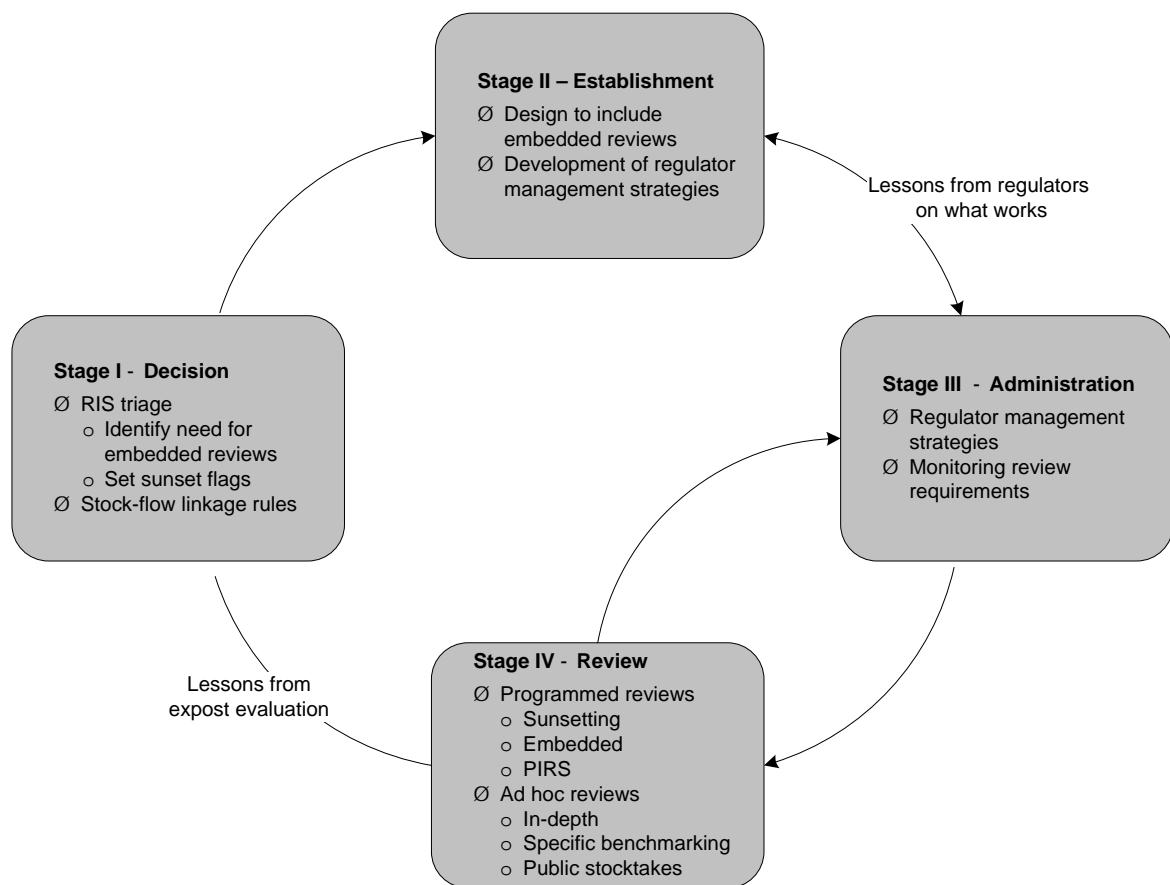
This section defines what is meant by the terms ‘regulatory cycle’ and ‘regulatory system’. These definitions provide a framework for describing the broad features of regulatory systems in the selected countries.

‘Regulatory policy’ encompasses the institutions, processes and tools applied to ensuring regulations are effective and efficient, and appropriate. This is an investment by governments in managing both the flow and the stock of regulation. Different countries develop and implement regulatory policy in different ways to suit their own needs and circumstances.

What is the ‘regulatory cycle’?

The regulatory cycle is represented as a series of stages that regulation passes through: from problem identification and development of a regulatory solution; to establishing the regulation; to its administration; then to evaluation and review. Completing the cycle, the regulation then lapses or is repealed or revised and renewed to start the cycle again (figure K.1).

Figure K.1 The regulatory cycle



Tools used in the regulatory cycle

The main objective of stock management is to ensure that the stock of regulation continues to be relevant, deliver net benefits to the community and minimise unnecessary burdens — that is, it remains ‘fit for purpose’. A variety of tools are drawn on in each stage of the regulatory cycle to achieve this objective. The Commission has defined four stages to better identify when the various tools might be applied.

In the first stage — the *policy advice and decision* stage — a RIS (also known as a regulation impact assessment (RIA)) would ensure that there is a significant problem and that the proposed regulatory solution is the best option for addressing this problem. Moreover, an ex ante evaluation (via a RIS) is a useful tool to ensure that the expected benefits of the regulation exceed the costs to the community. At this point, consideration could also be given to the type of stock management approach that would be most appropriate in the circumstances. For example, within a RIS, consideration could be given to whether the proposed regulation is a candidate for sunseting (over and above any broader requirements which may operate) or whether a statutory review requirement (an embedded review) is needed.

The *establishment* stage of regulation is the second step in a regulatory cycle. It involves the making of legislation and design of the regulations, as well as the assignment of responsibilities and accountabilities for implementation, administration and oversight. Detailed arrangements which establish processes to monitor compliance and enforce the regulation would be developed at this stage.

From a stock management perspective, consideration could also be given in this stage to the scope the regulator would have to fine tune the regulation that is administered (in order to minimise the compliance burden). The processes surrounding the collection of data and the conduct of reviews would also be embedded in the legislation at this point (with due consideration to potential additional burdens that might be placed on business).

Administration of the regulation comprises the third stage in the regulatory cycle. The scope that a regulator has to operate a ‘responsive regulation’ model (PC2011a), which in turn adopts a risk-based approach to monitoring compliance and enforcing regulation, is largely determined by the legislative framework within which the regulator operates. Regulators can also help manage the stock of regulation at this stage through implementing better practice administration arrangements (appendix G and ANAO 2007).

Further, during the administration phase, regulation should be monitored to assess progress in implementing the regulation and to identify the need to fine tune the regulation. In some cases, a post-implementation review may occur in this stage of the cycle. The data from monitoring activities provides some of the information required to undertake any subsequent embedded review that is planned. Indeed, the examination of the data gathered from monitoring might also inform the need for a more comprehensive review.

The fourth and final *review* stage of the regulatory cycle comprises evaluations and/or reviews of various types (see below). This stage provides the opportunity to

examine the appropriateness, effectiveness and efficiency of the regulation. A process audit would generally occur at this stage. These offer an important mechanism for improving the quality of implementation, reducing compliance costs (or regulatory burdens) and may also flag the need for a (more or less intensive) evaluation.

Both *ex ante* and *ex post* evaluations and audits (box K.1) — in conjunction with the data derived from regular monitoring — also play a vital role throughout a number of stages in a robust regulatory cycle.

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Box K.1 Types of evaluations and reviews

- *Summative* evaluations (evaluations) examine the causal links between an action and the outcomes.
- *Formative* evaluations (audits) assess adherence to process.
- *Ex post* evaluations occur at some stage after the introduction of new (or a change to existing) regulation and can be either summative or formative.
 - In-depth reviews (appendix C) and certain programmed reviews (appendix E) usually involve some analysis of how well the existing system works, which requires an *ex post* evaluation.
 - Regulation management reviews (such as the audits of Commonwealth regulation conducted by the Australian National Audit Office (ANAO)) and some benchmarking reviews (appendix F) are examples of process and performance audits.
- *Ex ante* evaluations occur before regulation has commenced and are summative.
 - A regulation impact statement (RIS) should include an *ex ante* evaluation of the proposed regulatory option and the alternatives. Another type of *ex ante* evaluation is an ‘implementation RIS’, which focuses on identifying the most cost-effective option, once a policy decision has been made.

What is a regulatory ‘system’?

Drawing in part on the Organisation for Economic Cooperation and Development (OECD 2009b), conceptually a regulatory system comprises the organisations and administrative structures, agreed processes, communication and consultation arrangements and regulatory tools that manage the flow and stock of regulation.

- *Organisations and administrative structures* are the agencies involved in each stage of the regulatory cycle as well as in overseeing the operation of that cycle.

-
- *Processes* are the agreed rules for managing, allocating and coordinating the flow of regulation, resources and information between each stage of the regulatory cycle. The processes establish the lines of responsibility for what, when, who, and how to undertake each stage in the regulatory cycle.

Some processes are clearly documented as part of a legislative requirement, while others are set by the institution within the bureaucracy that is responsible for managing the flow and/or overseeing the stock of regulation (for example, the requirements for making a RIS).

- *Consultation and communication* are the types and levels of public engagement at each part in the regulatory cycle. Some consultation and communications processes establish the extent of transparency that is required in the process while others do not. (And some processes themselves are transparent and others not.)
- *Regulatory stock and flow tools* include a variety of evaluation approaches and techniques. These tools are discussed in further detail in appendixes B to J.

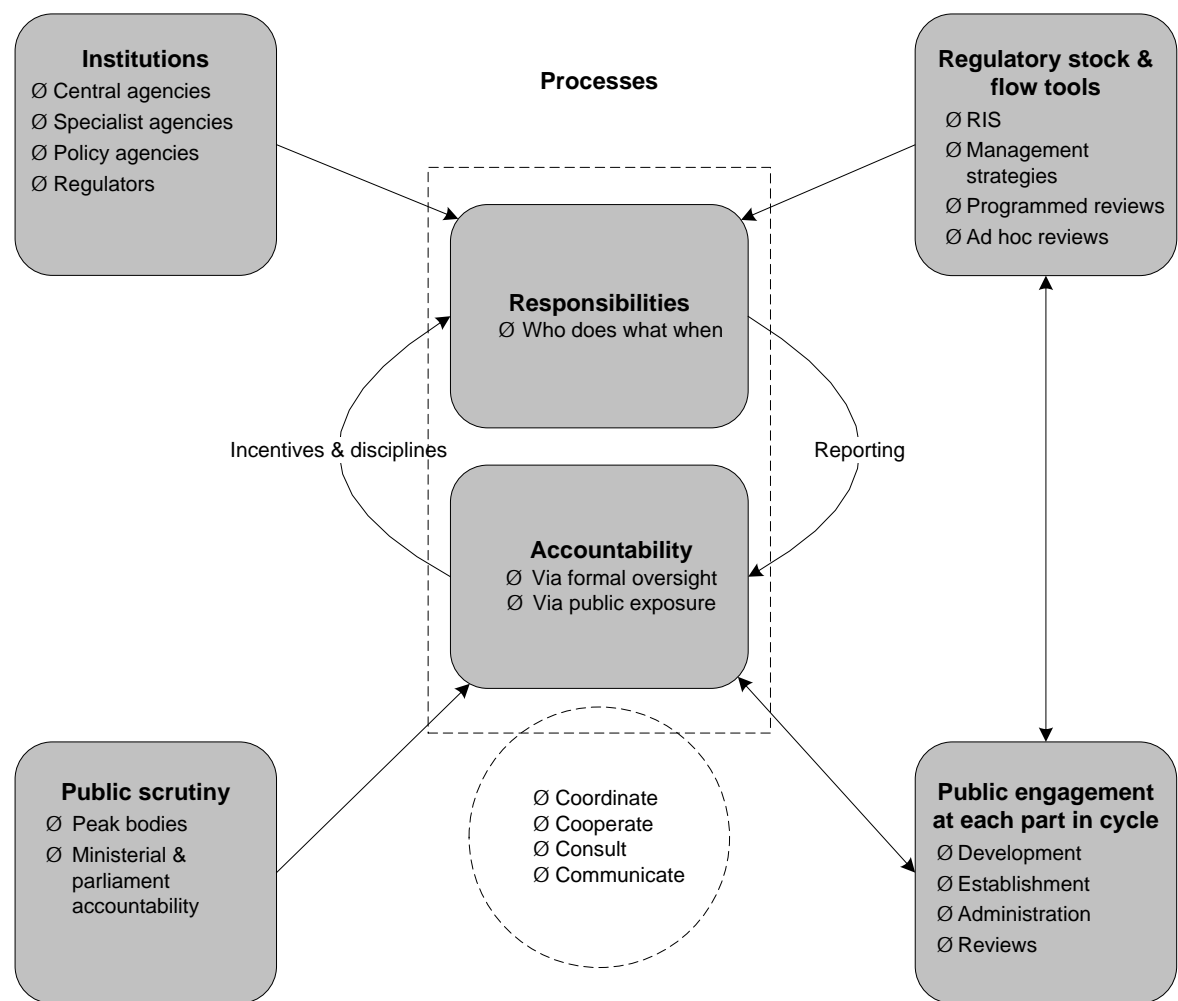
This view of a regulatory system can be represented diagrammatically in figure K.2.

As shown below in each of the country write-ups, countries differ with respect to the resourcing of different elements of their regulatory systems.

A ‘good’ regulatory system will act to ‘join up’ the four stages of the regulatory cycle in order to achieve the ultimate goal of appropriate, effective and efficient regulation. It will:

- *choose the right tools for the task, where review effort is matched by expected payoffs.* This should avoid ‘gold plating’, or expending effort where the tool is not up to the discovery task required
- *get the timing of the review activity right.* This requires coordinating with reviews of related regulation so, where possible, the regulation can be reviewed as a ‘package’. It can be about being opportunistic when external events create the environment in which important reforms have a greater chance of being successful. It can also be about being prepared should such opportunities emerge
- *assign the responsibilities to use these tools to the right agencies so they can be used in the most cost-effective way.* For example regulators are likely to be best placed to pursue a program of continuous improvement in administration which relies on regular feedback for business, while a policy agency is most likely to be in the best position for initial screening of their regulation for sunset reviews

Figure K.2 A stylised view of the regulatory system



- *ensure adequate resourcing of the various stock management tools.* Underfunding can mean that an approach is not applied properly (such as with tick and flick application of checklists). In such cases it is better not to undertake the approach as it gives a false impression that the regulation has been reviewed
- *get the right incentives and disciplines in place.* This includes decisions on when independence is essential, as is the case for a public stocktake to be effective. It will underpin the efforts agencies make to use sunseting as an opportunity to review and reform their stock of regulation, including legislation that may not sunset but warrants review. And it is important to ensure regulators worry as much about the burdens that their administration imposes as they do the risks or regulatory failure. Transparency and stakeholder engagement can also create incentives for proper application of the various tools.

The OECD (2010d) has emphasised this last point. That is, regulatory systems need to support and provide incentives to develop a culture of ‘continuous improvement’ in rule making and enforcement. The importance of ‘culture’ in the regulation making agencies was also noted in the submission by the Department of Innovation, Industry, Science and Research (sub. 6):

If the aim is to address compliance costs and improve regulatory outcomes for business, then efforts would be better focused on fostering a greater understanding of the importance of quantifying compliance costs, and in particular cumulative compliance, when developing policy. This will require a corresponding change in the culture of departments and agencies responsible for developing regulatory initiatives.
(p. 6)

The European Commission (EC) (box K.2) has set out the main features of regulatory systems that embed evaluation and review effectively.

Box K.2 Features of regulatory systems that embed evaluation

The European Commission (EC 2007) noted several key features of systems which incorporate ex post evaluations into regulatory cycles. These features include that evaluations:

- be conducted independently with specific budget funding
- be systematic
- not be limited in scope to particular types of regulations
- should allow for a tailored approach (for example, a highly complex policy may involve individual evaluations that are carried out a disaggregated level, or at a more aggregate level or on the basis of thematic issues)
- be carefully planned in a transparent and consistent way to ensure that relevant information is gathered and is timely
- adopt a coherent approach to minimise duplication of effort and ensure that evaluations do not ‘fall through the cracks’
- clearly define the roles and responsibilities of stakeholders
- support the establishment of evaluation networks
- actively encourages the provision of adequate resourcing for evaluations in the early stages
- are actively committed to and supported by government and senior management.

Source: EC (2007).

K.2 Canada

Organisations, administrative structures and processes

The main organisation that exercises the challenge function on new regulatory proposals or regulatory amendments to support the Governor-in-Council decision making for the Government of Canada is the Regulatory Affairs Sector (RAS) within the Treasury Board of Canada Secretariat (TBCS 2007).

In addition, the Red Tape Reduction Commission (RTRC) was established as a short term initiative for the period January 2011 to March 2012.

