



Australian Government

**Department of Industry
Innovation, Science, Research
and Tertiary Education**

**Productivity Commission Study:
Regulator Engagement with Small Business**

Public Submission

**By the Department of Industry, Innovation, Science,
Research and Tertiary Education**

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EXECUTIVE SUMMARY

The Department of Industry, Innovation, Science, Research and Tertiary Education (the Department) welcomes the opportunity to provide a submission to this review. The Department supports the Government's systematic approach to regulation reform, including ongoing measures to enhance the enforcement and administration of regulation.

While the Department does not have many functions as a regulator, its interaction with industry provides an insight into the compliance issues imposed on business through the enforcement and administration of regulation. Excessive and onerous regulatory enforcement processes imposes unnecessary burdens on small business. The increase in regulatory processes stems primarily from a reticence to adopt a risk-based enforcement approach (that is, moving away from a one-size fits-all approach) and the time-consuming compliance requirements mandated by regulators. The Department believes strongly that regulation should be proportionate and risk based and seeks to tailor its approach accordingly when implementing them.

This submission provides comment on the different definitions of small business, noting that the variation in definitions is not a source of unnecessary regulatory burden. This submission further outlines that regulators need to be more receptive toward the needs of small business. This does not necessarily equate to granting increased exemptions or concessions for small business. Rather, it is the notion that regulators be conscious of their approach to small business and the ensuing burden it can impose. Not all businesses are the same; it is argued that the implementation of a risk-based approach to the enforcement of regulation and the adoption of cooperative, responsive and educative approaches will better address the needs of small business.

The Department is focused on developing an internationally competitive, innovative and sustainable business environment in Australia. The Department is also focused on developing a skilled and productive workforce and fostering collaboration between industry, business and research sectors to help shape Australia's future economy. The Department provides advice on a wide range of policy issues affecting the competitiveness and growth of Australian businesses. The Department's responsibilities in relation to small business policy and support for the deregulation agenda means it is well placed to provide comment on regulator engagement with small business.

The definition of small business

The two most common ways of defining a small business in Australia are by annual turnover, or the number of employees. The Government's small business policy agenda is part of the broader industry policy framework. The Department, through its policy advice and program delivery, utilises the ABS definition of a small business: that is, a business employing less than 20 people¹. Employing this metric, small business provides a significant contribution to the Australian economy: approximately 96 per cent of all Australian businesses are small businesses, contributing around 34 per cent of private sector industry value add in 2010–11 and almost 46 per cent of total private sector industry employment, as at June 2011².

There is however no single definition of 'small business' that fulfils the needs of government and the private sector. For this reason, both the government and the private sector rely on a range of different definitions that turn on the particular traits of the small business which a policy outcome is related to or intending to target.

A single definition of small business is not a panacea to alleviating small business regulatory burden. Rather, the regulatory burdens imposed on small business stem from more endemic shortcomings in government decision making; namely, inadequate consultation with small business in the policy development phase – resulting in unnecessary, excessive regulation that does not consider the constraints of small business or achieve the intended goals of the new regulations. Additionally, disconnects between the regulator and the policy maker, in terms of understanding the objective of a policy, further create an unnecessary compliance burden on business in the enforcement and delivery of regulation – further undermining the potential achievement of the Government's objective/s for regulating in the first instance.

In the policy development phase, policy makers need to be more effective in calculating the potential cost of regulation. This capacity to sequentially consider the range of potential impacts imposed on business, based on supporting evidence, provides for the articulation of impacts and anticipated compliance activities required of business. This provides policy makers with a better informed understanding of the regulatory impacts, the range of compliance costs and how best to set the goals meant to be achieved by regulator in enforcing the regulations. A systematic quantification analysis provides regulators with an informed understanding of the administrative or regulatory objectives of a regulatory proposal. In turn, this provides for a more effective role in administering the regulation – that is consistent with the intentions of the policy maker – without imposing unnecessary burdens on business.

¹ Australian Bureau of Statistics, Counts of Australian Businesses, Including Entries and Exits, June 2007 to June 2011, cat. no. 8165.0, ABS, Canberra, 2012.

