

DEPARTMENT OF FINANCE AND DEREGULATION

SUBMISSION TO

PRODUCTIVITY COMMISSION'S
2011 ANNUAL REVIEW OF THE
REGULATORY BURDEN ON BUSINESS:
IDENTIFYING AND EVALUATING REGULATION REFORMS

Introduction

The Australian Government renamed the Department of Finance and Administration the Department of Finance and Deregulation (Finance) on coming to office in November 2007. It also created two Ministerial positions with ongoing responsibility for regulatory management. This structure provides an institutional framework to support the Government's commitment to regulatory management. In outlining the place of better regulation in a future government agenda in April 2007 the then Opposition leader, Kevin Rudd, identified a series of initiatives to 'radically reduce the regulatory burden on productive Australian businesses'¹. In late 2007, work commenced to create a deregulation agenda to support the Government's policy commitments, including the transfer of the Office of Best Practice Regulation from the Productivity Commission to Finance. In 2008, Finance subsequently created a separate Deregulation Group comprising:

- the Office of Best Practice Regulation (OBPR), which assists Australian Government departments and agencies meet the Australian Government's requirements for best practice regulatory impact analysis and monitors and reports on their performance. It also serves a similar role for the Council of Australian Governments (COAG) in relation to national regulatory proposals considered by ministerial councils, national standard-setting bodies or COAG itself; and
- the newly created Deregulation Policy Division, which assists the Ministers responsible for Deregulation by providing policy advice and support directed at improving the quality and operation of regulation at both the Commonwealth and cross-jurisdictional levels.

Addressing the flow of new regulation: Regulatory impact analysis

2. At the Commonwealth level, regulatory impact analysis (RIA) has existed in one form or another for the last 25 years. Regulation Impact Statements (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 within 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.

3. Most recently in 2010, the Australian Government reviewed and further enhanced the operation of the RIA framework. The Government removed any remaining ambiguity

¹ Rudd, K., Hon MP, 2007, "Facing the Future", address to the National Press Club, 17 April.

concerning the requirement to produce a RIS so that a RIS is now compulsory for all regulatory proposals put to Commonwealth decision-makers unless the impact on the business or not-for-profit sector or both is minor or machinery in nature.

4. The commitment to ensure regulatory proposals are subject to adequate consultation has been emphasised. For the OBPR to assess a RIS as compliant, adequate consultation must be demonstrated. 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.

5. Transparency has been significantly strengthened. The OBPR now posts RISs on the online register of Regulation Impact Statements and Best Practice Regulation Updates shortly after public announcement of the relevant regulatory action. 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. The OBPR maintains the register, which has an accompanying blog facility that enables anyone to comment on a posted RIS.

Addressing the stock of regulation

6. 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. The approach taken by the Australian Government has necessarily been broad, testing the effectiveness of a suite of interventions which have included measures to reduce stock and initiatives to improve the quality and effectiveness of existing regulation.

OECD Review of Regulatory Reform in Australia

7. On 30 October 2008, the then Minister for Finance and Deregulation, the Hon Lindsay Tanner MP, announced that the Organisation for Economic Cooperation and Development (OECD) had been invited to conduct a review of Australian regulation, examining Australian regulatory management frameworks and processes by reference to best practice in other OECD member countries. The review was expected to assist in identifying regulation reform approaches and priorities.

8. The OECD conducted missions to Australia in February and June 2009, meeting with a range of Commonwealth and State and Territory officials, industry associations, consumer groups, and academics. The review included chapters on the capacity to assure high quality regulation in Australia, multilevel regulatory governance (cross-jurisdictional regulation), competition policy, and market openness.

9. The OECD's final report on Australia, 'Towards a Seamless National Economy, 2009 Review of Regulatory Reform', was generally positive in its assessment of Australia's regulatory policy framework. The review highlighted Australia's regulatory reform achievements, commending Australia's mature regulatory system, proactive approach to reform, early adoption of OECD best practices, and use of innovative regulation management approaches. The OECD also identified a number of challenges for regulatory reform and opportunities for improvement, particularly continued efforts toward greater

cross-jurisdictional consistency in regulations affecting businesses operating nationally and improved engagement with business.

Stock reduction measures

10. In considering scope to reduce the stock of Commonwealth regulation, the Australian Government has some advantages over other countries. The Commonwealth Government has complete and up to date records of all current and recent legislation. Subordinate regulation, that is, regulation made under an Act of Parliament, is only enforceable as and when it is registered online with the Federal Register of Legislative Instruments (FRLI). FRLI currently contains some 55,000 instruments, with around 41,000 currently in force.