There is a strong focus on managing Canada's federal regulatory system using a lifecycle approach through the processes and responsibilities set out in the 2007 *Cabinet Directive on Streamlining Regulation* (CDSR) (box K.3). In particular, the CDSR

... contains a number of new process, coordination, and analytical requirements, such as, the need to measure and report on the performance of regulatory initiatives and evaluate and review regulations periodically. The Directive also places greater emphasis on the need for clear issue identification and risk assessment, instrument choice, and a more robust cost benefit analysis, particularly for high impact regulatory proposals. (TBCS 2011a, p. 1)

The RAS manages and oversees the government's regulatory function as well as providing policy leadership on the CDSR. In particular, RAS:

... delivers on its mandate by undertaking policy research and analysis, and developing policy and associated frameworks; providing reliable and timely advice to departments on regulatory policy interpretation and application; reviewing regulatory and non-regulatory submissions to the GIC [Government in Council] (except for appointments) and, among other things, ensuring submissions adhere to the CDSR; ensuring that relevant information is provided for decision-making of the GIC; contributing to learning programs that strengthen all of government regulatory capacity, particularly their understanding of regulatory policy requirements; and brokering the resolution of issues through interdepartmental coordination and horizontal policy management. (TBCS 2011b, p. 1)

Recognising that the full and prompt implementation of the CDSR was likely to be challenging for many departments, the RAS developed an implementation plan. The plan included:

- hiring additional RAS analysts to provide guidance and support
- developing new guides to help public servants to prepare regulatory submissions

Box K.3 **Government of Canada's Cabinet Directive on Streamlining Regulation**

On 1 April 2007, the Government of Canada's *Cabinet Directive on Streamlining Regulation* (CDSR) came into effect. The Directive applies to all federal departments and agencies in Canada. It states that government officials are responsible for abiding by the CDSR at all stages of the regulatory lifecycle — development, implementation, evaluation and review.

Development

The CDSR sets out requirements for: regulatory consultation; identifying and assessing public policy issues and setting public policy objectives. Best practice is also identified and encouraged within a number of these requirements.

Implementation

Implementation requirements in the CDSR cover: selecting, designing and assessing regulatory responses; and planning for implementation, compliance and enforcement.

Evaluation and review

Departments and agencies are required to: measure and report on performance; evaluate regulatory programs; and review regulatory frameworks.

In relation to evaluating regulatory programs, subject to the impact and complexity of the program, evaluations are required to assess: inputs, activities, effectiveness, the outcomes and the extent to which the program contributed to achievement of results; relevance, efficiency and cost-effectiveness; and governance, decision making and accountability processes, service standards, and service delivery mechanisms.

Further, departments are required to undertake regulatory evaluations according to the time frames and cycles established in the Treasury Board of Canada's *Policy on Evaluation*. These include:

- submitting to the Treasury Board a rolling five-year evaluation plan
- ensuring coverage requirements are met and reflected in the departmental evaluation plan.

In relation to the review of regulatory frameworks, regular assessment of the results of performance measurement and evaluation is required to identify regulatory frameworks in need of renewal. Once identified, regulation should be examined with a focus on: its effectiveness; the instrument selection, level of intervention and degree of prescriptiveness; clarity and accessibility of the regulation to users; and the overall impact on competitiveness, including trade, investment and innovation.

Planning and reporting

Departments and agencies are also required to develop regulatory plans and priorities and publicly report on plans, priorities, performance and regulatory review.

Sources: Government of Canada (2007); TBCS (2009a).

-
- having a core curriculum developed by the Canada School of Public Service (CSPS)
 - maintaining ongoing cooperation and dialogue between the Community of Federal Regulators (CFR), CSPS, and RAS through specific learning events and conferences
 - creating the Centre of Regulatory Expertise (CORE) (TBCS 2011a).

Further information on the CORE is in box K.4.

Box K.4 The Canadian Government's Centre of Regulatory Expertise (CORE)

The Centre of Regulatory Expertise is located with the Regulatory Affairs Sector (RAS) in the Treasury Board of Canada Secretariat (TBCS).

Staffing

The CORE consists of a Director and five experts. Each expert has significant expertise in one of the CORE "services areas", i.e. risk assessment, cost benefit analysis, and performance measurement and evaluation. Also, one of our experts is a "generalist" with a broad range of experience in many aspects of regulatory development, including instrument choice, regulatory cooperation, triage, and in regulatory coordination and cooperation. (TBCS 2011a, p. 1)

Mandate

The CORE's mandate is:

To exercise strong leadership and expertise in implementing the Directive by providing expert advice and services to help departments build their internal capacity to develop sound, evidence based regulatory proposals and by collaborating with CFR and CSPS to facilitate the development and promotion of best practices and learning opportunities for federal regulators. (TBCS 2011a, p. 1)

Activities

The CORE is responsible for three main areas of activity:

1. providing specialist level analytical expertise to departments in areas of risk assessment, cost benefit analysis, performance measurement and evaluation
2. costing sharing of external expertise when it is unable to provide the service
3. developing and promoting best practice, capacity building, and learning opportunities in collaboration with CSPS and CFR.

Services

CORE's services include: analytical services, coaching and advice, workshops and presentations and peer review.

Source: TBCS (2011a).

The RTRC was established for a limited period to find ways to reduce the burden of complying with federal regulatory requirements. It will make recommendations on ways to address this burden while maintaining appropriate regulation. In particular, its mandate is to:

- Identify irritants to business that stem from federal regulatory requirements and review how those requirements are administered in order to reduce the compliance burden on businesses, especially small businesses. The focus is on irritants that have a clear detrimental effect on growth, competitiveness and innovation; and
- Recommend options that address the irritants and that will control and reduce the compliance burden on a long-term basis while ensuring that the environment and the health and safety of Canadians are not compromised in the process. (RTRC 2011c, p. 1)

Communication and consultation

Public consultation with parties affected by new draft primary laws and new draft subordinate regulations is a significant feature of Canada's regulatory system (OECD 2009b).

In particular, the *Guidelines for Effective Regulatory Consultations* (TBCS 2007) provides 29 pages of guidance for public servants interpreting the requirements in the CDSR, which:

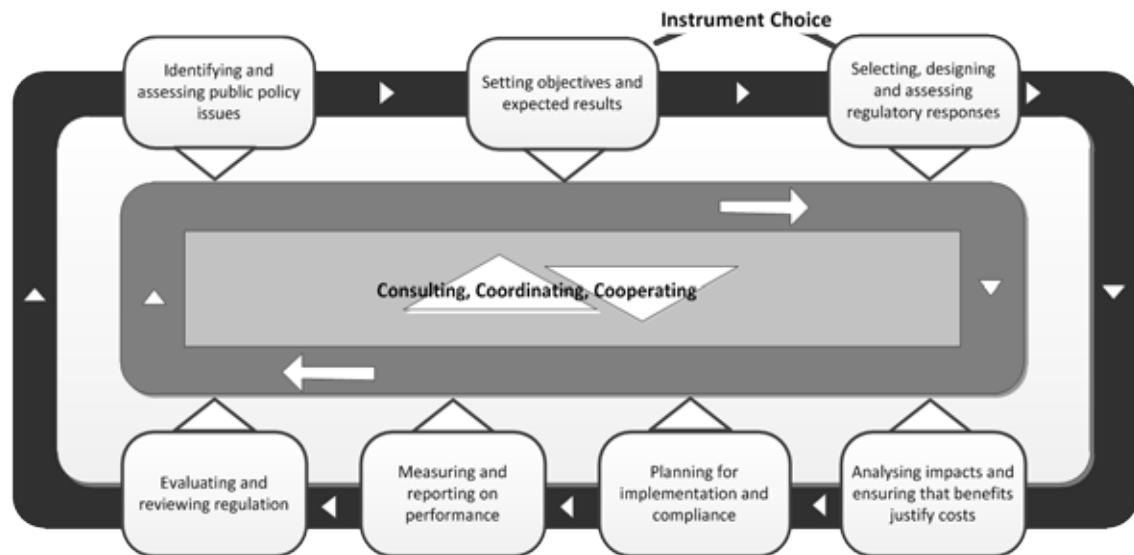
... requires that interested and affected parties be consulted on the development or amendment of regulations, and implementation of regulatory programs, and the evaluation of regulatory activity against stated objectives. Government departments and agencies must therefore make systematic efforts to ensure that interested and affected parties have the opportunity to take part in open, meaningful, and balanced consultations at all stages of the regulatory process, that is, development, implementation, evaluation, and review. (p. 1)

The guide emphasises that consultation:

- entails a two-way exchange between stakeholders and departments — so that stakeholders are given an opportunity to provide input and affect the outcome of a regulatory proposal
- does not involve a one-size-fits-all approach — the size and scope of the process will vary depending on the proposed regulation and the number of people or groups affected by them
- with Aboriginal groups involves special consideration

- should occur prior to a regulatory proposal as well as throughout the regulatory cycle on a range of matters — figure K.3 provides an overview of the range of consultations across the regulatory cycle expected in the Canadian system.

Figure K.3 **Canada’s approach to consultation over the regulatory cycle**



Source: TBCS (2007).

In addition, under the CDSR, departments and agencies are also required to develop regulatory plans and priorities and publicly report on plans, priorities, performance and regulatory review.

Regulatory stock and flow tools

Alongside its regulatory impact assessment process, the Canadian Government relies primarily on ex post reviews as a stock management tool. That said, depending on the recommendations of the RTRC, there may be some future changes to the use of stock management tools, possibly through the introduction of other types of stock management tools to reduce the compliance burden of regulation.

At the time of its creation, the RTRC commenced consultations on ways to reduce the burden of complying with federal regulatory requirements in Canada. The consultation paper (RTRC 2011a) seeks responses to the proposed areas of focus for the RTRC on some key questions. It is intended that a full list of recommendations be provided to government later in 2011. The key areas of red tape to be addressed that were identified in the discussion paper include:

- reducing administrative burden

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- timeliness and predictability of government services
 - improving coordination between federal regulators
 - minimising the cumulative burden of regulations
 - increasing specific attention to the needs of small business.

For example, at a roundtable held by the RTRC (2011b) as part of its consultation process, it was suggested that Canada's approach to managing the stock of regulation could be improved through, for example, adopting:

... an approach that measures the compliance burden, benchmarks it against other countries and jurisdictions, and reports on the reduction. ...

Regulations should have a sunset clause or an automatic review clause to ensure industry is involved in reviewing the regulation and determining whether the regulation is still relevant or if it needs to be changed or adapted. (p. 5)

In addition, the Government of Canada has committed to legislating a 'one-in, one-out' approach to manage the flow of regulation and to capping the overall number of regulations currently 'on the books'. However, at the time of writing, the details of this approach had yet to be determined (CORE, pers. comm., 8 November 2011).

Ex ante reviews

The main ex ante reviews of regulation in the Government of Canada occurs as part of the regulatory impact analysis statement (RIAS) process. The TBCS (2007) describes the RIAS as a:

... public accounting of how the regulatory proposal has followed each element of the [CDSR], including information on the consultations that have taken place to date ... and a summary of the expected impact of the proposed regulations. (pp. 2–3)

Departments are required to submit a draft RIAS to the RAS to obtain feedback. At this point the RAS also checks consistency with the CDSR and ensures that the RIAS is written in a style that is understandable to those affected by the proposed regulations. The RIAS is then submitted for approval to the appropriate Cabinet committee. Once approved, the RIAS is 'pre-published' in the *Canada Gazette*, Part I. This 'pre-publication' is intended to provide a final opportunity to obtain comments from stakeholders, determine whether any stakeholders were missed in the previous consultation process and examine the extent to which the regulatory proposal is in keeping with the original consultations. Interested parties usually have 30 days to respond (though exemptions may be granted) and 75 days is granted for regulations with a potential impact on international trade (TBCS 2007).

Ex post reviews

As noted by CORE (pers. comm., 8 November 2011) rather than inserting a sunset clause in legislation, a five yearly review clause is the preferred approach in Canada. Where necessary and appropriate, the review report will lead to legislative amendments.

Further, in 2007 Canada strengthened its focus on ex post evaluation at the federal level. This involved an explicit requirement for evaluation in the context of a ‘lifecycle’ approach to regulation. In particular, the CDSR requires that:

... regulatory departments and agencies regularly assess the results of performance measurement and evaluation of their regulatory programmes, and identify regulatory frameworks in need of renewal. Once identified, departments and agencies are to examine the regulation with a focus on:

- The effectiveness of the current regulation in meeting the policy objective;
- The current instrument selection, level of intervention, and degree of prescriptiveness;
- Clarity and accessibility of the regulation to users; and
- The overall impact on competitiveness, including trade, investment, and innovation. (Foreign Affairs and International Trade Canada 2009, p. 3).

The requirements for performance measurement and evaluation are set out in the Treasury Board of Canada’s (2009a) *Handbook for Regulatory Proposals: Performance Measurement and Evaluation Plan*. As noted by Foreign Affairs and International Trade Canada (2009), regulatory organisations are responsible for:

- measuring, monitoring and evaluating the extent to which their regulatory programs achieve the intended policy objectives
- reviewing when the evaluation demonstrates that the regulatory activities are not achieving the intended outcomes
- adjusting the regulatory program as needed
- providing an accurate account of progress and results to Canadians in a timely manner.

Reflecting the principle of proportionality, federal departments in Canada are only required to complete a Performance Measurement and Evaluation Plan (box K.5) when the likely impact of their regulatory proposal is assessed as ‘high’ in a *Triage Statement*. Completing a Performance Measurement and Evaluation Plan is optional and left to the discretion of the regulatory organisation when proposals are assessed as ‘low’ or ‘medium’ impact.

Box K.5 Government of Canada's Performance Measurement and Evaluation Plan

The Performance Measurement and Evaluation Plan (PMEP) is designed to provide a 'concise statement or road map to plan, monitor, evaluate, and report on results throughout the regulatory life cycle' (TBCS 2009b, p. 1). Information from the PMEP Template is carried forward into the 'Performance measurement and evaluation' section of the Canadian Government's version of the Australia's Government's Regulation Impact Statement (RIS) (an ex ante evaluation).

A completed PMEP should not be more than 12 pages in length and comprise the following 9 sections.

1. Description and overview of the regulatory proposal
2. Logic model
3. Indicators
4. Measurement and reporting
5. Evaluation strategy
6. Linkage to the program activity architecture
7. Regulatory Affairs Sector review
8. Assistant Deputy Minister sign off
9. Departmental contact.

Source: TBCS (2009b).

In addition, the CDSR requires regulatory organisations to evaluate their regulatory activities in accordance with the time frames and cycle established in the TBCS's (2009b) *Policy on Evaluation* (which also applies to spending programs).

While the CDSR requires all new regulatory proposals as well as the existing stock of regulation to be subject to evaluation and review, including rolling 5 year evaluation plans, the recent establishment of the RTRC of itself would appear to suggest that either the CDSR had some gaps or that there may be a gap between policy and practice in some areas of Canada's federal bureaucracy.

K.3 The European Union

Organisations, administrative structures and processes

The European Commission (EC) has developed a number of separate but interrelated areas and processes to manage the stock of regulation as well as to

support ex ante and ex post evaluations and audits (Cordova-Novion and Jacobzone 2011; EC 2006).

The key organisations in the EU managing the regulatory stock and flow are the:

- Secretariat General within the EC, which is responsible for ex ante evaluation through its regulation impact assessment (RIA) process. This process includes review by an independent Impact Assessment Board (IAB) (EU 2010)
- Directorate General (DG) Budget in the EC, which provides guidance and support to 27 DGs, and coordinates an evaluation network
- 27 Directorate Generals (DGs) within which evaluations and reviews are typically carried out (EC 2004; box K.6). (The DGs evaluation functions plan, manage, coordinate and follow-up evaluation activities, and promote quality of evaluation and organisational learning.)

Within DGs, two approaches have emerged. In DGs managing expenditure programs there is commonly a central, dedicated evaluation function. By contrast, in DGs mainly responsible for legislation and policy instruments, it is more common to have a decentralised approach, where the evaluation function supports the operational units in charge of evaluation projects.

The European Court of Auditors is also a key organisation, through its role in conducting a variety of performance audits.

Consultation and communication

Because of the decentralised nature of the EC, a common framework for consultation and communication was developed in 2002 (EC 2002). This framework was developed to ensure that consultations are carried out in a transparent and coherent manner. In particular, the EC's consultation standards are part of the 'Better Lawmaking' action plan.

According to these standards attention needs to be paid to providing clear consultation documents, consulting all relevant target groups, leaving sufficient time for participation, publishing results and providing feedback.

These **consultation standards** apply in particular at the policy-shaping phase to major proposals before decisions are taken. In particular, they apply to proposals in the impact assessment process which are included in the Commission's Annual Legislative and Work Programme. (EC 2011a, p. 1)

The public consultation period was recently increased from 8 to 12 weeks, commencing in 2012 (EC 2011d). A review of the EC's consultation policy was planned to occur during 2011 (EC 2010).