² Australian Small Business Key Statistics and Analysis, December 2012, pp20, 22

It is the Department's view therefore that the multitude of definitions does not, of itself, impose on small business increased regulatory costs or compliance burdens. Furthermore, the differing definitions of a small business within industry, such as banking sector definitions, do not appear to adversely impact small business. In the banking sector, for instance, the lack of a consistent definition does not appear to have impeded small business gaining access to finance. According to the Parliamentary Joint Committee on Corporations and Financial Services 2010 (*Inquiry into Access for Small and Medium Business to Finance*), the:

“[E]vidence before the committee does not indicate that the absence of a uniform definition of SMEs directly restricts SME's access to finance”³.

While a harmonised definition of small business could enhance statistical data collection and analysis, there is no clear evidence to suggest that a uniform definition will enhance the functioning of small business within the business operating environment.

Regulator posture

As the Productivity Commission identifies, regulatory burdens are magnified for small business as they have less capacity to identify, keep abreast of, and ultimately manage the changing regulatory environment. Accordingly, regulators should adopt a risk management approach and tailor their engagement and enforcement strategies to better accommodate the individual needs of business, including small business.

Risk management

Regulators can, by their nature, be risk averse and this can impose unnecessary compliance burdens for small business. A regulator's management of risk cannot be completely eliminated however, regardless of the industry or business activity being regulated. In the majority of regulatory contexts, there are diminishing marginal returns on increasing the compliance burdens on business to reduce risk through the traditional methods of regulation. For example, mandating a monthly compulsory building inspection, in place of an annual inspection, is likely to provide only a minor risk reduction to safeguard against a building's structural failings. Yet there is an increasing compliance burden being imposed on the small business by the regulator.

Likewise, a one-size fits-all enforcement approach to food regulation, for instance, is unnecessarily burdensome for those small business retailers that have been classified as low-risk food handlers selling predetermined low risk, pre-packaged foods. If such businesses are subject to the same audit and reporting processes as high risk small business food handlers selling unpackaged, temperature controlled foods, it results in an increased regulatory burden, without reducing risk to the community.

It is important to make clear the distinction between the regulatory activities of private sector companies and those of government. In 2012, the Senate Select Committee on Australia's Food Processing Sector was alerted to the onerous reporting requirements imposed on small businesses by the jurisdictions and major retailers. Food manufacturers supplying branded and private label products for the major supermarkets and retail food service providers have a mandatory requirement to comply with the retailers' quality assurance programs. These requirements are

³ Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Access for Small and Medium Businesses to Finance*, 2010

different to the certification required under jurisdictional law, but involve substantial duplication imposing a significant cost overhead. For example, the frequency and duplication of quality assurance audits – required by the jurisdictions and the major retailers – amount to a substantial and potentially unnecessary increase in direct and indirect costs and ambiguity in regulatory requirements for small business⁴.

The high levels of regulatory burden and inconsistent regulations in the food system are longstanding: the Productivity Commission has previously undertaken reviews in this regard. It is not the purpose of this submission to revisit these issues. That said, it is pertinent to point out the capacity for private sector companies to impose unnecessary burdens on small business through the supply chain. Businesses often confuse these burdensome practices as being a function of government, which is not the case.

Departmental observation supports the concerns of small business around duplicative, excessive reporting requirements and frequent and uncoordinated audits imposed on them by regulators. Small businesses believe that regulators too commonly adopt a one-size-fits-all philosophy.

A regulator's use of risk management tools can improve enforcement, decision-making and administrative actions. The Australian Tax Office evidences this through its application of compliance risk and assessment tools to optimise voluntary compliance. The National Measurement Institute (NMI) adopts an educative, risk-based approach to its enforcement activities to minimise the risks associated with non-compliance (case study 1). Moreover, the Department's approach to regulation enforcement under the *Higher Education Support Act 2003* (HESA) is to increasingly adopt a risk-based approach (case study 2).

In regards to regulatory enforcement of tertiary education in Australia, the Australian Skills Quality Authority (ASQA) is the primary regulator of the vocational education and training (VET) sector, whilst the Tertiary Education Quality and Standards Agency (TEQSA) is the national regulator of higher education. TEQSA's enabling legislation requires the regulator to regulate higher education using principles relating to regulatory necessity, risk and proportionality.