11. It has proved more difficult, however, to identify those ‘regulations’ that, consistent with the definition set out in the Government’s Best Practice Regulation Handbook, is “any rule endorsed by government where there is an expectation of compliance”. FRLI captures all instruments, including those where the primary purpose is to remove an instrument from being ‘in force’. FRLI also captures instruments that are primarily administrative or operational in nature, with no easy way of differentiating these from instruments that have an economic impact.

12. To review regulatory trends from time to time, Finance reviews the ComLaw database (incorporating FRLI) to identify legislation introduced or revoked during the review period. The data is filtered to remove Acts and legislative instruments that, while they may have some economic impact, are primarily administrative or operational in nature, such as airworthiness directives. This provides an imperfect measure of regulation as defined in the Government’s Best Practice Regulation Handbook because it does not include non-legislative regulatory measures such as codes and may over-estimate the extent to which some classes of subordinate instrument have an economic impact. Nevertheless, this process can provide a useful proxy for the extent of Commonwealth regulatory stock.

13. The Government has employed a series of measures since 2007 to reduce the stock of Commonwealth regulation.

One-in-one-out

14. 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.

15. 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.

16. Regulation that has been removed or proposed for reform through the application of the one-in, one-out principle includes:

- the Australian Fisheries Management Authority introducing e-licensing, with lower fees than for paper based applications, to encourage electronic business dealings and reduce compliance costs for the fishing industry;

- removing the cap on the number of unclassified films that can be advertised in a given year as well as removing the requirement to obtain the Classification Board's permission to advertise a film they are yet to classify. These changes were given effect by amendments to the *Classification (Publications, Films and Computer Games) Act 1995*;
- allowing superannuation funds to use their website as the default method of delivering annual reports rather than requiring written or electronic statements; and
- simplifying the number of categories used for billing patients under the Medicare Benefits Schedule.

Stocktake of redundant regulation

17. In mid-2008, Finance coordinated a stocktake of Commonwealth regulations, in which all departments were asked to identify redundant and potentially redundant regulation. Over 200 redundant Acts, items of subordinate legislation and other regulations were removed following the Stocktake.

- 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.

Review of pre-2008 subordinate regulation

18. In February 2009, the Australian Government announced in the Updated Economic and Fiscal Outlook that it would undertake a review of all pre-2008 subordinate regulation (Pre-2008 Review) '...to document those regulations which impose net costs on business and identify scope to improve regulatory efficiency'.

19. As discussed in paragraph 11 above, identifying which of these instruments imposes costs on business can be challenging. Finance examined various classes of instrument and determined that around 73 per cent were likely to have an economic impact, 17 per cent were Government internal administrative requirements, and 10 per cent concerned the delivery of services and payments to citizens.

20. Of the instruments with an economic impact, just under half (32 per cent of the total number of instruments) were air worthiness directives, that is, technical standards mirroring international compliance requirements for aircraft and aeronautical product safety. A further 19 per cent (14 per cent of the total number of instruments) were tariff concession orders, which provide tariff relief for importers of a large list of eligible products. The remaining 38 per cent of instruments identified as having an economic impact (27 per cent of the total number of instruments) were classified as 'other'.

21. As a result of this filtering, 11,444 subordinate regulatory instruments were grouped into 348 thematic policy 'clusters'. Finance then worked with each Commonwealth portfolio department in turn to determine:

- the instruments that fell within scope of the review (those instruments that had not been reviewed elsewhere since the beginning of 2008 and were not currently under review);

- the sector that the in-scope legislative instruments primarily impacted on (business, government or individuals); and
- the purpose and ongoing relevance of the in-scope legislative instruments.

22. Overall, the Pre-2008 Review found that, generally, the stock of Commonwealth subordinate regulation is reviewed regularly for continued policy relevance by agencies, though not systematically. The Pre-2008 Review also found that more attention should be directed to revoking or otherwise dealing with redundant regulations.

23. 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 the redundant regulations, 10 Acts were also identified that appear to be redundant.

24. 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.

Improving the quality and operation of regulation

25. The Government's approach has focussed on reviewing the way in which regulatory schemes operate. These reviews of regulatory frameworks enable broader examination of the efficiency of administration of a particular scheme (such as skills and workforce pressures or changes in industry structures) and the experience of business where it may be required to deal with multiple agencies. This approach has identified opportunities to reform areas of regulation at the cross-jurisdictional and Commonwealth levels.