Box K.6 Examples of building capacity and support for evaluation in the European Commission

- Central support and coordination — DG Budget provides guidance, training, workshops, seminars, overviews of the EC's evaluation activities and evaluation results, and promotes, monitors and reports on good evaluation practice. In addition, the Secretariat General coordinates impact assessments.
 - For example, a large number of evaluation guides (32) have been produced, covering both ex ante and ex post evaluations.
 - Evaluation courses (on challenges of an evaluation, managing the evaluation process, methods and tools of an evaluation and integration of evaluation practices within the EC) have been established.
 - Most evaluations are carried out with the assistance of external expertise and measures have been taken to enable access to experts.
 - Establishing a steering group to manage evaluations has become standard practice.
- Evaluation Network — DG Budget coordinates an Evaluation Network, formed by the DG's evaluation functions, to spread best practice.
 - The EC's Evaluation Network meets around 6 times per year. There are a number of working groups which focus on specific issues and there is an annual work program. Several DGs have also set up their own specific evaluation networks with the Member States in order to improve cooperation and share results.

Source: EC (2007a).

The EC's also has formal 'communications' which are published on its website (www.ec.europa.eu). As well, the EUR-Lex portal provides electronic access to the full body of EU legislation (EC 2010).

Regulatory stock and flow tools

The EU's 'Smart Regulation' agenda (EC 2010) (which builds on the EU's (2010) 'Better Regulation' agenda) includes:

- ensuring that new legislation is the best possible — through continued independent scrutiny of impact assessments through the IAB together with a number of changes to this process
- improving the stock of EU legislation — through simplifying EU legislation and reducing administrative burdens and evaluating the benefits and costs of existing legislation

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- improving the implementation of EU legislation — through paying greater attention to implementation and enforcement in impact assessments, as well as providing support to Member States during the implementation phase and through transposition workshops
 - making legislation clearer and more accessible — through scrutinising new legislation to ensure it is set out in simple language, continuing to codify, recast and consolidate legal texts, and repealing obsolete provisions and improving full access to legislation through the EUR-Lex portal (EC 2010).

Ex ante reviews

In 2005, three EU institutions (the European Parliament, the European Council and the EC) developed a ‘Common Approach to Impact Assessment’ (EC 2005a). This set out the basic ‘traffic rules’ for impact assessment throughout the legislative process.

Ex ante evaluations (including impact assessments) must be carried out in accordance with DG Budget’s guide for ex ante evaluation or the EC’s Impact Assessment Guidelines (EC 2009) to ensure adequate quality.

Cecot et al. (2008), in their analysis of impact assessments found that while recent EU impact assessments included more economic information than they did in the past, important items were still missing. Similar to findings in the USA, Cecot et al. also found that the quality of an impact assessment increased with the expected cost of a proposal and that the quality of these high cost proposals were similar to the quality of assessments made by their USA counterparts.

However, the cautionary findings of Gaskill and Persson (2010), in relation to the use of EU impact assessments in decision making, suggest that adherence in practice to stated evaluations policies may be variable. They cite two examples where several significant proposals were overlooked in the impact assessment process. One example related to a proposal to amend an EU regulation defining conditions which must be met by fresh, frozen and quick-frozen poultry meat. The UK Parliament (2009) through its Commons EU Scrutiny Committee concluded:

The history of this proposal is not a happy one, in that the [EC’s] proposal — which clearly has a major impact on the UK — was not accompanied by an Impact Assessment, and then appears to have been steamrolled through the Council, without sufficient consideration being given to less damaging alternatives, such as improved labelling. (p. 3)

Most recently, the European Court of Auditors (ECA) examined the role that impact assessments play to support decision making. It concluded that:

On balance, particularly in recent years, the audit has shown that impact assessment has been effective in supporting decision-making within the EU institutions. In particular, it was found that the Commission had put in place a comprehensive impact assessment system since 2002. Impact assessment has become an integral element of the Commission's policy development and has been used by the Commission to design its initiatives better. The Commission's impact assessments are systematically transmitted to the European Parliament and Council to support legislative decision-making and users in both institutions find them helpful when considering the Commission's proposals. However, the Commission's impact assessments were not updated as the legislative procedure progressed and the European Parliament and Council rarely performed impact assessments on their own amendments. (ECA 2010, p. 6)

Accordingly, the ECA (2010) made a number of recommendations to improve impact assessment procedures and the content and presentation of impact assessment reports.

Based partly on the ECA's (2010) report, the EC (2010) outlined a number of proposed changes to the impact assessment system, including:

- that a positive opinion from the IAB is needed before a proposal can be put forward for Commission decision
- an increase in the consultation period from 8 to 12 weeks from 2012
- the development of specific guidance for assessing social impacts
- reinforcement of the assessment of impacts on fundamental rights (including the development of specific guidance)
- seeking to improve the quantification of costs and benefits, where practical.

Reducing administrative burdens

As noted in appendix G, in 2007 the EU set a target of reducing the administrative burden associated with EU legislation by 25 per cent (EC 2007b; box G.3). While welcoming this target, a number of business groups in the Netherlands noted that the Dutch business sector had gained much experience in reducing administrative burdens. This experience was mixed but they felt that:

An important lesson is that programme must not be non-committal. That is why it is particularly positive that the European Commission has committed itself to setting a firm quantitative target. (VNO-NCW and MKB-Nederland 2008, p. 5)

In addition, the EC's work to reduce administrative burdens is supported by a High-Level Group of Independent Stakeholders on Administrative Burdens.

While there were separate programs to reduce administrative burdens and simplify red tape under the EU's Better Regulation agenda, under its 'Smart Regulation' agenda the EU has merged its efforts to reduce administrative burdens with those to simplify legislation. Accordingly, the mandate of the High Level Group of Independent Stakeholders has been extended to the end of 2012 (EC 2010).

During 2010, the EC in its work to simplify existing legislation and reducing the administrative burden

... made proposals that, if adopted by the Parliament and Council, could cut administrative costs by 31% — way beyond the initially agreed 25% target. (EU 2010, p. 124)

Ex post reviews

As a way of preventing obsolescence of legislation, the EC (2011c) noted that reviews, revisions or sunset clauses are often introduced into legislative proposals, especially in policy areas of rapid technological development.

While the EC has a long tradition of evaluating expenditure policies, this has not generally occurred for regulation and other non-spending activities. Accordingly, the EC (2010) is planning to extend its evaluation experience and knowledge to these types of evaluations. In addition, it plans to undertake 'fitness checks'¹ to 'assess if the regulatory framework for a policy area is fit for purpose and, if not, what should be changed' (p. 4).

In particular, the EC (2010) stated that it intended to:

- include an evaluation of existing and related legislation in all significant legislative proposals
- present planned evaluations of legislation on a specific website to allow Member States and stakeholders to prepare inputs at an early stage
- carry out 'fitness checks' during 2010 in four areas (environment, transport, employment/social policy and industrial policy) and extend to other areas in 2011

¹ A 'fitness check' is described as a comprehensive policy evaluation assessing whether the regulatory framework for a policy sector is fit for purpose. They aim to identify excessive administrative burdens, overlaps, gaps, inconsistencies and/or obsolete measures which may have appeared over time, and help to identify the cumulative impact of legislation (EC 2011e).

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- finalise the administrative burden reduction programme by 2012 and mainstream the findings into the evaluation and policy making processes
 - improve the consultation website to allow stakeholders to express more easily their concerns about administrative burdens and simplification issues
 - asked the High Level Group of Independent Stakeholders to report by November 2011 on best practice ways on implementing EU legislation in the least burdensome way. In parallel the EC will analyse the issue of ‘gold plating’ and report on substantial findings
 - adjust, where appropriate, the membership of the High Level Group of Independent Stakeholders to reflect its broader remit.

There are also a number of acts governing evaluations carried out by the EC. These cover basic requirements concerning the scope, purpose, timing and use of evaluations.

The EC (2007) has developed a set of binding Evaluation Standards covering five areas (A to E in box K.7). These standards are expressed as a set of guiding principles (these are italicised in box K.7) and are general enough to cover both evaluations and audit. Each guiding principle has a number of baseline requirements (designed to contribute to compliance with the overarching principle). The principles are binding on each DG and the way the principles are implemented may be audited. The standards also apply to all EC evaluations of policy instruments such as expenditure programs, legislation and other non-spending activities.

While the guiding principles apply to all types of evaluations, only the baseline requirements in the Evaluation Standards apply to ex post evaluations.

Internal stocktakes and simplifying EU rules

In 2005, the EU launched a rolling programme of simplification of EU rules. In 2011, the programme covered 185 measures, of which the EC had adopted 132 (EC 2011b). The EC’s (2005b) strategy to simplify the regulatory environment includes: repeal; codification; recasting; co-regulation; and use of regulations. In its *General Report* for 2010, the EU (2010) stated there was a list of 46 multinational simplification proposals for 2010–12.

In 2008, the EC completed a comprehensive screening of the existing stock of EU legislation (*acquis*). A total of around 3,600 acts were examined (EC 2011b).

The EU (2010) noted in its 2010 *General Report*, that the EC:

... began reviewing the entire body of legislation in selected policy fields to identify potential overlaps, gaps, inconsistencies and obsolete measures through 'fitness checks'. Pilot exercises started in 2010 in environment, transport, employment and social affairs, and industrial policy. (p. 124)

Box K.7 The European Commission's Evaluation Standards

A. Resourcing and the organisation of evaluation activities

Evaluation activities must be appropriately organised and resourced to meet their purposes.

1. Each Directorate General must have an evaluation function with a clearly defined responsibility for co-ordinating and monitoring evaluation activities of the Directorate General (from the planning of evaluations until their dissemination and use), promoting quality of evaluation and organisational learning, and assisting the central services in the implementation of the Commission Evaluation Policy.
2. Each Directorate General must ensure that human and financial resources are clearly identified and proportionately allocated for evaluation activities to be carried out.
3. Each Director General must clearly define the tasks, responsibilities, organisation and procedures for all actors involved in planning, designing and conducting evaluations, and disseminating and using evaluation results.

B. Planning evaluation activities

Evaluation activities must be planned in a transparent and consistent way so that relevant evaluation results are available in due time for operational and strategic decision-making and reporting needs.

1. An annual evaluation plan and an indicative multi-annual evaluation programme are to be prepared by the evaluation function in consultation with the other units in the Directorate General and integrated in the Annual Management Plan.
2. The multi-annual evaluation programme must be drawn up on the basis of the life cycle of the interventions, the operational and strategic decision-making needs of the Directorate General, general requirements for evaluation, and any specific requirement for evaluation as set out in the legal base of the intervention.
3. All activities addressed to external parties must be periodically evaluated in proportion with the allocated resources and the expected impact.
4. The timing of evaluations must enable the results to be fed into decisions on the design, renewal, modification or suspension of activities.
5. All relevant services (in particular the evaluation function, SPP/policy planning coordinators, IA co-ordinators and key operational units) must contribute to or be consulted on the annual evaluation plan and the indicative multi-annual evaluation programme.

(continued next page)

Box K.7 (continued)

C. Designing evaluations

Evaluation design must provide clear and specific objectives, and appropriate methods and means for managing the evaluation process and its results.

1. Save in duly justified cases, a steering group must be set up for each evaluation to advise on the terms of reference, support the evaluation work and take part in assessing the quality of the evaluation at the appropriate regularity; its composition must be adjusted to the specific needs and circumstances of each evaluation and the evaluation function must be advised thereon.
2. Terms of reference must be established for each external evaluation and a corresponding document/mandate must be established for each internal evaluation, which must at least specify the following points: purpose and objectives, key questions, scope, expected outputs, deadlines, and quality criteria.
3. Issues of relevance to all services concerned must be considered for the terms of reference.

D. Conducting evaluations

Evaluation activities must be conducted to provide reliable, robust and complete results.

1. The evaluation must be conducted in such a way that the results are supported by evidence and rigorous analysis.
2. All actors involved in evaluation activities must comply with principles and rules regarding conflict of interest.
3. Evaluators must be free to present their results without compromise or interference, although they should take account of the steering group's comments on evaluation quality and accuracy.
4. The final evaluation reports must as a minimum set out the purpose, context, objectives, questions, information sources, methods used, evidence and conclusions.
5. The quality of the evaluation must be assessed on the basis of the pre-established criteria throughout the evaluation process and the quality criteria must as a minimum relate to relevant scope, appropriate methods, reliable data, sound analysis, credible results, valuable conclusions and clarity of the deliverables.

(continued on next page)

Box K.7 (continued)

E. Disseminating and utilising evaluation results

Evaluation results must be communicated in such a way that it ensures the maximum use of the results and that they meet the needs of decision-makers and stakeholders.

1. The evaluation results must be examined by the services concerned, who must outline the actions they propose to take towards the formulation, planning and/or revision of the relevant interventions, in accordance with procedures set out by the Director General (cf. standard A1).
2. Evaluation results must be communicated effectively to all relevant decision-makers and other interested stakeholders/parties.
3. The evaluation results must be made publicly available and targeted summary information should be prepared to facilitate communication to the general public.
4. The evaluation function must promote the use of evaluation in decision-making and organisational learning by ensuring that policy implications and lessons learnt from (and across) evaluations are synthesised and disseminated.
5. The use of the evaluation results must be regularly monitored by the evaluation function.

Source: EC (2007).

Systemic reviews

There have been a number of reviews of the EC's approach to regulatory management.

Furubo et al. (2002) concluded that the EU had been successful in institutionalising evaluation, establishing an evaluation culture and influencing the growth of evaluation across continental Europe.

In 2005, the Court of Auditors — in its audit of the EC's Evaluation Framework — concluded that the framework provided an adequate basis for implementing its policy measures. The Court also acknowledged that evaluation had become an established management tool within the EC and was widely used to improve the preparation, implementation and performance of individual policy instruments (EC 2007).

During 2004-05 the European Policy Evaluation Consortium (EPEC 2005) examined the use of evaluation results in the commission. It concluded that evaluation results were most used within the same DG for expenditure programmes but were less often used as an input into setting priorities. EPEC made a number of

recommendations including the need to: further develop and enforce evaluation standards; improve the timing and planning of evaluation activities (so that evaluators could anticipate their use by others better); enhance the use of evaluations for non-expenditure programs and activities; and strengthen the role of evaluation in the budgetary cycle (to improve efficiency in resource allocation within the EC).

The EC (2007, p. 19) acknowledged that ‘legislative instruments which do not involve budgetary expenditure are still less frequently evaluated than expenditure programs’. Moreover, while the number of evaluations completed in a year had risen from just over 40 in 1996 to 170 in 2005, this increase was mostly due to an increase in impact assessments rather than ex post evaluations of regulations in place.

In 2008, the EC commissioned Euréval in association with Rambøll-Management (Euréval 2008) to undertake a ‘Meta-study on decentralised agencies’. Issues covered included relevance, coherence, effectiveness and cost-effectiveness, internal efficiency, and evaluation requirements and practices.

It is understood that the EC undertook an overarching evaluation of regulatory agencies during 2008-09 (Euréval 2008) but the results of this evaluation do not appear to be public.

K.4 The Netherlands

Organisations, administrative structures and processes

Four ministries — Finance, Economic Affairs, Justice and the Interior — share responsibility for ‘Better Regulation’ policy in the Netherlands but each does so from a different perspective (OECD 2010i).

The main institutions and structures in the Netherland’s regulation system are the:

- Ministerial Group for Better Regulation (MGBR) — coordinates regulation across central government and is chaired by the Prime Minister’s Office. It meets quarterly and is supported by an officials’ steering group drawn from the four ministries which share responsibility for Better Regulation policy
- Regulation Reform Group (*Regiegroep Regeldruk*) (RRG) — a shared directorate of the Ministries of Finance and Economic Affairs, it is responsible for coordinating and monitoring the business program for regulatory burden

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- Regulatory and Administrative Burdens Programme (*Regeldruk en Administratieve Lasten*) (REAL) — located within the Ministry of the Interior and the Kingdom Relations, it is responsible for managing the program for reducing the administrative burden on citizens
 - Ministry of Justice — responsible for legal quality (broadly defined). It also has a program to improve law making (OECD 2010i)
 - Business Regulatory Burden Commission (Wientjes Commission) — comprises of private sector representatives and offers feedback on the government's regulatory reform initiatives
 - Inspection Council — oversees fourteen national enforcement inspectorates.

There are also three main review organisations.