ASQA regulates the VET sector through the standards for the regulation of vocational education and training which are set by the National Skills Standards Council (NSSC). The NSSC has confirmed the need to reform the standards for the regulation of vocational education and training. A review of VET regulator standards is being progressed to provide for a risk based, accountable approach by regulators (refer to **Attachment A**).

Engagement strategies

In directing a business to do something which it is not naturally inclined to do, the concept of behavioural economics can be applied to a regulator's approach to its enforcement activities. The profile of behavioural economics, within the policy context, is becoming more prominent. Focusing on the characteristics of how people (as businesses) behave in the real world, understanding the decisions they make and the factors which motivate and influence them, can better influence regulatory outcomes.

⁴ Food Processing Industry Strategy Group, Final Report of the Non-Government Members, p.106, 2012

Case Study 1

How the National Measurement Institute Approaches Small Businesses

National Measurement Institute (NMI) is Australia's peak measurement organisation, responsible for maintaining Australia's primary standards of measurement and for providing the legal and technical framework for the dissemination of those standards. NMI oversees all disciplines of measurement in Australia – analytical, biological, chemical, physical and legal. It provides measurement expertise, calibration services, chemical and biological analyses and pattern approval testing.

NMI's Responsibility for Trade Measurement:

In 2007, NMI was given the responsibility of initiating and managing the transition of trade measurement regulatory responsibilities from the states and territories to the Commonwealth. On 1 July 2010, the new national system of trade measurement commenced, replacing eight different systems of measurement.

Trade measurement refers to all transactions in which the price of the commodities or goods is based on measurement of quantity or quality. The primary purpose of a trade measurement system in Australia is to ensure that the pricing of traded goods is based on accurate measurement. Trade measurement covers both business-to-business transactions and business-to-consumer transactions.

NMI's Approach to Small Business Regulation:

NMI enforcement activities span a wide variety of small business retailers, ranging from bakeries and butchers to landscaping businesses and jewellers. In its role as a regulator, NMI is cognisant that small businesses may have fewer resources to ensure they comply with regulation requirements. For this reason, NMI adopts an educative, risk-based approach to its enforcement activities to minimise the risks associated with non-compliance.

To increase transparency and raise awareness, NMI makes all of its consultations on proposed (or potential) changes to regulations public on the NMI website, and regularly consults with industry associations. This enables small business owners to keep abreast of proposed changes in their own time and provides for industry input into the decision-making process. Furthermore, and in line with continuous improvement, NMI consistently enhances its communication processes with small business. As trade measurement is a technical topic, the capacity to explain legislation and compliance requirements in simple, easy-to-understand language (in both English and translated material) is an important, ongoing focus for NMI. Over nine industry specific brochures have been published and translated into five different languages, and distributed to Migrant Resources Centres nationwide who focus on developing migrant communities. NMI has also set up an interpreting service to aid small business owners should they require it.

To increase its reach within the diverse small business sector, NMI has implemented a direct communication campaign that supports regular communication with servicing licensees via an online newsletter. Through this newsletter, NMI publicises its 'hot issues' and 'key areas of enforcement' activity. Similar to the direction adopted by the Australian Tax Office, NMI seeks to inform businesses of its strategic approach to compliance; this is outlined in its recently released: *National Compliance Plan 2012-13*, which is published on the NMI Website.

In regards to inspections and enforcement activities, NMI inspectors routinely engage in 'field visits' to shopping and retail centres and business premises to highlight and inform small businesses of their compliance requirements. NMI adopts a tailored conciliatory approach to these educational visits to promote compliance. For instance, if an NMI inspector discovers non-compliance that has no detriment to the consumer, an educative approach is adopted to facilitate future compliance.

The United Kingdom Behavioural Insights Team (BIT) – established in 2010 to find ways of encouraging, supporting and enabling people (businesses) to make better choices for themselves – provides a good model for innovative approaches to regulatory enforcement. The BIT, which operates out of the UK Prime Minister’s Cabinet Office, employs the premise and insights of behavioural economics on government operations to improve outcomes. Its work to date has identified that traditional attempts to increase compliance do not resonate with how people (as businesses) behave. In February 2012, the BIT set out the results from eight trials, drawing on its Test, Learn, Adapt guidance approach, that applied insights from behavioural science to reduce fraud, error and debt⁵. The trial results outlined an increase in fine collection and reduced administrative expenditure, through applying approaches that made it easier to comply, rather than seeking to punish non-compliance. The approaches employed by the BIT were varied, ranging from more simple and clearer communication techniques, to clarifying misconceptions by reinforcing normal practices to highlighting the risks of non-compliance. The underlying premise is that small, inexpensive policy initiatives can have large and highly beneficial effects.

