
Regulation-making in Australia: Is it broke? How do we fix it? *

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Introduction

Business is in revolt over regulation. The Business Council of Australia, in a major report released in May, has issued an appeal to governments for action:

Many other countries have recognised the need to reform business regulation to keep their businesses competitive. If Australia does not match these efforts, we will fall behind and economic growth will slow. (BCA, 2005)

Such concerns are not confined to the ‘big end of town’. Indeed, small business organisations have been protesting about the regulatory imposition on their members for many years. The complexity of regulation and the costs of complying with it are consistently cited by small business as major impediments to their performance.

Meanwhile farming interests have also become more vocal critics of what many see as increasingly intrusive and costly regulation impacting on farm enterprises. Recent research by the Australian Bureau of Agricultural and Resource Economics has confirmed that agricultural inputs are subject to increasing regulatory controls, and that the growth in regulation is having a negative impact on farm performance. (Davidson and Elliston, 2005).

In sum, the backlash against regulation is growing and is broadly based. The complaint is that there is too much regulation and that it is too costly — both to business and the economy at large.

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A paradox?

An apparent paradox in this outcry against regulation is that it follows a period of unprecedented regulatory reform in Australia. Over the last two decades, a battery of long-standing regulatory obstacles to productive endeavour and efficiency have been reduced or eliminated. Trade liberalisation, National Competition Policy and a succession of reforms to industrial relations and taxation have helped create a more flexible, responsive economy which has achieved historically high rates of productivity and income growth and labour utilisation.

Australia's regulatory reforms have won it plaudits from international economic agencies such as the IMF and OECD. In a recent study, the OECD found Australia to have the least market-restrictive regulatory environment among member countries, and it has cited us as a role model for other countries (Conway, Janod and Nicoletti, 2005; OECD, 2004; Banks, 2005).

So what's going on? How do we reconcile this regulatory success with the rising backlash against regulation from Australian business? There is a logical explanation. But it has a number of parts to it.

The forces behind the backlash

Regulatory reform has exposed other regulatory costs

The first point to make — a positive one for the reform process — is that the current business sensitivity to regulation is in part a *consequence* of the earlier regulatory reforms. Many of those reforms have exposed businesses to much greater competitive pressures, with the desirable effect of making them more conscious of the need to reduce their costs and raise their productivity. The business costs that are within the realm of government include infrastructural services, taxation and regulation (or 'red tape'). All have accordingly become targets for further reform. As the Australian Industry Group has argued:

At a time when manufacturers are facing pressures from low cost imports and the higher dollar, it is crucial that Government policy be directed towards reducing the cost of red tape. (AIG, 2004).

However it would be wrong to attribute business's concerns about regulation simply to heightened sensitivity on their part. Some important changes have also been evident in the nature and extent of regulation itself.

Re-regulation, not de-regulation

For one thing, much of the earlier pro-competition regulatory reform did not involve actual de-regulation, but rather the replacement of one set of regulations with another. While the successor regulations have generally brought net benefits to the community from greater efficiency, they have typically also been more complex to administer and comply with.

This good-news/bad-news aspect of past regulatory reform is perhaps best illustrated by the regulatory regimes established to provide for third party access to monopoly network infrastructure — like rail track, gas pipelines or telecommunication wires. Previously these networks, which are essential to provide a range of important services to ‘downstream’ businesses and households, were typically reserved for the use of a vertically integrated government monopoly. That has now changed. For example, while Telstra is still popularly thought of as a monopoly, in most areas of the telecommunications market it has many rivals (for example, there are at least 25 providers of mobile phone services). With other structural and governance reforms, the regulatory changes have contributed to price declines and productivity improvements in infrastructure services that are estimated to have in turn generated a 2½ per cent increase in Australia’s GDP (PC, 2005).

However, while the access regimes were originally conceived under the NCP as a light-handed mechanism to facilitate commercial transactions between businesses, they have ended up becoming highly prescriptive, time-consuming and litigious — bringing the detailed involvement of a host of new regulators and significant costs for the businesses concerned (PC, 2001, 2004b). These issues have been elevated recently with the Dalrymple Bay case and the Fisher/Ergas/Moore-Wilton review of infrastructural bottlenecks affecting exports. (Their proposal for periodic audits of infrastructure, agreed to by COAG, could be usefully extended to include parallel independent audits of the regulatory environments and public processes that shape infrastructure investment outcomes.)

Rising prosperity, new knowledge and risk

Outside the ‘trade practices’ domain, regulatory growth has also been very strong. Part of the reason for this is prosperity. As in other advanced economies, rising income levels have brought increased expectations or demands on governments to meet a range of social and environmental goals that may previously have not been seen as priorities (or considered unaffordable). The expansion of regulatory controls in areas such as industrial relations, public health and safety and pollution provides plenty of examples. (In the case of pollution regulation, for example, there are now National Environment Protection Measures for Ambient Air Quality, Movement of

Controlled Waste, Used Packaging Materials, Diesel Vehicle Emissions and Air Toxics, among other areas.) A related driver of new regulatory demands has been technological progress (eg the internet has spawned new regulations to deal with cyber porn, scams and spam) and new information coming to light about risks and adverse impacts from old technologies (such as asbestos, CFCs and greenhouse gases).