- The Impact Assessment Board (*Commissie voor Effecttoetsing*) (CET) — assesses legislative proposals with substantive impacts on society.
- The Advisory Board on Administrative Burdens (*Adviescollege Toetsing Administratieve Lasten*) (ACTAL) — an independent regulatory review and complaints body monitoring regulatory pressure on business and citizens and investigating complaints.
- The Netherlands Court of Audit (NCA) (*Algemene Rekenkamer*) — which operates in a similar way to many national audit offices.

The Dutch regulatory system has evolved over time, from an initial focus on burden reduction and cost cutting to a more broad-based regulatory impact perspective. In particular, Djankov and Ladegaard (2009) from the World Bank Group made the following observation:

The gradual shift of the regulatory reform agenda away from burden reduction and cost cutting towards annoyance factors, impacts as perceived by the private sector, and a more broad-based regulatory impact perspective also marks a critical turning point. This shift is essential for the continued development of regulatory reforms in the Netherlands, and should be continuously broadened towards a regulatory quality agenda with a balanced and comprehensive appreciation of regulation as [a] tool to achieve policy objectives. (p. 4)

The OECD (2010i) also described the Netherlands as a 'pioneer' in the development of 'Better Regulation' policies in Europe and indicated that the establishment of the RRG, MGBR, ACTAL and the institutional framework to share the Better Regulation agenda with local levels of government had placed the Netherlands on a sustainable 'Better Regulation' footing. But it also stated that:

The central institutional framework for overseeing Better Regulation in its entirety remains, however, relatively weak and fragmented. ... This relative fragmentation

stands in the way of an even stronger Better Regulation performance. It also means that responsibilities – who does what – are not clear to stakeholders outside the system, and that the system itself does not provide an optimal framework for tackling next steps, ... The Ministry of Foreign Affairs, which plays an important role in the management of EU regulations, is not part of the group. (OECD 2010i, p. 18)

There is also no single strategy document that sets out the Dutch ‘Better Regulation’ agenda in its entirety. Nonetheless, the reduction of regulatory burdens on business remains the focal point of the agenda (OECD 2010i).

Under the banner ‘less, simpler, tangible’, the RRG is primarily responsible for reducing regulatory burdens on business (the focal point of the agenda). In particular, the RRG is responsible for:

- coordinating and monitoring the business burdens reduction program
- monitoring, and advising and reporting to ministers and the parliament
- coordinating EU policy regarding administrative burden reduction for business
- developing methodology, educating and training civil servants (OECD 2010i).

Based on the findings and recommendations of the OECD (2010i), the World Bank’s 2007 review (Djankov and Ladegaard 2009) and ACTAL, as well as advice from the Confederation of Netherlands Industry and Employers (VNO-NCW) and the Dutch Federation of Small and Medium-sized Enterprises (MKB-Nederland) (MEAAIa 2011), the Dutch Government recently established its *Programme for Reducing Businesses’ Regulatory Burden 2011–2015* (RRG 2011a). As ‘regulatory costs’ include the costs of administrative burdens, poor service on the part of government and supervisory costs, the Programme has four complementary and overlapping components:

1. *quantitative targets* — the previous target of 25 per cent reduction in administrative burden on business has been lowered to 10 per cent in the period 2011-12 followed by an annual target of 5 per cent in subsequent years
2. *preventing new regulatory burdens* — the introduction of regulation impact analysis process, the business impact assessment (BIA) and independent regulatory assessment
3. *improving services* — this program includes the introduction of an electronic business file, electronic standard business reporting (SBR), incentives to improve public service provision of municipalities, provinces and tax authorities
4. *trust and supervision* — the program involves a risk-based approach to compliance checking and enforcement.

Further detail on each of these four components is outlined below as well as in RRG (2011a).

In relation to reducing the burden on citizens, the activities of REAL are similar to the RRG and include:

- coordinating and monitoring the three citizen burden reduction programs
- monitoring, and advising and reporting to the cabinet and parliament
- addressing administrative burdens of citizens at the EU level and exchanging knowledge and experience with other European countries
- developing methodology, and educating and training civil servants (OECD 2010i).

The remit of the independent review body, ACTAL, included examining the ex ante impact of government bills to assess the administrative burden and strategic advice as well as covering the citizens' administrative burdens reduction program. According to the OECD (2010i), ACTAL also focussed on cultural change within ministries with regard to regulatory impacts. In particular, OECD described ACTAL's responsibilities at that time as advising government and parliament on:

- administrative burdens for businesses and citizens as a result of proposed regulation
- programs and measures regarding the reduction of administrative burdens for businesses and citizens as a result of existing regulation
- strategic issues on the subject of regulatory burden, part of which is advising on the development and the use of the integral assessment framework in preparing policy and regulation (OECD 2010i).

An evaluation of ACTAL conducted over the period 2007 to mid-2010 was summarised by RRG (2011a) as follows:

- ACTAL's strong points are its core business of evaluating the administrative burden of proposed regulation and its contribution to the policy of reducing the administrative burden; in this respect ACTAL has built up a sound, authoritative position at the ministries and beyond;
- Ministry staff have increasingly internalised the administrative burden issue. ACTAL has made a positive contribution to this: its approach has been professional, predictable and consistent;
- ACTAL's strong emphasis on the necessity of full evaluation of every dossier, irrespective of the type of regulation or the extent to which administrative burden is an issue (proportionality), is seen as negative;
- Strategic consultancy by ACTAL has not properly taken off. Although the quality content of the recommendations and studies are valued, they are seen by the people

who receive them to be insufficiently innovative and lacking in policy relevance. (p. 12)

Accordingly, in 2011 the Dutch Government announced a new remit for ACTAL to achieve greater efficiency (RRG 2011a). According to the Minister for Economic Affairs, Agriculture and Innovation (MEAAI 2011b):

Actal will act as watchdog and monitor the progress made in reducing administrative burden. The government sets great store by the proper functioning of Actal and to this end Actal will be reorganised. Actal will continue to monitor the impact of regulatory pressure for citizens and businesses but it will also be an independent agency investigating complaints from the business sector. This task, formerly part of the Wintejes committee remit, will address complaints by naming and shaming. (p. 11)

In particular, ACTAL will no longer be evaluating every department's dossier of proposed regulations. Instead ACTAL is to:

... limit itself to sample testing to ensure that ministries themselves are consistently applying checks on the regulatory burden and to whether this results in regulator burden accountability. This is a different approach to the current remit, but much more efficient. It also fits in with the trust-based approach: not only in the relationship between government and business, but also within the public service. (RRG 2011a, p. 12)

In addition, ACTAL is to undertake strategic consultancy on deregulation where necessary and carry out external evaluations on the basis of complaints from the private sector (RRG 2011a).

Consultation and communication

Partly in response to the World Bank Group's (2007) *Review of the Dutch Administrative Burden Reduction Programme*, the Dutch Government has re-energised its communication strategy. The strategy has involved the opening up of new channels of communication, through mass media, and the creation of 'business spokespeople'. Summarising the communication strategy, Djankov and Ladegaard (2009) noted:

The business community, both companies and individual entrepreneurs, forms the primary target group. The communication objectives are:

- Knowledge: Businesses should know that regulatory burden and service levels are being addressed, that the government is aware of the effect they have, and that companies are able to complain about regulations which are seen as inappropriate, irrelevant or having a disproportionately high regulatory burden. Sector organizations should be aware of the ongoing process to reduce regulatory burden.

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- Attitude: Businesses can acquire a positive view of the government's efforts to reduce regulatory burden and to improve service.
 - Behaviour: Businesses should cooperate with the government to support the efforts to reduce regulatory burden and to improve service. (p. 4)

Djankov and Ladegaard (2009) welcomed the subsequent improvements in the Netherland Government's communication strategy and stated:

The overall objective of this communication is to increase the 'visibility' of the reduced regulatory burden. In order to achieve the desired degree of visibility, there must also be a tangible message. The communication strategy therefore provides for information activities to be commenced as soon as actual results have been achieved. Most of the communication will be channelled through the 'antwoordvoorbedrijven.nl' [www.answersforbusiness.nl] Web site. (p. 4)

One example of the communication strategy is the twice yearly *Regulatory Burdens on Business Progress Report* published by RRG — the latest available is November 2009 (RRG 2009). The communication strategy is also informed by a business sentiment monitor (Huijts 2009; Zijdenbos 2008).

Consultation around regulatory proposals is expected to be part of the new BIA (see below).

Regulatory stock and flow tools

As noted above, the Government of the Netherlands has recently implemented a number of regulatory stock and flow tools in four key areas: red tape reduction targets; ex ante review; improving services and risk-based compliance checking (RRG 2011a).

The most notable of these tools are the various red tape reduction targets (appendix G) and the associated development by the Dutch Government of the Standard Cost Model (SCM) as a method for estimating the administrative costs of regulation (appendix J).

While not yet in place, the use of legal instruments (such as sunset clauses, experimentation and evaluation provisions and other forms of temporary laws and regulations) will be encouraged in reducing the regulatory burden (RRG 2011a).

Red tape reduction targets

A 10 per cent net reduction in administrative burden on business in the period 2011-12 was set by the Government. Based on a baseline estimate of €7,417 million

(2011 prices), the 10 per cent reduction corresponds to a net decrease of €742 million in administrative costs by 2012. An annual target of 5 per cent reduction in costs has been established for subsequent years. As part of this, the Government has also announced that it will introduce a new framework for compliance costs ‘based on the principle that compliance costs of new regulations of this government will be compensated with reductions in current regulations’ (RRG 2011a, pp. 6–7)

Diminishing marginal returns has meant that the red tape reduction target in the Netherlands has inevitably been reduced from its previous 25 per cent level to 10 per cent in 2011-12 and 5 per cent per annum thereafter. The model has been widely adopted elsewhere as Voermans (2008) noted:

Elements of the Dutch approach have served as an inspiration and best practice for other countries and EU policies to simplify the regulatory environment. (p. 17)

The Dutch approach has been to reduce both existing burdens (through screening the legislative stock) as well as prevent and limit new administrative burdens (through regulatory impact assessment). This was operationalised through setting an administrative burden ceiling per ministry. However, as Voermans (2008) explains, the (previous) 25 per cent red tape reduction target did not apply evenly to all ministries — some ministries (for example, statistics, taxation) had already significantly reduced red tape prior to 2003. To help identify the unnecessary administrative burdens, ministries required to prepare an inventory and a list of proposals for reducing the burden and businesses are encouraged to complain about regulatory burden and red tape via a website (www.administratievelasten.nl). In addition, the SCM has been mandatory in all regulatory impact assessment requirements for new legislation. Previously, ACTAL scrutinised all departmental calculations to verify that SCM had been used appropriately and advise the government on whether the most efficient alternative had indeed been chosen. However, as noted above, in future ACTAL will be undertaking a sample-based scrutiny process.

Voermans (2008) noted that the success factors behind the Dutch approach to reducing regulatory administrative burdens were:

... method, political commitment, communication and embeddedness. The methodology used and political commitment over the period 2003-2006 account for a large part for the result observers — among them the OECD in a 2007[c] report — believe. (p. 17)

Alongside these success factors, one of the lessons identified by Voermans (2008) was the need for better communication with business:

Calculations, estimations, and reductions are important, but the process will not take root if it is nothing but a mathematical exercise, as many other countries have experienced as well. This one sided focus on targets and mathematics is of course a side-effect of the approach adopted but an Achilles heel as well. (Voermans 2008, p. 17)

The need for better communication with business in relation to reducing administrative burdens was echoed by Dutch business, VNO-NCW and MKB-Nederland (2008):

We have also learned that, although a reduction can often be achieved on paper, business does not experience any reduction in practice. The reason for this is that the 'low-hanging fruit' is often dealt with first and therefore applicable obligations that were already no longer effective disappear. (p. 5)

Partly responding to these criticisms the Dutch Government enhanced its communication strategy (see above).

Ex ante review

Like many countries, the main regulatory flow tool is the revised and strengthened regulation impact assessment tool (the aforementioned BIA).

Previously, the Dutch impact assessment process was identified as an area for improvement (Djankov and Ladegaard 2009; OECD 2010i). The Dutch Government have recently responded through developing an integrated assessment framework for policy and regulation (IAK) and establishing the independent Impact Assessment Board (CET) to assess all legislative proposals with major impacts on society (MEAAI 2011).

In particular, as part of the Dutch Government's *Programme for Reducing Businesses' Regulatory Burden 2011–2015* (RRG 2011a), every new policy proposal and legislative amendment will include a business impact assessment (BIA) as part of an integrated assessment framework for policy and regulation (*integraal afwegingskader voor beleid en regelgeving*) (IAK). This process is anticipated to assist in pulling together the different assessments (for example, the BIA, the environmental test, the administrative burdens test and so on) to facilitate greater clarity of the likely consequences of the proposal at the decision making stage. As noted above, on 1 September 2011 the Dutch Government established the CET to independently assess all legislative proposals with major impacts on society (MEAAI 2011a).

In addition, the RRG (2011a) noted that the government-wide experiment in conducting public internet consultation on proposed legislation will be evaluated

and a decision taken on whether, and if so, how such consultation processes could be embedded in the preparation of legislation.

Improving services

The Dutch Government's third main area with the Dutch Government's recently established *Programme for Reducing Businesses' Regulatory Burden 2011–2015* (RRG 2011a) deals with the costs associated with poor service on the part of government.

This program includes the introduction of an electronic business file (which allows information to be shared and re-used between government departments), electronic SBR, incentives to improve public service provision of municipalities, provinces and tax authorities through a Certificate of Good Service (box K.8), automatic licensing through the Silence is Consent Principle (*Lex Silencio Positivo* – LSP)² and common commencement days for date of entry into force of new rules and regulations (box K.9).

Risk-based compliance checking

The fourth program within the RRG (2011a) deals with the cost of regulations associated with the supervisory approach of regulators.

Partly following the recommendations of the Wientjes Commission (BRBC 2010), the Dutch Government has implemented a risk-based (or 'trust-based') approach to compliance checking and enforcement. Risks are prioritised in discussion with parent ministries. The rationale is to 'regulate where necessary, lift controls where possible'. In other words, while business will have greater scope it will also have greater responsibility. Nonetheless, if this confidence is breached, firm action by government is promised (RRG 2011d).

The approach is based on four pillars:

- modernisation and quality — streamlining structures, collaboration and modern risk based approaches
- transferred tasks and clustered expertise — more efficient re-organisation of tasks

² Lex silencio positvo means that 'no news (on an application for a license) is good news'. That is, the licences is deemed to be automatically issued (Voermans 2009).

Box K.8 The Netherlands Certificate of Good Service

The framework of standards for business is based on ten key 'indicators of good service' which have been translated into ten quantifiable standards. Public service organisations receive a 'Certificate of Good Service' if they have assessed businesses on the basis of the framework and established a plan with specific outcomes for improvements. As at April 2011, 51 municipalities had been awarded a Certificate of Good Service' but the Dutch Government is seeking this to be higher and to include all major municipalities (RRG 2011a).

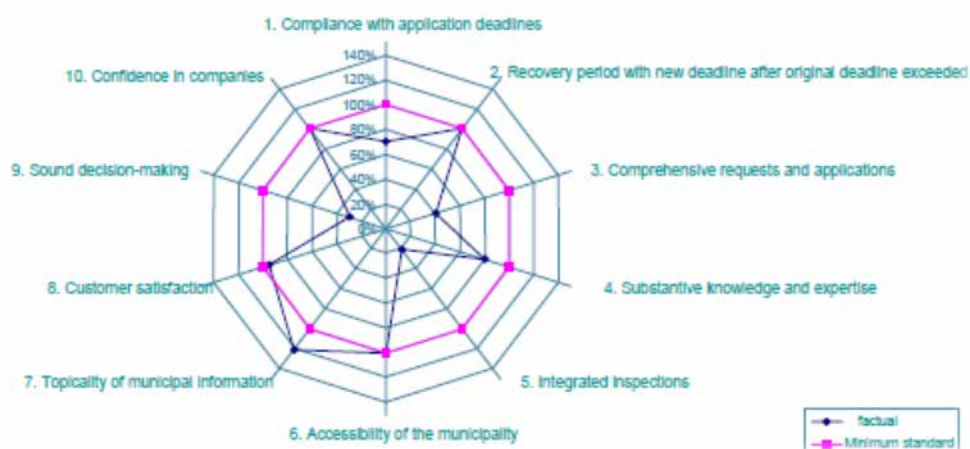
Standards of good service

The ten standards of good service for municipalities are outlined below:

1. compliance with application deadlines
2. recovery period after exceeding original deadline
3. comprehensiveness of requests and applications
4. substantive knowledge and expertise
5. perception of inspections
6. accessibility of the municipality
7. topicality of municipal information
8. customer satisfaction
9. sound decision-making
10. administrative burden on businesses.