As with all elements of regulation reform however, there needs to be a cultural change within government. This will ensure that the actions of regulation making institutions deliver regulation that is efficient, effective, and supports well-functioning markets and that the regulatory enforcement processes mirror this approach.

In recognition of these issues, the Centre for Excellence in Public Sector Design (DesignGov), which was established by the APS Secretaries Board, is undertaking a project that is exploring ways to dramatically improve the interaction between government and the business community. The results of this pilot project, which will be derived from first-hand observation of businesses and early prototyping of ideas, will be made available to the Secretaries Board later this year.

Regulator engagement with small business

The communication process adopted by governments and regulators with respect to small business is a source of regulatory burden for small business. Ineffective or inefficient communication methods – such as cumbersome, jargon-laded documents, which have key messages buried in the detail – are not receptive to time poor small businesses. In these instances small businesses do not comprehend the message being conveyed and this can lead to non-compliance issues for a business. This message was reinforced by the Inspector-General of Taxation in a report to the Assistant Treasurer – *Review into improving the self-assessment system* – which identified as a key area for improvement, amongst others, the augmentation of existing public consultation processes with tax law design teams who are engaged to provide advice on the proposed tax law, relevant explanatory memoranda and the nature and timing of ATO advice⁶.

Furthermore, the absence of a two-way exchange between the regulator and the business being regulated leads to ineffective enforcement approaches. In such environments, regulators do not obtain insights into their decisions or any adverse consequences, and continuous improvement is thus an aspiration, not an achievement. The direct impact of these shortcomings leads to increased business compliance costs for small business. Governments and regulators should therefore be employing practices to minimise these burdens for small business.

⁵ Cabinet Office Behavioural Insights Team, *Applying behavioural insights to reduce fraud, error and debt*, February 2012

⁶ August 2012

Case Study 2

Regulation of small businesses approved to deliver student loans

The Commonwealth through the *Higher Education Support Act 2003* (HESA) provides loans for tertiary students to pay their tuition fees for courses offered by small, medium and large businesses in the tertiary education field. This assistance is commonly known as the Higher Education Loan Program (HELP) income contingent loan schemes comprising: HECS-HELP, FEE-HELP, OS-HELP, SA-HELP and VET FEE-HELP.

The regulation of tertiary education providers under the *Higher Education Support Act 2003* (HESA) does not make distinctions on the size of a provider. All providers must meet the same compliance requirements; however, program administrators are able to recognise and adjust administrative practices for differing levels of risk of non-compliance and implement appropriate strategies to assist providers.

The Department's approach to regulation enforcement under HESA is to increasingly adopt a risk-based approach. This is due to the substantial increase in the number of providers offering HELP loans, but it also helps to target the known problem compliance areas (rather than allocating resources to monitor all compliance requirements).

The Department in dealing with regulatory compliance under HESA focuses on enhancing education and information materials to inform the education providers of their requirements. HESA places certain requirements on educational providers offering the loans, for most part these are described as student protection mechanisms, also known as the 'quality and accountability' requirements. A second tranche of requirements relate to the data needed to manage students' entitlements and the ensuing loans to be reported to the Australian Taxation Office for repayments.

The Department produces guidelines and instructions to meet the differing needs of providers and materials are delivered in a form that are easily interpreted, up-to-date, and disseminated in different accessible forms (such as websites, emails, newsletters, forums, and training sessions). The Department regularly seeks feedback on these education materials to identify the effectiveness in assisting providers to meet compliance requirements. This feedback is used to improve materials to better meet their needs.

In adopting a risk-based approach, the Department is able to focus on improving information and education processes for the more complex or confusing requirements. To this end, the Department's proactive approach facilitates a reduction in reporting burdens on approved providers, whilst enabling a policy intention/outcome approach to regulation. For example, utilising a simple scoring system, based on points allocated – such as 5 points for student complaints, 1 point for missing reporting deadlines – generates an overview of compliance issues by provider and by theme. This identifies where further education is likely to be necessary in the sector, or which individual provider may require more targeted support. Identifying problematic topics allows the Department's program administrators to adjust their initial training sessions for newly approved providers.

