



**Australian Government**

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**Department of Finance and Deregulation**  
Office of Best Practice Regulation

Ms Monika Binder  
Regulatory Burdens – Manufacturing and Distributive Trades  
Productivity Commission  
GPO Box 1428  
Canberra City ACT 2601

Dear Ms Binder

**Annual Review of Regulatory Burdens on Business  
Manufacturing and Distributive Trades**

Thank you for the opportunity to comment on the Productivity Commission's Annual Review of Regulatory Burdens on Business – Manufacturing and Distributive Trades Draft Research Report.

The Draft Research Report identified a number of concerns raised by participants that related to their experiences of administrative processes and practices. The Office of Best Practice Regulation (OBPR) has focussed its comments on the issues raised in relation to the OBPR's role in assessing regulatory impact analysis.

**Background**

The Office of Best Practice Regulation (OBPR) plays a central role in assisting Australian Government departments and agencies to meet the Australian Government's requirements for best practice regulatory impact analysis and in monitoring and reporting on their performance. The OBPR also serves a similar role for the Council of Australian Governments in relation to national regulatory proposals considered by ministerial councils, national standard setting bodies or COAG itself.

The OBPR is a division within the Department of Finance and Deregulation but has independence from the Department and portfolio Ministers in assessing and reporting on compliance with the best practice regulation requirements. The best practice regulation processes administered by the OBPR compliment other initiatives being undertaken as part of the Australian Government's deregulation agenda.

The OBPR does not comment on policy issues, but rather on whether the best practice regulation requirements have been adequately met. In cases where the OBPR determines that a regulatory decision has been made without meeting the best practice regulation requirements, the regulation will be reported as non-compliant by the OBPR in its annual report on compliance – the *Best Practice Regulation Report*.

In cases where a proposed regulation will have significant impacts on business, a Regulation Impact Statement (RIS) is required to be prepared by the responsible Ministerial Council, government department or agency. The OBPR assesses the RIS for its adequacy and the RIS is then published after the decision has been made public, generally when the legislation is tabled.

### **Problems in the regulation-making process**

The Draft Research Report identified that there have been ongoing concerns from sectors of the food industry that the best practice regulatory guidelines agreed to by COAG have not been adhered to in the development of food standards.

In particular, it was noted that a standard was developed even though the Office of Regulation Review (the predecessor to the OBPR) had failed the RIS for this proposal as it did not meet COAGs' requirements, including demonstrating that the benefits of introducing the standard would outweigh the costs.

Under the COAG Guidelines<sup>1</sup>, a RIS is required at two stages: a draft RIS (referred to as a 'consultation' RIS) is required for the purpose of public consultation and a final RIS is required for the decision-making stage. The final RIS takes into account outcomes from the consultation process. The RIS must be assessed as adequate by the OBPR at both stages - before the RIS is released for public consultation and before the proposal proceeds to the decision-maker.

The basic feature of the RIS is the systematic examination of the advantages and disadvantages of possible methods of achieving an agreed objective. There are seven elements that should be contained in the RIS including:

- Statement of the problem;
- Objectives;
- Statement of Options;
- Impact Analysis (Costs and Benefits);
- Consultation;
- Evaluation and Conclusion; and
- Implementation and Review.

The OBPR assesses the RIS against the above criteria and focuses on whether the RIS meets the requirements including whether the type and level of analysis are adequate and whether the RIS demonstrates that the preferred option results in a clear net benefit to the community.

As a general rule, the level of analysis included in the final RIS should be higher than that included in the draft RIS and is assessed by the OBPR accordingly.

The OBPR advises the Ministerial Council or standard setting body of its assessment, however the Ministerial Council will determine whether or not to adopt the OBPR's advice.

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<sup>1</sup>*Best Practice Regulation – A Guide for Ministerial Councils and National Standard Setting Bodies*, Council of Australian Governments, October 2007

The OBPR does not have any power over decisions made by Ministerial Councils as its role is advisory only.

Therefore, in relation to the development of the standard for country of origin labelling (CoOL) for unpackaged food, despite the RIS being assessed as inadequate by the OBPR, the Ministerial Council could still make the decision to proceed with the standard.

This is in contrast to the best practice regulation requirements for Australian Government proposals<sup>2</sup>. The Australian Government has decided that no regulatory proposal should go to the Cabinet or other decision-maker unless it has complied with the Government's regulatory impact assessment requirements, as advised by the OBPR. The Cabinet Secretariat plays a gate-keeping role to prevent regulatory proposals proceeding without an adequate RIS or compliance cost assessment or unless the Prime Minister has deemed that exceptional circumstances apply.