The minimum standard for each of the ten standards are outlined in RRG (2011b).

For example, an extract of the scores from the Certificate of Good Service for the Municipality of Draften in 2008 (RRG 2011c) is shown below.



Sources: RRG (2011a); RRG (2011b); RRG (2011c).

Box K.9 Netherlands Government common commencement days — dates of entry into force of new rules and regulations

Since 1 January 2010 all laws and general administrative orders prepared after 1 January 2010 enter into force at a fixed date, either 1 January or 1 July (Parliamentary Papers II, 2009-2010, 29 515, No. 309). Four possible fixed dates apply for ministerial orders: 1 January, 1 April, 1 July or 1 October. To ensure people are fully prepared, all legislation must also have a minimum introduction period of two months.

Deviation from entry into force dates of the introduction period is only possible based on one of the following grounds:

- high or excessive private or public benefits or disadvantages due to early or late entry into force
- urgent or emergency cases
- early legislation
- European or international regulations.

Because legislation will increasingly enter into force on a very limited number of dates per year, the effects of common commencement dates will be increasingly noticeable for businesses, citizens and institutions. The implementation of common commencement dates is monitored and evaluated in 2012. (RRG 2011a, pp. 9–10)

Source: RRG (2011a).

- regulations and policy — more flexible regulatory approaches
- Government accountability — promoting a new understanding of the limits of government responsibility in risk management (Minister of the Interior and Kingdom Relations 2008).

In particular, this approach involves an easing in businesses obligations related to implementation and reducing the number of exemptions for businesses that have proven ability to meet their regulatory responsibilities. Additional capacity will then be used for more intensive supervision of repeat offenders. Nonetheless, there are exemptions to this risk-based approach (RRG 2011a). Information on this approach is included in the twice yearly progress reports to Government on reducing the regulatory burden to business.

K.5 The United Kingdom

Organisations, administrative structures and processes

The main institutions and structures in the UK's regulation system are the:

- Better Regulation Executive (BRE) — which sits with the Department for Business, Innovation and Skills

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- Better Regulation Units (BRUs) — which sit within UK Government departments
 - Reducing Regulation Committee (RRC) — a Cabinet sub-Committee
 - Regulatory Policy Committee (RPC) — an independent advisory body.

The UK's National Audit Office (NAO) is also a key institution, through its role in conducting performance audits of regulations, regulators and the regulatory system. It exercises its scrutiny role on behalf of Parliament.

In December 2010, the UK Government released *Reducing Regulation Made Simple* — a policy document to guide the implementation of the UK Coalition Government's policy commitments on regulatory reform at both domestic and EU levels (BRE 2010; box K.10). The commitments include processes and arrangements designed to manage the size of the stock of regulation (including the introduction of a 'one-in one-out' rule) and the efficient management of the stock of regulation (such as targeting inspections on high-risk organisations).

According to the OECD (2010e):

An effective balance, rare in Europe, has been achieved between policies to address both the stock and the flow of regulations. Progress has been especially significant as regards ... enforcement which is increasingly risk based. (p. 14)

Box K.10 UK Government's commitments on regulatory reform

- To cut red tape by introducing a 'one-in, one-out rule' whereby no new regulation is brought in without other regulation being cut by a greater amount
- To end the culture of 'tick-box' regulation and instead target inspections on high-risk organisations through co-regulation and improving professional standards
- To impose sunset clauses on regulations and regulators to ensure that the need for each regulation is regularly reviewed
- To give the public the opportunity to challenge the worst regulations
- To end the so-called 'gold-plating' of EU rules, so that British businesses are not disadvantaged relative to their European competitors.

Source: HM Government (2010b).

Better Regulation Ministers across all departments have been given responsibility for leading the task of challenging policy advisers to meet the UK Government's commitment to reduce regulation. These ministers are supported by Board Level Champions (BLCs), who are senior officials who champion the new approach

within their respective departments. BLC's, in turn, are supported by BRUs in each department.

The BRE leads the regulatory reform agenda across government (NAO 2011). It also plays an important role in developing the skill base across government departments through the provision of expert support to departments and regulators to:

- drive the development of alternatives to regulation; drive the development of behaviour-based approaches
- provide guidance on putting into practice the new guiding principles for EU legislation, including how to transpose directives and avoid 'gold-plating'
- encourage the adoption of smarter regulation in Europe, including 'more rigorous use of Impact Assessments in the European Union' (NAO 2011, p. 26).

In the context of this training and support function, the BRE is developing materials and tools to 'promote creative thinking about alternatives including where and when self- or co-regulation might achieve similar outcomes, and the role of information advice and guidance. They are also exploring how best to signpost policy-makers to the latest thinking on behavioural-based approaches, including practical examples drawn from the UK and elsewhere' (DBIS 2011c, p. 1).

The OECD (2010e) described the BRE as 'one of the best examples of an effective central unit for Better Regulation in Europe' (p. 14). It further stated:

The simplification programme for the reduction of administrative burdens on business is well structured, has already delivered savings and promises more. The current target is a 25% reduction of burdens by 2010 and the programme has a broad scope. (p. 14)

In addition, a Better Regulation Strategy Group (BRSG) — a stakeholder advisory group to government across the regulation agenda — was established in the first quarter of 2010 by the BRE. It is chaired by non-executive Chairman Lord Don Curry, has a diverse membership representing business (employers and employees), consumers and government and informs the BRE's approach.

The RPC provides independent scrutiny of proposed regulation measures while the RRC, established in May 2010, is a Cabinet sub-Committee to ensure there is a robust case for any new regulations. According to Cordova-Novio3n and Jacobzone (2011), the RRC has been introduced as an explicit gatekeeping mechanism to enforce discipline, particularly around the 'one-in one-out' rule.

Consultation and communication

The UK Government's Better Regulation agenda consultation arrangements are based on the *Code of Practice on Consultation* (HM Government 2008). This guide is used when the Government decides to run a formal, written public consultation exercise. However, Ministers have the discretion not to conduct formal consultation exercises under the code. The seven consultation criteria are listed in box K.11.

Box K.11 UK Government's Seven Consultation Criteria

Criterion 1 When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2 Duration of consultation exercises

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3 Clarity of scope and impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4 Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5 The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6 Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7 Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience. (HM Government 2008, p. 4)

Source: HM Government (2008).

As noted above, one of the UK Government's commitments on regulatory reform is to give the public the opportunity to challenge the worst regulations (appendix G). Accordingly, the UK Government has launched the Red Tape Challenge website, which is designed to seek broad public feedback on existing laws and regulations which should be abolished or amended. Excluded regulations include tax (which is being reviewed separately by the Office of Tax Simplification) and national security (Red Tape Challenge 2011).

As noted by WSP Group (sub. 1):

The ‘crowdsourcing’ initiative will see 21,000 regulations posted on the website and arranged by theme between April 2011-April 2013. The site received 6,000 ideas and suggestions in the first week. The key question posed to participants is “Which regulations do you think should be removed or changed to make running your business or organisation as simple as possible?”. At the end of the three-month review for each sector, the comments received are collated by government officials. Ministers then have three months to decide which regulations they will repeal and by when. Built into the process is the presumption that all burdensome regulations will go unless government departments can justify why they are needed. Decisions are challenged by an independent reviewer. The retail sector consultation recently concluded with an announcement of over 160 regulations set to be scrapped or simplified. (p. 2)

In addition to the stock of over 21,000 statutory rules and regulations and as a result of comments about the enforcement behaviour of regulators, regulatory enforcement has been included as a Red Tape Challenge theme. Following the consultation process and consideration by Ministers, an Enforcement White Paper is expected to be published in the (northern hemisphere’s) autumn of 2011 (Red Tape Challenge 2011).

Other formal consultation arrangements include the BRSG (see above).

Businesses can also sign up for a regulation update email service on the Business Links website (www.businesslink.gov.uk). These updates are designed to provide business with information and about new and changing regulations that may affect business. Updates are also available on the Business Links website. The Business Links website also provides numerous links to the Red Tape Challenge website and a link to the DBIS website which provides links to the twice yearly statements of new regulation as well as links to individual departmental statements of new regulation.

Regulatory stock and flow tools

According to the UK’s National Audit Office (NAO 2011), the number of regulations required to be considered by business is relatively large:

Businesses interviewed by the NAO typically have to consider as many as 60 regulations, governed by many different regulatory bodies. (p. 6)

Alongside its traditional regulation impact assessment process (OECD 2009b), the UK Government has recently implemented a number of stock management tools to manage both the quantity and the quality of the stock of regulation. These include a version of the ‘one-in one-out’ rule (see appendix G), sunset clauses on new regulation and new regulators (see appendix E) red tape reduction approaches (see

appendix G), no gold plating of regulations (box K.10.), the refocusing of regulators' compliance efforts on risk-based approaches (box K.10) as well as ex-ante and ex post reviews, including principles-based reviews (see appendix D) and a review of the overall regulatory system.

Nonetheless, the OECD (2010e) noted that while there are a number of useful initiatives to simplify the stock of regulation, the overall approach to simplification was not systematic:

The lack of any systematic effort to map and consolidate regulation in the United Kingdom's common law based structure, which also relies heavily on secondary regulations, may be of some consequence as there is a risk of significant regulation overload over time. (p. 23)

Further, while acknowledging the early stages of the UK's initiatives, Gaskell and Persson (2010) argue that the lack of an EU focus in the UK Government's regulatory reforms is problematic for a range of reasons. The main problem they identify is that because a large proportion of the flow of regulation (and therefore, over time, the stock of regulation) emanates from EU directives, there is little room for the UK Government to manoeuvre.

That said, the BRE (pers. comm., 18 November 2011) indicated that the UK Government has a number of work streams focusing on EU regulation which are set out in the 'Guiding Principles for EU legislation' (DBIS 2011d). In particular:

Government departments responsible for implementing an EU law must satisfy the cabinet that they have identified the aims of the law and the relevant government policies and will harmonize them in a way that does not cause unintended consequences in the United Kingdom and that minimizes the cost to business. The government is also working with businesses to identify good practices for implementing EU rules and ways to make EU laws friendlier to economic growth. (International Bank for Reconstruction and Development and World Bank 2012, p. 36)

One-in one-out rule

As outlined in appendix G, in 2010 the UK Government introduced a modified form of a 'one-in one-out' rule. In practice, the UK's approach is probably the first example of the practical implementation of a regulatory budget tool. The approach adopted is akin to an incremental variant of a regulatory budget — the introduction of primary and secondary legislation that imposes costs on business requires the removal of regulation with an equivalent cost on business (HM Government 2011a and 2011e). However, regulations required to comply with EU obligations are exempt from this rule.

The rule requires that any new regulation must be costed and validated by the RPC as part of an impact assessment process. The RRC will enforce the ‘one-in one-out’ rule. A statement of new regulation, monitoring performance against the rule, is to be published twice a year.

In September 2011, the UK Government published its second *Statement of New Regulation* (HM Government 2011c), which concluded that over the first year of the program:

... the increase in business burdens has remained at, or close to zero (p. 5)

However, as noted in appendix G, the impact of the ‘one-in one-out’ rule on the stock remains unclear. For example, during the June to December 2011, it appeared that the cost of new regulation exceeded the offsets by around 20 per cent.

Sunset clauses for new regulations and regulators

As discussed in appendix E, sunseting is now mandatory for new regulation where there is a net burden (or cost) on business or not-for-profit organisations. UK Government guidelines (HM Government 2011d) state that new domestic regulation should have an automatic expiry date and be subject to the formal requirement of a statutory review. The expiry date (sunset clause) is normally seven years after commencement unless another time period is appropriate. (Where a sunset clause is not used, a ‘duty to review’ clause is expected in order to ensure the regulation is regularly reviewed.)

By contrast, domestic regulation that implements international (mostly EU) obligations are not required to have an automatic expiry date but are subject to a ministerial duty to review every five years (HM Government 2011d). Reviews are expected to include a comparison with how the UK’s main competitors have transposed the particular EU obligation with a view to reducing UK burdens on business and others.

Departments are required to include sunset clauses and planned reviews in all new regulatory proposals to government. Exceptions need to be explained to and cleared by the RRC.

The UK Government also has plans to impose sunset clauses on new statutory regulators. These sunset clauses will require regular, cyclical reviews of their work. The role of network infrastructure regulators, however, is being reappraised separately from the regulator sunset review process (DBIS 2011a).

Red tape reduction targets

The previous UK Government set a red tape reduction target of 25 per cent, covering all government agencies. Exceptions to this target were the UK Cabinet Office (35 per cent) and the Office of National Statistics (19 per cent). However, the current UK Government's approach to red tape reduction relies on the 'one-in one-out' rule and the Red Tape Challenge website and its associated reporting arrangements (described above).

No 'gold plating' of EU regulations

As noted, the 'gold plating' of new EU regulations has been minimised through arrangements which copy them from the EU directive into UK law via the UK Government's 'Guiding Principles for EU legislation':

This direct 'copy out' principle will mean that the way European law is interpreted does not unfairly restrict British companies. The key elements of the principles are:

- Work on the implementation of an EU directive should start immediately after agreement is reached in Brussels. By starting implementation work early, businesses will have more chance to influence the approach, ensuring greater certainty and early warning about its impact.
- Early transposition of EU regulations will be avoided except where there are compelling reasons to do so. British businesses will then not be at a disadvantage to their European competitors.
- European directives will normally be directly copied into UK legislation, except where it would adversely affect UK interests, such as putting UK businesses at a competitive disadvantage.
- Ministers will conduct a review of European legislation every five years. The review process would involve a consultation with businesses and provide a unique opportunity to improve how European legislation is implemented, to ensure that it poses as small a burden as possible on business. (DBIS 2010, p. 1)

Detailed guidance to officials on how to implement EU Directives in the context of the UK Government's 'Guiding Principles for EU legislation' is provided in *Transposition Guidance: How to implement European Directives effectively* (HM Government 2011e).

Risk-based approaches to regulatory management

The OECD (2010e) and the NAO (2010b and 2011) note that there has been a steady roll out of the Hampton Review (Hampton 2005) recommendations, which

seek to embed a risk-based regulatory management approach within a variety of regulatory agencies and local authorities.

The NAO (2008) published a review of the performance of the five largest regulators in implementing the Hampton principles. While most had implemented the principles, the NAO pointed out some common challenges. A key challenge was the development of a comprehensive risk assessment system to deal with a wider range of risks, including those applying to the regulated sector generally and at the level of the firm so that resources could be effectively applied. The review also suggested that much value would be gained from regulators sharing their knowledge and experience (NAO 2008).

As noted above, feedback on the Red Tape Challenge website has led to the inclusion of regulatory enforcement behaviour as a theme for discussion. A number of discussion papers have been released as a basis for consultations on:

- improving the management and enforcement of regulation (DBIS 2011b)
- replacing the Local Better Regulation Office (LBRO) with a new organisation that is part of the Department of Business, Innovation and Skills, and extending the benefits of the primary authority scheme to boost confidence and trust by business in regulation (DBIS 2011c).

Ex ante and ex post reviews

An overview of the UK Government's approach to ex ante and ex post evaluation within the context of its better regulation agenda is provided in box K.12.

In summary, the UK's arrangements for evaluation operate across the regulatory cycle. While evaluation is not yet strictly 'embedded' as a requirement in the UK regulatory cycle (box K.12), there are incentives to produce evaluations in the context of the sunset requirement (which applies to the flow of new regulation) and the 'one-in, one-out' rule (which applies to the stock of regulation). An example of one UK Government department's response to these incentives is provided in box K.13.

Moreover, reinforcing the need for ex post evaluation of regulation, the RPC's (2011) report on the analysis supporting regulatory proposals found:

- the areas of greatest deficiency or weakness in the IAs we scrutinised were in terms of:
- the failure to produce reliable estimates of costs and benefits; ...
 - the failure to ensure substantive evidence was provided to support estimates made and conclusions reached. (p. 17)

Box K.12 The UK government's arrangements for ex ante and ex post evaluations

Ex ante evaluation

The Reducing Regulation Committee (RRC), a Cabinet sub-Committee, has been established to scrutinise, challenge and approve all new regulatory proposals as well as proposals for transposing EU obligations.