Online reporting

In April 2012, COAG agreed to a new competition and regulatory reform agenda, which included a commitment to reduce reporting burdens on business, and identify specific ways to remove overlaps in Commonwealth, state and territory reporting obligations, including through expanded use of online business reporting⁷. This work was progressed by a cross-jurisdictional Taskforce – the Business Advisory Forum (BAF) Taskforce.

The BAF Taskforce subsequently identified significant duplication and overlap in business reporting requirements to government. This included company notification processes; taxation (including payroll tax); information sought by the Australian Bureau of Statistics; reporting in relation to employees and some energy efficiency reporting⁸.

The Commonwealth Government has committed to reduce the business reporting burdens and is working to streamline business reporting requirements through expanded use of the online Standard Business Reporting (SBR) initiative. The expanded use of SBR will extend to all business electronic reporting to the Australian Taxation Office by 2015; employer reporting obligations to the Department of Human Services; and paper-based reporting to the Insolvency and Trustee Services⁹. It is expected that this will increase the take-up of SBR. Increased uptake of the SBR program may significantly reduce time and cost burdens associated with business to government reporting (across both State and Federal jurisdictions). And further, as SBR enabled products mature and come to market, there is the potential for regulatory reporting by small business to occur as a natural consequence of normal business processes.

Improved consultation

Business liaison is a core focus of the Department's work and through its interaction with the small business sector, advocates for better engagement with small businesses to give them the information they need in the way they want it.

The Department is progressing a whole-of-government engagement strategy to assist regulatory agencies better tailor their consultation mechanisms and communication strategies with small business. The strategy is being developed in consultation with small business stakeholders. The strategy reinforces the message that unnecessary compliance requirements have a magnified impact for small business and diverts resources away from more productive requirements, creating a disincentive to invest and innovate. The strategy in turn outlines simple principles that if adopted, will enhance regulator engagement with small business and improve the way Government agencies communicate to this group.

⁷ Council of Australian Governments, Communique, 13 April 2012

⁸ Business Advisory Forum Taskforce Report on Progress, 6 December 2012, p.8

⁹ Council of Australian Governments Business Advisory Forum, 6 December 2012

Case Study 3

The Small Business Support Line

Business liaison is a core focus of the Department. The Department provides the policy direction and program delivery for the national Small Business Support Line. The Small Business Support Line provides small business owners with a first point of contact to access information and referral services to improve their business sustainability and aid better management of their business

Through the Small Business Support Line database, the vast majority of calls identified as relating to 'Government Regulation' were made to the Support Line before contact with a government regulator. Enquiries were most frequently in regard to: product labelling and safety, working visas, food safety regulations, industry standards, company regulations and the Australian Consumer Law (in particular, exchange/refund policies). The concerns of small business centred on licensing information (fee structures), conflicting advice from agencies/regulators, unclear advice from agencies/regulators, and insufficient information available.

Statistics

From 3 September 2009 to 15 February 2013, the Small Business Support Line received 306 calls classified as *Government Regulation*. The most frequent calls were:

ACCC	96 (31%)	ASIC	44 (14%)
Standards Australia	43 (14%)	General	42 (14%)
Visa	21 (7%)	Food Standards	16 (5%)
Australian Consumer Law	14 (5%)	The Treasury	8 (3%)
APRA/PPCA	7 (2%)		

Is there a rationale for treating small businesses differently?

Taxation is routinely cited by small businesses as the most burdensome source of regulation. In 2010, the Government's *Australia's Future Tax System* (AFTS) report noted that small businesses bear a disproportionately higher share of the tax compliance burden¹⁰. The AFTS report recommended that small business tax concessions be streamlined and broadened to reduce this burden.

Although the provision of specific tax concession may be helpful to small businesses, tax system complexity can impose a high cost on small business operators. There is some preliminary, albeit inconclusive, evidence that some small businesses are indifferent to most small business tax concessions, as they consider them too complex or not worth the effort¹¹.