Council of Australian Governments (COAG) Seamless National Economy reform agenda

26. Poorly designed or inconsistent regulatory frameworks can impact negatively on productivity, growth and competitiveness of Australian businesses by diverting resources away from more productive uses, raising barriers to entry and producing disincentives to investment and innovation. The costs of regulation in Australia are multiplied where each State and Territory has a different set of rules for business and individuals operating across jurisdictions.

27. Through the COAG National Partnership Agreement to Deliver a Seamless National Economy (SNE NP), all jurisdictions are working together to tackle inefficient and costly cross-jurisdictional regulation through the implementation of 27 deregulation priorities, eight areas of competition reform and improved regulatory processes. The SNE NP was agreed by all Australian jurisdictions in November 2008 and provides facilitation and reward funding of up to \$550 million to States and Territories for delivery of the 27 deregulation priorities. The agreement also includes eight competition reforms and a commitment to improve regulatory management processes nationally.

28. To date, 14 of the 27 deregulation priorities under the agreement are operational, including:

- on 1 January 2011, a national Australian Consumer Law commenced, replacing 20 separate Acts across Australia and providing enhanced protections for consumers;

- on 1 July 2010, a new national consumer credit regime commenced, replacing eight State and Territory regulatory arrangements with a single, uniform law that provides enhanced consumer protection against unfair and predatory lending practices; and
- on 1 July 2010, Standard Business Reporting commenced, which allows business to quickly and efficiently prepare and lodge business information electronically to a range of Commonwealth and State and Territory agencies.

29. COAG agreed on 13 February 2011 that the Business Regulation and Competition Working Group, which oversees the implementation of the agreement, would develop a second national regulatory reform agenda for COAG's consideration by the end of 2011. It agreed a series of principles to guide the development of the agenda and indicated that the exercise is to be informed by advice from the Productivity Commission concerning the extent to which reforms are likely to generate material increases in productivity or economic growth or both after accounting for transitional and implementation costs.

30. A series of meetings with representatives of business and the not-for-profit sector commenced in the mainland State capitals in the week beginning 10 October 2011 to inform development of this agenda. Written submissions are also being sought.

Better Regulation Ministerial Partnerships

31. At the Commonwealth level, Better Regulation Ministerial Partnerships (Partnerships) are proving to be a valuable mechanism for identifying, reviewing and reforming regulation. Under this approach, the Minister for Finance and Deregulation agrees with the relevant portfolio Minister the need to review and reform an area of regulation that, for a variety of reasons such as technological improvements or changing industry structure, may no longer serve the purpose for which it was originally intended or has otherwise become inefficient or ineffective. The Partnerships approach is still relatively new and the results of completed Partnerships will need to be evaluated when business take up of new arrangements is at a point where outcomes can be usefully measured.

32. Six Partnerships have been completed to date and are being implemented. They have:

- reduced the length and complexity of product disclosure statements for a range of financial services products;
- improved the efficiency of processes for Government assessment of new health technologies;
- reduced compliance costs for businesses importing excise equivalent goods;
- established centralised security clearance arrangements covering all Australian Public Service employees and contractors;
- improved the quality and efficiency of agriculture and veterinary chemical assessment and registration regulation; and
- simplified tariff concession arrangements for importers, brokers and manufacturers.

33. A further four Partnerships are currently underway. These will:

- consolidate Commonwealth anti-discrimination legislation into a single Act;

- halve the number of temporary residence and visitor visa sub-classes and streamline application processes;
- examine all Commonwealth legislation applicable to the offshore petroleum industry with the aim of improving the current objective based regulatory framework and provide the offshore petroleum industry with certainty when operating in Australian waters; and
- enhance the competitiveness of the Australian chemical industry and public health and environmental outcomes by improving regulatory settings.

Systemic reviews

34. Reviews focusing on systemic regulatory issues are also being considered. These may focus on issues such as behaviour of regulators, use of risk management frameworks, and online accessibility. These reviews will complement Better Regulation Ministerial Partnerships.

35. Strategic reviews have been conducted by Finance for some years in relation to Budget priorities. The scope of these reviews has been expanded to include better regulation targets. The first strategic regulation review, a review of small regulatory functions within Commonwealth portfolios, has recently commenced. It will identify all small Commonwealth regulators and regulatory functions that have an impact on the business and not-for-profit sectors and document good regulatory practice. It will also consider the extent to which the broader application of best practice could improve the quality of regulatory outcomes.

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