- The RRC is supported by a Regulatory Policy Committee (RPC), an independent advisory committee, whose opinion is expected to be submitted alongside any new regulatory proposal to the RRC.
- New regulatory proposals are only able to be submitted to the RRC for clearance once the RPC has agreed the associated impact assessment is fit for purpose, including the direct net cost to business.
- Sunsetting clauses for all new regulation made on or after April 2011 will require regulation to be re-assessed by the RRC (via the RPC). Where a sunset clause is not used a 'Duty to Review' clause should be used to ensure the regulation is regularly reviewed. This clause also applies to EU-sourced legislation.

Ex post evaluation

The *Reducing Regulation Made Simple* document states that the UK Government is committed to improving the quality of evaluation.

- Plans for ex post evaluation should be set out in the impact assessment accompanying consultation on the proposed policy.
- Post-implementation reviews are also required 2–4 years prior to the sunsetting of regulation. Information from monitoring is expected to be used in post-implementation reviews.
- Departments will be required to undertake reviews of their existing stock of regulation and this requirement is seen as critical to the successful implementation of the 'one-in, one-out rule'.
- Thematic reviews will also be commissioned by the UK Government and it is expected that UK departments would be actively involved in EU regulatory reviews in specific policy areas.
- A 'Your Freedom' website provides opportunities for external challenge of regulation and public suggestions to remove or change regulations. (The Your Freedom programme closed in September 2010 and has been superseded by the Red Tape Challenge website (BRE, pers. comm., 18 November 2011).)
- The UK Government also plans to evaluate the regulators through imposing sunset clauses on statutory regulators, requiring regular, cyclical reviews of their work. (Network infrastructure regulators is being reappraised separately from this sunset review process, however.)

Source: BRE (2010).

**Box K.13 Department of Environment, Food and Rural Affairs
Better Regulation Programme**

In response to the incentives arising from sunseting and the 'one-in, one-out' rule, the Department of Environment, Food and Rural Affairs (DEFRA 2011) established a Better Regulation Programme in September 2010 and also proposes to:

- map how key areas of DEFRA's regulation will be reviewed
- publish a guide for a systematic approach to regulatory review in mid-2011
- establish a Strategic Regulatory Scrutiny Panel to challenge and advise DEFRA and its delivery network
- by 2013, carry out systematic reviews of all key areas of DEFRA regulation on a rolling basis, to investigate whether the degree of regulation is justified and identify opportunities for reform of the DEFRA regulatory landscape
- evaluate progress being made and review scope for further initiatives to promote regulatory reform.

Source: DEFRA (2011).

Programmed reviews

Programmed reviews include post implementation reviews (PIRs) and statutory reviews.

As noted in appendix E, the UK Government's impact assessment guidelines state that a PIR Impact Assessment should normally be produced for a policy intervention which triggered the RIA requirements, with the PIR normally expected 3–5 years after implementation (HM Government 2011b; box E.4). The PIR should be planned and carried out so as to feed into any statutory review of regulation as required in any sunseting provision (including the requirement to review all new EU legislation every five years), and other related processes such as the post-legislative scrutiny of primary legislation. The guidance also notes that departments may also produce additional PIRs for implemented policies that were not subject to a pre-implementation impact assessment. This is recommended, for example, when the proposition that a policy will not impose additional costs is subject to public criticism or debate.

The UK Government advises that the depth of analysis for a PIR should be proportionate to the likely benefit of conducting the review. A high-impact policy should be subject to a full PIR, including an evaluation of the actual costs and benefits as a result of the policy. In many cases a less detailed review will be appropriate (box E.4). The UK Government noted:

Government expects policymakers to evaluate policies after implementation because such evaluation can yield invaluable insights. Examining the actual impact of policies can show what works, what could be improved, and how others can learn from the approaches used. (HM Government 2011b, p. 13)

According to the NAO (2010b), the process for determining whether a review should occur has improved somewhat, but it infers the process could do better:

In 2007 we reported that there continued to be an unstructured and ad hoc approach to post implementation review across all departments. Since then, we have found greater numbers of Impact Assessments include a statement of when a review should be conducted, although relatively few have been carried out to date. (p. 9)

According to UK Government (2011a) guidelines, the first statutory review of domestic regulation made through primary legislation should be published in most cases (other than exceptional circumstances) no later than five years after the regulation comes into force (see also box K.12). But where regulation is subject to automatic expiry (i.e., domestic regulation enacted through secondary legislation), the statutory review should be scheduled to take effect seven years after the regulation comes into force.

The UK Government Guidelines for sunseting and PIRs advise that departments should coordinate their activities for programmed reviews, where more than one review is required in overlapping policy areas. It notes that combining the delivery of a programmed review of a particular regulation with a broader review has some potential advantages, including quality and efficiency improvements. Other activities that stand-alone programmed reviews could ‘piggy-back’ on include: statutory reviews of related regulation; post implementation reviews; stock reviews, formal evaluations of relevant policy areas and wider reviews undertaken by other levels of Government (HM Government 2011a).

As noted in appendix H, there are legislative requirements in the UK for certain regulators to consider their stock of regulation. Under legislation introduced in 2008, regulators are required to monitor their stock of regulation, and publish an annual statement outlining how they propose to reduce regulatory burdens. This approach appears to have been effective at encouraging regulators to consider their stock of regulation. Regulators involved have committed to a range of reviews and reforms, such as reviewing licensing arrangements, and reviewing consultation practices.

Principles-based reviews

The UK has undertaken a competition assessment program which involved two staff members from the UK Office of Fair Trading playing an active role. While a small

percentage of the roughly 400 regulations reviewed per year received detailed scrutiny, the remaining regulations were assessed by means of a filter which permitted officials to assess whether there was a significant likelihood of competition problems (appendix D).

Systemic reviews

Recently, the NAO (2011) released a report on the overall system of regulatory management across the UK Government. The report focussed on the impact of regulation on business, how departments choose to regulate and the implementation of regulation. While the NAO report focused on the experience prior to the change in government in May 2010, it also reported on progress in implementation of the proposed changes and made some recommendations in this respect, including the need for:

- the BRE to identify cost-effective ways to strengthen its understanding of the costs and benefits of regulation as experienced by business and use the findings to guide future work on reviewing and reforming regulation. In this context, the NAO found that while departments and the BRE know which areas of regulation concern business, ‘most do not have a clear picture either of the size of the policy costs and benefits resulting from the stock of existing regulation, or of the capacity of businesses and others to respond to new proposals’ (NAO 2011, p. 9)
- other departments (besides DEFRA) to consider reviewing their regulatory stocks
- the BRE to undertake further work to strengthen incentives for departments to plan and carry out ex post evaluations and use the findings to revise regulation accordingly (because evaluation and feedback remains a weak element of regulatory management)
- departments to increase the level of informal engagement with business prior to formal consultations on new regulation
- the BRE to develop and consult on an implementation plan for the regulatory reform program, including a definition of what success should look like, how it will be measured and a timetable of activity
- the BRE to work with the Cabinet Office to develop a clearer statement of accountabilities for departments and the BRE (because clarity over accountability and effective incentives are important in achieving good quality regulation).

K.6 The United States of America

Organisations, administrative structures and processes

The key organisation in the federal USA system is the Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget (OMB). OMB is a Cabinet-level office within the Executive Office of the President of the United States of America. It is staffed by both political appointments and career public servants.

The Administrator of OIRA is one of the six positions within the OMB that are presidentially appointed and Senate-confirmed.

OIRA was created by Congress with the enactment of the *Paperwork Reduction Act 1980* (PRA). The key functions of OIRA include: reviewing Federal regulations; reviewing paperwork burdens; and overseeing policies relating to privacy, information quality and statistical programs (OMB 2011a).

Under President Reagan's Executive Order (EO) 12291 (dated 17 February 1981), OIRA is assigned responsibility for coordinating interagency review (within EOP) of proposed regulations. The review references the costs and benefits and considers less burdensome alternatives (Sunstein 2011a).

OIRA also provides:

- guidance on 'best practice' for regulatory analysis through circulars. For example, one such circular (OMB 2003) was subject to peer review and solicited public comments prior to being finalised
- summary information on the costs and benefits of significant regulatory actions from the Executive Branch agencies through an annual report to congress (for example, OMB 2011c).

Consultation and communication

OIRA's disclosure and transparency policies must align with:

- the disclosure requirements in EO 12866
- President Obama's 21 January 2009 'Memorandum on Transparency on Open Government' with its three core principles of transparency, participation and collaboration (Hunt 2010)
- the OMB Open Government Directive.

According to Cass Sunstein, Administrator of OIRA:

Everyone in the world can have access to proposed rules and findings on regulations.gov – at least if they have an Internet connection. (2011a, p. 4)

In addition to reports, policies and guidance to agencies on OIRA’s website, OIRA makes public all substantive communications with any party outside the Executive Branch concerning regulatory actions under review.

If the OIRA Administrator or his/her designee meets with outside parties during a review, the subject, date, and participants of the meeting are disclosed on the OIRA website. Any written material received from outside parties on rules under review is placed on the OIRA website. After a regulatory action is published in the Federal Register, OIRA will make publicly available certain documents exchanged between OIRA and the rulemaking agency during the review period. (OIRA 2011a, p. 3)

The Regulatory Dashboard (www.Reginfo.gov) is a public website which discloses information about OIRA’s review of draft regulations under EO 12866 and EO 13563. According to OIRA:

This dashboard graphically presents information about rules under OIRA review through an easy-to-use interactive display, and it allows the public to sort rules by agency, length of review, state of rulemaking, economic significance, and international impacts.

In addition, the ICR Dashboard displays agency information collection requests to OIRA for review under the Paperwork Reduction Act. (OMB 2011a, p. 1)

The different types of regulatory actions displayed on the dashboard include: ‘notices’ which announce new programs or policies; ‘Pre-rule’ (or advance notice of proposed rulemaking); ‘proposed rule’, which announces a proposal to add or change existing regulation and solicits public comment on the proposal; ‘final rule’, where the agency responds to public comment and makes appropriate revisions; ‘interim final rule’, typically issued when a proposed rule has skipped the ‘proposed rule’ stage which is possible when public comment on a proposed rule would be impractical, unnecessary and contrary to the public interest; and the ‘direct final rule’, which are similar to ‘interim final rules’, except that there is no comment period after publication, on the grounds that they are uncontroversial.

Nonetheless, draft documents and the text for a proposed regulatory action during the review stage are considered deliberative and not available for public release during the review.

While the www.regInfo.gov website provides information about the status of documents undergoing OIRA review, the www.regulations.gov website provides information on published regulatory actions (and any supporting material provided by agencies) which are also open for public review and comment.

Regulatory stock and flow tools

Sunsetting

Sunset provisions in federal regulations are used on a selective basis. It would appear that they are only used when a law changes or government action is required reasonably quickly or when the ramifications of the law in question are difficult to foresee. The *Patriot Act* is a prime example of legislation which included a sunset provision (appendix E).

Ex ante reviews

Impact assessments have been a long standing feature of the USA's regulatory system. On 30 September 1993, President Clinton's EO 12866 continued the arrangement to ensure 'significant' regulations are reviewed before publication and agency compliance with the principles in EO 12866. These principles include incorporating public comment, considering alternatives to regulation and analysing both the costs and benefits of regulation (box K.14).

Such review also helps to promote adequate interagency review of draft proposed and final regulatory actions, so that such actions are coordinated with other agencies to avoid inconsistent, incompatible, or duplicative policies. OIRA review helps to ensure that agencies carefully consider the consequences of rules (including both benefits and costs) before they proceed. (OIRA 2011a, p. 2)

Following an extensive public consultation process (Sunstein 2011a), the principles in EO 12866 were recently affirmed and supplemented by President Obama's EO 13563 (box K.14).

OIRA is also responsible for determining which proposed regulatory actions are 'significant' and therefore subject to interagency review. EO 12866 defines 'significant' regulatory actions as those that:

1. Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order. (OIRA 2011a, p. 2)

Box K.14 **United States federal government's Executive Orders relating to regulation**

- President Reagan's Executive Order (EO) 12291 and President Clinton's EO 12866 required federal executive agencies to prepare a Regulatory Impact Analysis (RIA) for all major federal regulations. Federal agencies have prepared RIAs for more than twenty years and guidelines for economic analysis have been provided by OIRA.
- In particular, EO 12866 'Regulatory Planning and Review, and Amendments':
... establishes and governs the process under which OIRA reviews agency draft and proposed final regulatory actions. The objectives of the Executive Order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. For all significant regulatory actions, the Executive Order requires OIRA review before the actions take effect. On the part of the agencies, Executive Order 12866 requires an analysis of the costs and benefits of rules and, to the extent permitted by law, action only on the basis of a reasoned determination that the benefits justify the costs. (OIRA 2011a, p. 1)
- President Obama's EOs 13563 affirms and supplements the requirements for regulation making in EO 12866 and also sets out new ex post review requirements.
- EO 13563 'Improving Regulation and Regulatory Review' (issued on January 18 2011) provides five new principles to guide regulatory decision making:
First, agencies are directed to promote public participation, in part through making relevant documents available on the regulations.gov [website] to promote transparency and comment. It also directs agencies to engage the public, including affected stakeholders, before rulemaking is initiated.
Second, agencies are directed to attempt to reduce "redundant, inconsistent, or overlapping requirements," in part by working with one another to simplify and harmonize rules.
Third, agencies are directed to identify and consider flexible approaches to regulatory problems, including warnings and disclosure requirements. Such approaches may "reduce burdens and maintain flexibility and freedom of choice for the public."
Fourth, agencies are directed to promote scientific integrity.
Fifth, and finally, agencies are directed to produce plans to engage in retrospective analysis of existing significant regulations to determine whether they should be modified, streamlined, expanded, or repealed. (OIRA 2011a, pp. 1–2)
- EO 13579 'Regulation and Independent Regulatory Agencies' extended the coverage of EO 13563 to independent regulatory agencies, such as the Securities and Exchange Commission, the Federal Communications Commission and the Consumer Product Safety Commission.

Sources: Hahn and Litan (2003); Obama (2011a,b); OIRA (2011a); OMB (2011b).

According to the www.Reginfo.gov website, OIRA generally designates between 500 and 700 regulatory actions as significant per annum.

Under EO 12866, OIRA review is limited to a maximum of 90 days, although extensions may be granted in limited circumstances.

During the review period, OIRA can ‘return’ the rule for reconsideration by the agency (for example, because it does not comply with law, the quality of the agency’s analysis is inadequate, the regulation is not justified by the analysis, the proposed rule is inconsistent with regulatory principles or with the President’s policies or priorities, or if the proposed rule conflicts with the efforts of other agencies).

In addition, during the review period, OIRA is able to meet with any outside party interested in discussing issues on a proposed regulation which is under review. Procedures for such meetings are outlined in EO 12866 and a log of meetings is available on OIRA’s website (see below).

Regular reporting by OMB to Congress on the expected costs and benefits of all new regulation adopted in a year is also undertaken (for example, OMB 2011c). These reports summarise the expected costs and benefits of ‘significant’ regulations passed during the year prior to the report. Longer-term summary cost estimates are also occasionally included. Within each report, OMB must make recommendations for reform (including on processes as well as proposed actions relating to specific policy objectives). Accordingly, this information assists Congress in assessing the overall regulatory performance and determining future reform priorities. Under EO 12291, these annual reports also compare ex ante analyses in the original impact assessments with ex post estimates where available. As such, they can also help to improve the methodological approaches of ex ante analyses. (For example, in OMB’s (2011c) report to Congress recommended that where quantification is not possible, a ‘breakeven analysis’ should be presented.) Importantly, the comparison of ex ante with ex post analyses highlight regulations where costs have exceeded the benefits or benefits have failed to materialise which feed into the prioritisation process.