¹⁰ May 2010

¹¹ Lignier, P., & Evans, C, *The rise and rise of tax compliance costs for the small business sector in Australia*, Sydney: Atax UNSW, 2012

To this end, potential increases in complexity should be considered during the formulation and design of small business focussed concessions. This is in line with the concept of minimum effective regulation (both in the design by policy makers, and the enforcement by regulators) and the idea that the best way to avoid imposing unnecessary burdens on business is to not impose them in the first place.

Conclusion

The enforcement and administration processes adopted by regulators can impose unnecessary burdens on small business. Such burdens do not stem from the way a small business is defined. Rather, these burdens result from the complexity in the design of regulation, in the first instance, and are compounded by the lack of a risk assessment and management approach to the education and enforcement activities of regulators.

Small businesses face resource constraints and they have less capacity to absorb the cost imposts of government. Just as governments realise the importance of not imposing unnecessary regulatory burdens on small business, regulators equally need to develop an appreciation of the limitations of small business in complying with different regulatory regimes.

Regulators should be moving away from a one-size fits all approach and embracing a risk-based approach, to achieve a more efficient enforcement and administration of regulation. This should be informed through education and innovative thinking. Improved consultation with the small business sector can further facilitate this; engaging in consultation processes that are receptive to small business can overcome issues of confusion and non-compliance.

Regulation of the Tertiary Education Sector – Standards Review

The Australian Skills Quality Authority (ASQA) is Australia's primary regulator of the vocational education and training (VET) sector, with responsibility for the registration and quality maintenance of approximately 4,000 of the estimated 5,000 registered training organisations (RTOs) that operate in Australia. The Tertiary Education Quality and Standards Agency (TEQSA) is Australia's national regulator of the higher education sector, with responsibility for the registration and quality maintenance of 173 higher education providers.

TEQSA regulates the higher education sector through the application of the higher education standards as set by the Higher Education Standards Panel. The Higher Education Standards Panel makes its recommendations to make and vary the standards directly to the relevant Commonwealth Minister, and independently of TEQSA. The Panel is required to undertake a review of the current Threshold Standards in accordance with Section 29 of the *TEQSA Consequential Amendments and Transitional Provisions Act 2011*. That review has commenced.

Throughout the review, the Panel will be consulting with stakeholders and keeping them informed of developments through regular Communiqués and other consultations. As the development process progresses, draft standards and related material will be released for comment as part of formal consultation processes.

ASQA regulates the VET sector through the standards for the regulation of vocational education and training which are set by the National Skills Standards Council (NSSC). The NSSC is a committee of the Standing Council on Tertiary Education, Skills and Employment (SCOTESE), one of a number of Standing Councils that report to the Council of Australian Governments (COAG).

SCOTESE asked that the NSSC, as a priority, undertake a broad ranging review of the standards for the regulation of vocational education and training, focusing on issues of quality. The review of the standards is critical to the appropriate and effective regulation of vocational education and training, ensuring the integrity of qualifications awarded to learners and supporting the achievement of both improved productivity and social outcomes for all Australians.

The NSSC has confirmed the need to reform the standards for the regulation of vocational education and training. Through an analysis of available evidence and extensive consultation, the NSSC found that there are many instances of excellent practice in registered training organisations (RTOs) across the country, leading to quality outcomes. However, there is growing concern that this is specific to individuals and groups of providers and is not systemic across the vocational education and training, with current delivery considered to be highly variable in terms of quality with excellence in outcomes not assured. The regulation of vocational education and training needs to ensure that the reputation of the sector is maintained, that employers and industry continue to value qualifications issued by RTOs and individual learners and employees have the skills to effectively perform in the workforce.

The NSSC commits to continue to work closely with the Higher Education Standards Panel, State and Territory Governments, and the Commonwealth as administrators of VET FEE-HELP, to reduce regulatory burden in relation to business administration standards.

Consultation is currently taking place as part of the standards review. The standards review is likely to propose changes which will have an impact on small businesses. There will be cost and other impacts on RTOs currently in the system in terms of meeting the new standards. These may be felt more keenly by small businesses. The cumulative effect of all this may be that some RTOs which are small businesses may decide not to seek registration under new higher standards.

The VET regulator standards are also the subject of review. These standards will provide for a risk-based, transparent and accountable approach by the regulators. The regulators' actions will need to be proportionate and in response to the specific circumstances of the RTO. While size is not a factor per se, it may be a consideration in terms of the particular circumstances of an RTO.