### **Delays in the finalisation of regulatory impact statements (RISs)**

The Draft Research Report identified that participants were concerned about the delays in the finalisation of RISs associated with regulatory proposals relating to energy labelling and mandatory minimum energy performance standards (MEPS).

One of the main methods by which the OBPR assists agencies is by providing feedback on drafts of RISs. Where a draft RIS is not considered to be adequate, the OBPR provides written feedback to the relevant agency on the issues that need to be addressed before the RIS can be assessed as adequate against the Australian Government or COAG requirements. The OBPR will generally assess a RIS within two weeks of receipt.

The level of analysis in a RIS must be commensurate with the regulatory impact of the proposal. A proposal with a large regulatory impact, such as banning a product or restricting competition will require detailed analysis.

The OBPR notes that some of the issues it has raised in its comments on drafts of RISs for proposed MEPS have not been addressed in the subsequent draft of the RIS. In these instances, the OBPR has had to reiterate some of its previous comments. Similarly, the New Zealand Regulatory Impact Analysis Unit (which also provides comments on draft consultation RISs for MEPS proposals) has reported that some of its comments on draft RISs for MEPS proposals have not been addressed in subsequent drafts. The failure to address OBPR comments in subsequent drafts has, at times, slowed the assessment process and contributed to delays in finalising the RIS. However, the OBPR's comments need to be addressed in order for the RIS to be assessed as adequate.

In 2006, the Equipment Energy Efficiency Committee (EEEC) of the Ministerial Council on Energy proposed to the OBPR a method of expediting the RIS process. The EEECs proposal involved the EEECs providing a 'cost-benefit analysis' (a 'pre-consultation' RIS) to the OBPR to allow feedback to be provided before the first draft of the consultation RIS was submitted. The aim was for the EEECs to be alerted in advance to any issues that would need to be addressed in the yet-to-be-drafted consultation RIS. The OBPR agreed to provide comments on any pre-consultation RISs that were submitted.

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<sup>2</sup> *Best Practice Regulation Handbook*, Australian Government, August 2007

On several occasions, however, issues flagged by the OBPR in relation to pre-consultation RISs had not been addressed in the subsequent draft of the consultation RIS. As these issues should have been addressed or responded to before the consultation RISs could be assessed as adequate, the OBPR had to reiterate its comments. This lengthened the time taken for the subsequent consultation RISs to be cleared by the OBPR, and defeated the objective of expediting the process.

The OBPR notes that departments and agencies with the responsibility for preparing a RIS also have responsibility for managing timelines in the policy development process. In this context, agencies need to allow time to address any OBPR feedback on draft RISs. In relation to the MEPS RISs, the OBPR received the RIS for the Gas Water Heaters MEPS in mid-October 2007, when it had been scheduled for release in that month.

The OBPR notes, and concurs with, the Draft Research Report's discussion of climate change policies and programs (Section 6.2), including:

All existing and prospective (climate change) policies and programs therefore need to be assessed comprehensively according to the principles of good regulatory process. Essentially this means (they) should target clearly expressed objectives in a manner that maximises net community benefit. The policies and programs should also satisfy an additional hurdle – namely, whether their underlying objective is already met by the emissions trading scheme.

In this regard, the OBPR's comments on several draft RISs for MEPS proposals have reiterated the need for more detailed analysis of the rationale for MEPS policies in view of the Government's decision to implement an emissions trading scheme (ETS). The OBPR has been working with the EEEC on this issue.

### **Improving the regulatory impact assessment process**

In response to the issues raised in the Draft Research Report, the OBPR acknowledges the need for stronger and more frequent communications to be developed and is committed to working with agencies to ensure that the best practice regulation requirements can be met.

Face-to-face meetings are a useful means of communication. Going forward, the OBPR will be mindful to schedule face-to-face meetings with departments and agencies early in the policy development process in order to enhance channels of communication and promote mutual understanding of the proposed policy and the regulatory impact analysis process. This strategy is particularly important where consultants have been engaged by departments or agencies. The OBPR will offer face-to-face meetings to discuss its feedback on drafts of RISs to ensure that a better and earlier understanding of the comments can be reached.

The OBPR has been working with senior officers in DEWHA and has agreed to engage in more face-to-face meetings at key points in the process.

Provision of training is another key mechanism through which the OBPR promotes awareness of the Australian Government and COAG best practice regulation requirements. In 2006-07 the OBPR trained over 600 people on the best practice regulation requirements. The OBPR will continue to deliver training to staff of departments and agencies and it has recently

enhanced its role in this area through the provision of training in the discipline of cost-benefit analysis.

The OBPR also encourages secondments from staff in other agencies to assist with a better understanding of the RIS process. We note DEWHA has offered a secondment.

We would be happy to discuss any of the above matters with you at your convenience.

Yours sincerely

Su McCluskey  
July 2008