Ex post reviews

As noted above, President Obama’s EO 13563 recently required federal regulatory agencies to undertake retrospective reviews of existing regulations (or ‘rules’):

... It asks for ‘periodic review’ to identify ‘rules that may be outmoded, ineffective, insufficient, or excessively burdensome.’ It directs agencies to produce preliminary plans for period review of significant rules and submit them to OIRA within 120 days. Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. Before a rule has been tested, it is difficult to be certain of its consequences, including its costs and benefits. During the process of retrospective analysis, the principles ... remain fully applicable, and should help to orient agency thinking. (Sunstein 2011a, p. 5)

Most recently, Obama’s EO 13579 extended EO 13563 to apply to independent regulatory agencies (OMB 2011b). A suggested template for independent agency plans (of retrospective analysis of existing regulation) is provided in OMB’s (2011b) Memorandum. The proposed template is comprised of the following eight parts: executive summary of plan; scope of plan; rules for retrospective review; public access and participation; current agency efforts already underway independent of EO 13579; elements of plan; components of retrospective analysis; and publishing the agency’s plan online. Retrospective analysis of existing USA regulation has been a longstanding recommendation of a number of commentators (for example Greenstone 2009). Because of the relatively recent nature of the Obama administration’s EO’s, formal commentary assessing these initiatives is limited. Nonetheless, Greenstone (2011b) welcomes the requirement for ex post evaluation of existing regulation but noted:

... The evaluations are currently performed by the agencies that write the regulations. But, objectivity about one’s own performance is always difficult and a primary reliance on self-evaluations is not the hallmark of a well-functioning system. While these evaluations are subject to public comment and White House review, a next step might be to consider shifting to a system of independent evaluations in addition to, or in place of, self-evaluation. (pp. 1–2)

Bayh and Card (2011) felt that more could be done, stating:

... the order exempts from review the huge flow of regulations in the pipeline generated by the health-care and financial reform laws, as well as the large number of major rules generated by the Environment Protection Agency over the past two years. (p. 1)

Some examples of the initial results of the stock review required under EO 13563 were discussed in a speech by Cass Sunstein (2011b), Administrator OIRA, to the American Enterprise Institute. The initial results of the reviews undertaken by thirty departments and agencies suggest that hundreds of millions of dollars in annual regulatory burdens could be eliminated over the next several years.

In fact, over \$1 billion in savings are anticipated from just a few initiatives for the Department of Transportation [DOT], the Department of Labor, and EPA [the Environmental Protection Agency]. ...

The sheer range of plans is truly extraordinary. Some plans list well over fifty reforms. DOT offers seventy regulations on which action will be taken and fifty-five for further study. EPA put forward sixteen high-priority initiatives, intended for completion in the short-term; it also offers fifteen high-priority initiatives for the longer term. (Sunstein 2011b, p. 3)

Sunstein (2011b) noted that many proposals focus on small business while others represent a fundamental rethink about how to do things differently. For example, the Department of Transport's paperless initiative indicated savings of over \$400 million over five years. Another example, which simply proposed to exempt milk from being defined as an 'oil' (and therefore subject to costly regulation designed to prevent oil spills) was expected to save the milk and dairy industries as much as \$1.4 billion over the next decade.

Sunstein (2011b) also noted that many of the initiatives derived from direct public input into the process of 'lookback' over the stock of regulation. At the time of writing, these agency and department plans for regulatory simplification and reform were in the public domain for comment.

K.7 Australia

Organisations, administrative structures and processes

The Deregulation Group within the Department of Finance and Deregulation (Finance) is responsible for implementing the Australian Government's better regulation and red tape reduction agenda (Wong 2008). Within the Group is the Office of Best Practice Regulation (OBPR) and the Deregulation Policy Division (DPD) (Department of Finance and Deregulation, sub. DR11).

Broadly speaking, the OBPR is responsible for managing the flow while the DPD is responsible for overseeing the stock of both regulation within the jurisdiction of the Australian Government and regulation which has cross-jurisdictional impacts.

The DPD is also responsible for providing advice to the Australian Government on better regulation policy. It also provides secretariat services to the Council of Australian Governments' (COAG) Business Regulation and Competition Working Group (BRCWG). In addition, the DPD is also responsible for streamlining regulatory burdens (OECD 2010d).

While the OBPR is a division within the Department, according to a Ministerial Statement (Tanner 2008) it has a degree of independence from the Department and the portfolio ministers in its role of assessing and reporting on compliance with best practice regulation requirements.

OBPR's charter (box K.15) sets out its responsibilities in promoting the Australian Government's objective of effective and efficient legislation and regulations.

Box K.15 Office of Best Practice Regulation's Charter

According to its charter, the role of the Office of Best Practice Regulation (OBPR) is to promote the Australian Government's objective of effective and efficient legislation and regulations. Its functions are to:

- advise government agencies on appropriate quality control mechanisms for the development of regulatory proposals and the review of existing regulations, including whether **regulation impact statements** (RISs) are required
- examine RISs and advise decision makers whether they meet the government's requirements and provide an adequate level of analysis, including cost-benefit and risk analysis of appropriate quality
- advise agencies on assessing business compliance costs and maintain the **Business Cost Calculator** (BCC) as a regulation costing tool
- manage other regulatory mechanisms, including **Post-implementation Reviews** and **Annual Regulatory Plans**
- promote the **whole-of-government consultation principles** and provide clear guidance on best practice consultation with stakeholders to be undertaken as part of the policy development process
- provide **training and guidance** to officials to assist them in meeting the assessment requirements to justify regulatory proposals
- provide technical assistance to officials on **cost-benefit analysis** and consultation processes
- **report annually** on compliance with the government's requirements for Regulation Impact Statements and consultation, and on regulatory reform developments generally
- maintain a central online public register of all RISs
- provide advice to ministerial councils and national standard-setting bodies on **Council of Australian Governments guidelines** that apply when such bodies make regulations
- monitor regulatory reform developments in the states and territories, and in other countries, in order to assess their relevance to Australia.

Source: Department of Finance and Deregulation (2011).

Assistance to develop and apply continuous improvement and total quality management processes to regulation was initiated in 2008 (Wong 2008). In addition, the Australian Government has established Better Regulation Ministerial Partnerships between the Minister for Finance and Deregulation and relevant

ministers to progress substantial areas of regulation (Australian Government 2010a). According to the Department of Finance and Deregulation (sub. DR11), six Partnerships have been completed and are being implemented and a further four Partnerships are currently in train (see also appendix G).

The Productivity Commission is an independent standing review body, which operates under its own Act. It has undertaken reviews of specific areas of regulation (appendix C) as well as sectoral stocktakes (appendix B) and benchmarking (appendix F).

Inter-jurisdictional arrangements

COAG plays an important role in Australia's regulatory management system, especially in developing national regulation and in relation to addressing areas of regulatory duplication or inconsistency between the different levels of government in Australia's federal system of government. (COAG is the peak inter-governmental forum in Australia comprising the Australian (federal) Government, the six state and two territory governments and the Australian Local Government Association.)

The OBPR examines 'COAG RISs' to ensure compliance with COAG's (2007) best practice regulation guide.

The BRCWG provides an on-going national forum for the consideration of reforms encompassing all jurisdictions — including improved processes and areas of regulation (for example, the Seamless National Economy items discussed in chapter 2 and appendix D).

The COAG Reform Council (CRC) monitors progress in the regulation (and other) reforms to which commitments have been made, and publishes estimates of key performance indicators on an annual basis (see appendix I).

Communication and consultation

The Australian Government has sought to entrench a culture of continuous regulatory improvement and reform. A number of consultation processes seek to encourage regulators to work with industry to identify improvements to regulatory practice, and have regulators subject to on-going feedback from business (Wong 2008).

As noted in box K.15, OBPR's charter includes the promotion of Australian Government's whole-of-government consultation principles (box 6.3 in chapter 6)

and the provision of clear guidance on best practice consultation with stakeholders to be undertaken as part of the policy development process.

The Australian Government's (2010b) *Best Practice Regulation Handbook* (the Handbook) provides guidance on the consultation strategy to be used in the Australian Government's RIS process. The consultation strategy is established in accordance with the Australian Government's Consultation Principles. Related to these principles, there are a number of specific consultation mechanisms – Annual Regulatory Plans (see below), a business consultation website (www.business.gov.au), and policy exposure drafts (which are used to test complex regulations with relevant businesses prior to finalisation). However, as the Australian Government (2009) noted:

... consultation conducted in accordance with the regulatory impact analysis requirements might nonetheless fail to meet the [Legislative Instrument Act's] requirement for consultation. (p. 42)

Australian Government agencies are also required to prepare and publish an Annual Regulatory Plan in July each year. This is intended to provide business and the community with information on forthcoming changes in Australian Government regulation that may have a significant impact on business with the aim of making it easier for business to take part in the development of regulation.

Transparency is a key ingredient in the process of making new and maintaining the stock of good regulation and the OBPR maintains a central online public register (see <http://ris.finance.gov.au/>) of all RISs, including those assessed as inadequate. The OBPR also publishes an annual 'Best Practice Regulation Report' which provides details on compliance with best practice regulation requirements of the Australian Government and COAG.

Regulatory stock and flow tools

Alongside the ex ante RIS process to manage the flow of regulation, there is a suite of regulatory stock management tools operated by Australian Government.

Ex ante reviews

A key process in managing the flow of new regulation in the Australian Government (and in COAG) is the making of a RIS. According to the Department of Finance and Deregulation (Finance, sub. DR11):

At the Commonwealth level, regulatory impact analysis (RIA) has existed in one form or another for the last 25 years. ... RISs were first required for Cabinet proposals

affecting business in 1986. The RIS requirements were set out in a circular of the Business Regulation Review Unit (BRRU) located with the then Department of Industry, Technology and Commerce. The BRRU was transferred to the then Industry Commission in 1989 and renamed the Office of Regulation Review (ORR). RIS requirements have been refined progressively, largely to improve their coverage and transparency. However, key features have changed little over time including the core requirements of problem identification, objectives, options, impact analysis, consultation, conclusion and implementation and review. (p. 1)

In early 2007, the Office of Regulation Review (ORR) was upgraded and renamed the Office of Best Practice Regulation (OBPR) and following the election in October 2007 it was relocated to the Department of Finance and Deregulation.

In 2010, the Australian Government reviewed the operation of the RIA framework and a RIS is now compulsory for all Commonwealth regulatory proposals (unless the impact on businesses or not-for-profit organisations is minor or machinery in nature).

The OBPR provides advice to government agencies on individual RISs and vets whether RISs meet the Government's requirements, as set out in the *Best Practice Regulation Handbook* (the Handbook) (box K.16). (Following the 2010 review of the RIA framework, the previous version of the Handbook was revised in response to the review.)

In addition, the Handbook emphasises the need to ensure that regulatory proposals are subject to adequate consultation:

The RIS must set out the nature and extent of consultation that has been undertaken, summarise the views of those consulted and identify how those views have been considered in developing the proposal. In addition, a consultation plan must now be developed and included in department and agency Annual Regulatory Plans, which are published on the OBPR website. The OBPR reports in its annual Best Practice Regulation Report on whether consultation plans were published. (Finance, sub. DR11, p. 2)

As mentioned, RISs are also published on an online register (with an accompanying blog facility that enables anyone to comment on a posted RIS) shortly after public announcement of the relevant regulatory action. Finance noted in its submission (DR11) that:

Under previous arrangements, compliance was often not reported publicly until up to 18 months after the making of a regulatory decision with the release of the OBPR's Annual Report approximately six months after the end of the relevant financial reporting year. (p. 2)

Box K.16 The Regulation Impact Statement process

Notification

Agency contacts the OBPR for all regulatory proposals with impacts on business or not-for-profit sector.

Sound analysis

No further action if the OBPR assesses that the proposal is of a minor or machinery nature.

If the proposal is not of a minor or machinery nature the agency is required to prepare a RIS. Agency prepares a RIS analysing all feasible options (unless the Cabinet directs that a RIS for Cabinet only requires certain options). The agency Head or Deputy Head certifies the RIS. If OBPR assesses the RIS as adequate, a one-page summary is prepared for the decision maker. If OBPR assesses the RIS as not adequate, it will provide clear and timely advice to the agency on the reasons.

Informed decision making

The Cabinet Secretariat provides a gate-keeping role to ensure that regulatory proposals coming to the Cabinet and sub-committees of the Cabinet meet the RIS requirements, unless the PM has deemed that exceptional circumstances apply.

Either

Proposal goes to Cabinet or sub-committee:

- RIS attached to submission
- OBPR to provide coordination comments on Cabinet submissions
- OBPR to prepare one page summary.

Or

Proposal goes to other decision maker:

- PM or Minister
- Board or Agency head
 - RIS and one page summary prepared by agency and assessed by OBPR attached to letter to PM or material for Minister
 - RIS and one page summary prepared by agency and assessed by OBPR attached to material for Board or agency head.

Transparency

RIS published (with OBPR assessment of adequacy) on OBPR website once decision has been announced.

For bills or legislative instruments, RIS attached to Explanatory Statement or Explanatory Memorandum and tabled.

OBPR publishes annual *Best Practice Regulation Report*, noting compliance with Best Practice Regulation requirements by Department and Agency.

Source: Australian Government (2010b).

The OECD (2010d) has stated that:

Australia is one of the front-running countries in the OECD in terms of its regulatory reform practices. Australia benefits from a mature system for regulatory management, with early and comprehensive adoption of OECD good practices as well as introduction of novel approaches. The government elected in 2007 has provided a renewed reform impetus, establishing a solid institutional framework and announcing a commitment to "continuous improvement" in regulatory quality. The government has endorsed the principles of good regulatory processes recommended by the Banks Taskforce on Reducing the Regulatory Burdens on Businesses and adopted by the previous government, and has reaffirmed the commitment to best practice regulation requirements.

Recent reforms have strengthened Australia's system for Regulatory Impact Assessment (RIA) to protect business from new, unnecessary regulation, making it among the most rigorous and comprehensive in the OECD. (p. 15)

By contrast, the BCA (2010) has argued that recent changes — such as streamlined RISs for election commitments and a narrowing in the range of options required to be analysed — have diluted the effectiveness of the RIS process in its task of ensuring the flow of new regulation is appropriate, effective and efficient.

Sunsetting

The *Legislative Instruments Act 2003* (the LIA) establishes a 'comprehensive regime for the management of Commonwealth legislative instruments' (Australian Government 2009). Under Section 6 of the LIA, regulations are to be treated as legislative instruments.

Under the LIA, all Australian Government regulations will cease to be in force (sunset) approximately 10 years after they commence or are required to be registered, unless action is taken to either continue their operation or they have been formally exempted from the sunset process.

The 2008 Review of the LIA (Australian Government 2009) suggested that agencies should be proactively culling regulation that is no longer required without waiting for its automatic repeal, but found there was insufficient activity by agencies in this regard. Further, the review found that there were varying states of preparedness among agencies in relation to sunseting (see appendix E).

Accordingly, the review felt that the pre-2008 review of regulation (see below) may be a useful vehicle to progress the reviews associated with sunset clauses. In addition, the review also recommended that the current 10 year sunseting period be maintained and the question of whether it should be reduced to 5 years (as recommended by the Regulation Taskforce (2006)) be considered as part of the

2017 statutory of review of the LIA's sunset provisions (Australian Government 2009, p. 49).

Post implementation reviews

According to the Handbook (Australian Government 2010b), where a regulatory proposal proceeds without an adequate RIS, the resulting regulation must be subject to a PIR. The PIR must commence within one to two years of the regulation being implemented, and is required regardless of whether or not an exemption from the RIS requirements for exceptional circumstances was granted by the Prime Minister (see appendix E). Each PIR should also be generally similar in scale and scope to the RIS that would have been prepared in the decision making stage. Consultation (according to the Australian Government's consultation principles) is also required when making the PIR. Agencies are also required to list PIRs in their Annual Regulatory Plans. The OBPR's assessment of the PIR is published on the OBPR's central online RIS register. OBPR also reports on compliance with PIR requirements in its annual 'Best Practice Regulation Report'.

'One-in one-out'

The Australian Government committed to a 'one-in one-out' principle for new regulation to address the cumulative burden of regulation (Wong 2008). This has been given effect through a regulatory 'offsets' process (outlined in a Guidance Note issued by Finance to Commonwealth agencies in January 2009). These arrangements have been explained by Finance in their submission (sub. DR11):

A regulatory offset is any regulation or regulatory processes that can be removed, repealed or amended which results in a net reduction in the cost of regulation. Examples might include the removal of redundant regulation, streamlining reporting requirements or simplifying administrative procedures. The requirement to provide offsets is not mandatory, however, agencies must provide evidence that opportunities for offsets have been considered. (p. 3)

Some examples of these regulatory 'offsets' are provided in the Finance submission (sub. DR 11) and in appendix G.

Stocktake of pre-2008 subordinate regulation

For regulation made prior to 2008, in 2009 the Australian Government commenced its first systematic review of Commonwealth subordinate legislation (approximately 30,000 items) (Australian Government 2010a; box G.13; sub. DR11). This

systematic review of pre-2008 regulation was completed in 2010 and while the full results were not published, a media release stated that:

This is the first comprehensive review of these types of regulations and we are acting promptly on its recommendations. As part of this review, the Department of Finance and Deregulation and responsible Commonwealth departments examined 11,444 subordinate regulatory and legislative instruments. They were assessed chiefly with regard to their ongoing relevance and efficient operation. Overall the review found most Commonwealth subordinate regulation is reviewed regularly by agencies for continued policy relevance, although it also found more attention should be directed to revoking redundant regulations. The review identified some interesting redundant regulations which will be repealed. The regulations relating to the Treaty of Versailles were among the more striking examples. (Sherry 2011, p. 1)

Following the release of the Commission's Draft Discussion paper, a submission from Finance indicated that following this stocktake, over 200 redundant Acts, items of subordinate legislation and other regulations were removed. In particular:

- The Statute Stocktake (Regulatory and Other Laws) Act 2009 (the Act) removed eight redundant Acts and amended a further 14 Acts to remove redundant legislative provisions. The Act also enabled, through consequential amendments, the removal of references to these redundant Acts and legislative provisions in six other Acts.
- Departments have taken action to remove a further 197 redundant Acts, items of subordinate legislation and other regulations. (p. 4)

In its submission (sub. DR11), Finance also outlined the filtering process used to determine which of the 11,444 instruments would be reviewed by Finance and the relevant policy department. Finance also stated that most of the Commonwealth's regulatory stock is regularly reviewed (albeit not systematically) by agencies and that:

Across portfolios as a whole, the Pre-2008 Review identified 4,204 legislative instruments, or around 14 per cent of the stock, that were redundant or potentially redundant. In the process of identifying redundant regulations, 10 Acts were also identified that appear to be redundant.

A report was prepared for each portfolio outlining findings and actions to be taken. All portfolio Ministers agreed their reports with the Minister Assisting on Deregulation and have undertaken to implement the recommended actions. Finance is monitoring progress in implementing the recommended actions and will continue to monitor progress at regular intervals. (p. 5)

Ex post reviews

In addition to any PIR requirements, Australian Government regulation is required to be regularly reviewed. In particular, unless regulation is subject to the review provisions in the *Legislative Instruments Act 2003*, other statutory review processes

(embedded reviews), or is minor or machinery in nature, all regulation (which was made in 2008 or subsequently) is to be reviewed every five years. The first of these five yearly reviews will be required in 2012. The Handbook indicates that a screening process will be applied (by the OBPR) to identify those regulations that should be reviewed. According to Australian Government's (2010a) response to the OECD (2010d) recommendations:

The OBPR will provide advice to departments and agencies to assist with identifying which regulations should be reviewed, and on the modality of each review. In addition, the OBPR will provide advice to departments and agencies on appropriate quality control mechanisms and other matters, including the consideration of related policy issues, associated with the review of particular regulations.

A trial of the proposed approach is being conducted with selected departments and agencies in 2009-10 to identify the scale and scope of the task. The final approach to the five-yearly reviews will be finalised taking into account the results of this trial. (Australian Government 2010a, p. 5)

Individual agencies will be required to list the reviews to be conducted as part of this five-yearly review requirement in their respective Annual Regulatory Plan, which is also published on the OBPR's website. The results of each five-yearly review will be published on the OBPR's online RIS register.

Red tape review

Further, the Australian Government (2010a) in its response to the OECD's (2010d) review also noted that it had commenced a review of internal red tape as a means of reducing unnecessary administrative costs. Undertaken by Finance, the review was expected to be completed by mid-2010. This results of this review do not appear to be public.

Other reviews

A considerable number of reviews of regulation of Commonwealth and state and territory government regulation have also been undertaken by the Productivity Commission and its predecessor organisations (appendixes B and C). In addition, the Commission has undertaken a series of benchmarking studies for COAG and has reviewed Australian business regulatory burdens by sector.

The Legislative Review Program under the National Competition Principles Agreement also provides for a principles-based 'reviews of legislation which restricts competition every ten years to ensure that they are in the public interest' (Australian Government 2010a, p. 11).

Performance audits of a range of Australian Government regulation are regularly undertaken by the ANAO. These performance audits:

... do not canvass the merits of government policy, but may consider advice given to government by departments in the development of a policy measure and comment on the impact of a policy measure. (McPhee 2010, p. 5)

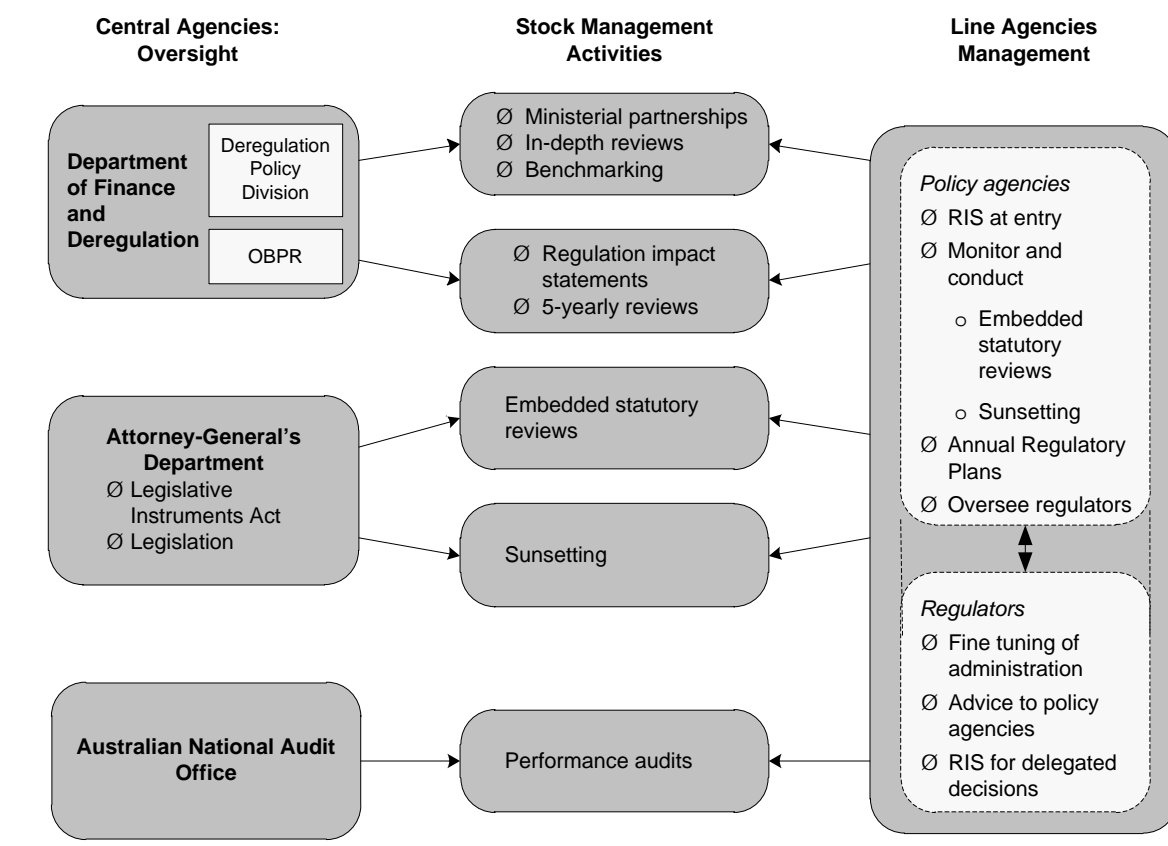
The OECD also reviews Australia's regulatory reforms from time to time. The most recent of these occurred in 2010 (OECD 2010d). While that review found that Australia's approach to regulatory governance one of the 'front-runners' in the OECD in terms of its regulatory practices, it recommended that Australia expand the framework of accountability to Ministers and regulatory authorities.

The Business Council of Australia's 2010 *Scorecard of Red Tape Reform* (BCA 2010) rated the Australian Government as having 'Adequate/Good' accountability arrangements at that time. The BCA (2010) considered that three main accountability elements (an independent oversight body, a Cabinet-level gatekeeper and a champion of better regulation) are necessary in a regulatory system to ensure that agencies comply with regulation making procedures. Because the BCA did not consider that OBPR's placement within Finance gave it sufficient independence as an oversight body (see above), the BCA did not rate the Australian Government as 'Good' in its scorecard.

As noted above, the Australian Government (2010a) agreed with the OECD's (2010d) recommendation and strengthened accountability to either Ministers or departmental heads in the RIS process. In addition, to improve the accountability of Australian regulators, agencies will be required to state to their responsible minister 'how they will regulate to minimise unnecessary costs and burdens on business and the not-for-profit sector and report on outcomes in their Annual Reports' (Australian Government 2010a, p. 1).

Figure K.4 sets out the basic structure and institutions involved in the regulatory system in the Australian Government.

Figure K.4 The structure of the Australian regulatory system



K.8 Summary

Recent work by the OECD's Regulatory Policy Committee (RPC) suggests most OECD countries have been unable to quantify the contribution that regulation policy makes to better regulation outcomes. In addition, the RPC's *Indicators of Regulatory Management Systems* (OECD 2009b) suggests that while there has been a 'progressive consolidation of regulatory management systems across the OECD area at the national level over past decade' (p. 6), in practice it is difficult to verify a country's compliance with its regulatory policy.

In most of the countries reviewed in this appendix, a central agency monitors the flow of regulation but arrangements vary with regard to the institutional arrangements for overseeing and monitoring the stock of regulation.

In particular, there is generally greater clarity around the roles and responsibilities for managing the flow of regulation than for managing the stock. As Finance (sub. DR11) noted:

While there is broad consensus internationally that the RIA framework is the most effective tool for identifying the impacts of new and amended regulation on business and other stakeholders, there is no such consensus on how best to identify those impacts in the stock of existing regulation which impose an unnecessary burden on business. (p. 2)

Similarly the use of transparent process is generally greater for managing the flow than for the stock. (For example, there are open and transparent consultation arrangements surrounding proposed regulations as well as publication of RIAs in most countries.) Nonetheless, some countries have recently rebalanced their efforts in transparently managing the stock and flow of regulation. For example, Canada and the USA have introduced transparent arrangements for evaluating the stock. The Netherlands has expanded the use of their ‘reducing regulatory burdens’ lens from a traditional focus on the stock to focus on the flow. Some countries, notably Canada, the US and the EU, have recently established specific requirements to undertake ex post evaluations of significant regulations. By contrast, while the UK does not yet require the use of ex post evaluations, its sunset requirements and the ‘one-in one-out’ rule both create an incentive for such evaluations.

Finally, a risk-based approach by regulators is also a feature of regulatory management systems in the Netherlands and the UK.

Like the OECD (2009b), this appendix confirms the overall trend towards introducing regulatory management systems to manage both the stock and the flow of regulation as well as its quantity and quality. Indeed, while there are some broad similarities in management approaches, this appendix documents the diverse strategies employed (as well as different tools used) to manage regulatory systems in the range of countries selected for comparison. However it has been beyond the scope of this appendix to assess the effectiveness and efficiency of the different approaches.

Tables K.1 and K.2 summarises some of the main features of the different systems.



Table K.1 Summary of approaches to managing regulation — Canada, European Union and the Netherlands

	<i>Canada</i>	<i>European Union</i>	<i>Netherlands</i>
Oversight arrangements	Oversight of <i>Cabinet Directive for Streamlining Regulation</i> (CDSR) by a central agency – Regulatory Affairs Sector (RAS), Treasury Board of Canada Secretariat	Oversight by DG Budget Mainly decentralised evaluation function – 27 Directorate Generals (DGs)	Oversight by Ministerial Group for Better Regulation, specialised agencies with specific responsibilities Regulation Reform Group focus is on reducing burdens for business Regulatory and Administrative Burdens Programme coordinates 3 citizen burden reduction programs
Regulatory impact assessment and consultation	Centralised and assessed by RAS Pre-proposal consultation required	Centralised through Secretariat General in DG Budget Reviewed by an independent Impact Assessment Board Common consultation framework and standards	Business Impact Assessment recently introduced Independent review by Impact Assessment Board (CET) Trialling internet based consultation Independent review body (ACTAL) monitors burdens and investigates complaints
Ex post review requirements	Performance Management and Evaluation Plan required for all regulation with a major impact Five year review clause often inserted in legislation	Comprehensive for expenditure programs, increasing for regulation from low base Proposing ‘fitness’ checks of policy areas	For reporting on burden reduction only – ACTAL shifted from comprehensive review to sampling of compliance Other review of regulation not required
Stock management tools used	Red tape targets, assess ‘irritation’ as well as compliance cost Commitment to ‘one-in one-out’ and capping overall number of regulations	‘Smart Regulation’ agenda - rolling simplification program, red tape target (25 per cent)	Red tape target (reduced to 10 per cent after two targets of 25 per cent each) – used stocktake methods to help identify Risk-based compliance checking

Review consultation and communication	<p>Consultation guidelines to be followed</p> <p>Plans for review to be published but unclear if public reporting of reviews is required</p>	<p>Common framework for communication and consultation</p> <p>Group of Independent Stakeholders assists identify/test administrative burden reduction</p> <p>Unclear if public reporting on reviews is required</p>	<p>Business spokesperson program</p> <p>Website to report on government burden reduction activities</p> <p>Business sentiment monitor</p>
Capacity development	<p>Centre of Regulatory Expertise supports skill development and assists agencies to fulfil obligations under CDSR</p>	<p>DG Budget provides training, coordinates an Evaluation Network</p>	<p>ACTAL provides 'strategic consultancy'</p>

Table K.2 Summary of approaches to managing regulation — United Kingdom, the United States of America and Australia

	<i>United Kingdom</i>	<i>United States of America</i>	<i>Australia</i>
Oversight arrangements	<p>Cabinet sub-committee (Regulatory Policy Committee (RPC)) provides oversight</p> <p>Better Regulation Executive (BRE) leads and coordinates government's regulation agenda</p> <p>Cabinet advisory committee (Reducing Regulation Committee (RRC)) acts as a gatekeeper</p> <p>Better Regulation Units (BRUs) sit within each department</p>	<p>Central agency oversight through the Office of Information and Regulatory Affairs (OIRA), which sits in the is the Office of Management and Budget (OMB) – within Executive Office of the President of the United States (EOP)</p>	<p>Central agency oversight through the Department of Finance and Deregulation (Finance)</p> <p>Office of Best Practice Regulation (OBPR) in Finance assesses all regulation impact statements (RISs) and provides advice to Cabinet</p>
Regulatory impact assessment and consultation	<p>RRC scrutinises, challenges and approves all new regulatory proposals</p> <p>Opinion of RPC sits alongside regulatory proposals</p> <p>Code of Practice on Consultation applies</p>	<p>Regulation Impact Assessment required for 'significant' regulatory proposals</p> <p>Assessed by OIRA which also coordinates interagency review of significant regulations</p> <p>RegInfo.gov website provides information about the status of documents undergoing OIRA review.</p>	<p>RIS required when there are significant impacts on business, assessed by OBPR</p> <p>OBPR's Handbook provides consultation guidance based on the Government's Consultation Principles</p> <p>RISs posted on website as proposal shortly after Government announcement</p> <p>Publication of Annual Regulatory Plans by Departments required</p>
Ex post review requirements	<p>New regulation required to have a review arrangements set out in Regulation Impact Assessment (RIA)</p>	<p>Presidential requirements for periodic reviews of regulation</p>	<p>Discussion of proposed ex post review arrangements required in a RIS.</p> <p>Post implementation review (PIR) required for all regulation that has not followed standard RIS process</p> <p>5 yearly review requirement as 'catch-all'</p>

Stock management tools used	<p>Red tape target (25 per cent)</p> <p>'One-in one-out' (a modified regulatory budget)</p> <p>Internal stocktakes to support 'one-in one-out'</p> <p>Post implementation reviews (PIRs) required for regulations with a RIA that have major impacts</p> <p>Sunsetting – for new regulation and regulators</p> <p>Risk-based compliance checks</p> <p>Developing a tool on regulatory enforcement</p>	<p>Regulation review program 2011 – compulsory review to find savings (health care and financial reform excepted)</p>	<p>Sunsetting of regulations from 2005</p> <p>'One-in one-out' rule implemented as a voluntary off-set</p> <p>Red tape review in 2010 – covers internal administrative costs</p>
Review consultation and communication	<p>Better Regulation Strategy Group – stakeholder advisory group advises BRE</p> <p>Red tape challenge website – a complaints portal</p> <p>Email update service (Business Links) on new and changing regulation</p>	<p>Transparency and disclosure requirements</p> <p>OIRA reports annually on costs and benefits of regulation to Congress</p> <p>Regulations.gov website provides information on published regulatory actions (and any supporting material provided by agencies) which are also open for public review and comment.</p>	<p>Not specified except in some statutory reviews</p> <p>OBPR publishes an annual Best Practice Regulation Report</p> <p>Annual Regulatory Plans required to include plans for review of regulation (including any PIRs)</p>
Capacity development	<p>BRE provides expert support to departments and regulators</p>	<p>OIRA provides guidance on best practice</p>	<p>OBPR offers a 'consultancy service', training in RISs</p>

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