A common thread in much of the regulatory accretion in Australia and other OECD countries has been the shifting of risk from individuals to the State or corporation. A certain amount of this may be desirable, but it can go too far. This is not just the view of libertarian economists or business. UK Prime Minister, Tony Blair, has recently called for a ‘sensible debate about risk in public policy making’.

In my view, we are in danger if having a wholly disproportionate attitude to the risks we should expect to see as a normal part of life. This is putting pressure on policy-making [and] regulatory bodies ... to act to eliminate risk in a way that is out of all proportion to the potential damage. The result is a plethora of rules, guidelines, responses to ‘scandals’ of one nature or another that ends up having utterly perverse consequences. (26 May 2005).

Australia has not been immune from this. As a community we have a much lower tolerance of risk than even 30 years ago. To take a minor, but topical example, in an effort to reduce the road toll among younger people, regulations come into effect next week in NSW restricting the type of cars that P plate drivers can drive. Reading the media on this issue, one could be forgiven for thinking that there has been a worsening road toll problem. In fact, the number of road deaths per 100 000 people in NSW has declined from around 30 in 1970 to 8 in 2003 (latest data), its lowest level since 1908 and the fatality rate of P plate drivers has also been trending down.

A second topical example for Canberrans is the regulatory reaction to the terrible January 2003 bushfires. If you want to light a camp fire outside an approved fireplace in the ACT bush you must now get a permit *and* the advice from the Park authorities is that you must also carry a chemical fire-extinguisher. I don’t believe this is the usual accompaniment to the bushwalker’s rucksack – it is a requirement either likely to be flouted or, for the law-abiding, deter them from having campfires at all, which may indeed be the goal. But the facts are that the fires that triggered this regulation were prompted by lightning, not fires lit by recreational users. (The most recent devastating fire in an Australian national park was actually caused by the Park authority doing a ‘controlled’ burn.)

Fortunately, there have also been some significant initiatives recently to achieve a better regulatory apportionment of risk in areas like mutual obligation, and the

recent shift in judicial predilections in the tort of negligence (though too late to avoid prescriptive legislation restricting the ambit of the Common Law).

An off-budget solution?

It has been suggested that the greater fiscal stringency of the past decade may have lent impetus to regulation as an off-budget mechanism for achieving a range of policy objectives. The ANU's Geoff Brennan has portrayed this possibility as follows:

Consider the following scenario. You are a policy advisor at a high level. You find yourself sitting around the table at a meeting of Cabinet, preparing the Annual Budget. Your Minister has a pet project, which he would like to have endorsed as policy by his Cabinet colleagues. However, he knows, and you know, that his Cabinet colleagues all have pet projects of their own. ... They know, as you do, that the opportunity cost of your getting your project up is their own forgone. ... As the debate proceeds, you hit upon a thought. You pass your Minister a note. You have thought of a way that his project could be achieved without any fiscal cost at all. All you need is an appropriate regulation. Your Minister offers that thought. And immediately, the politics around the table changes. ... And when the opportunity cost of any project falls, it is more likely to receive endorsement. (Brennan, 2004).

The logic of this scenario is pretty compelling. How significant such a phenomenon may have been in Australia, however, is unclear. For one thing, much of the earlier pro-competition reforms would appear to have gone the other way, with regulatory forms of assistance and cross subsidy being removed or replaced with (lower levels of) financial support.

However some important examples do come to mind, particularly in the areas of environmental and social policy. One examined in detail by the Productivity Commission is the set of regulations that constrain farmers' actions in relation to the native vegetation on their properties (PC, 2004a). As the Commission found, much of this regulation effectively forces farmers to bear the costs of providing public benefits for which the public itself should pay — or at least have its willingness put to the test.

Another possibility may be in the related area of heritage regulation, which is currently also the subject of another Productivity Commission inquiry.

Any fiscal motivation for regulatory measures is likely merely to compound what is already a natural proclivity for governments to tackle problems with regulation. This has a number of origins. Regulation is the most tangible expression of government action. Where the political risk of not achieving a desired state is high, a regulation can generally be designed to deliver, at least at the 'headline' level.

And regulation is often simpler for officials to administer than the alternatives. A final motivation, related to the fiscal one, is that the costs of regulation are often diffuse and hard to identify.

Regulation builds on itself

Finally there is a tendency for regulation to build on itself, rather than be rationalised over time, as changing needs are identified and new regulations implemented. This is partly because regulations typically emanate from separate government silos, with each focused on the regulations for which it is responsible, without being aware of the cumulative impact on other regulations or their interaction. (At last count, there were some 60 regulatory bodies at the Commonwealth level. The State of Victoria appears to have 69 regulators focused on business alone – see VCEC, 2005.) But it may also reflect a natural tendency to focus on what’s new, rather than reviewing measures already in place.

Perhaps the most celebrated example of regulatory accretion in Australia is the Income Tax Assessment Act, which as I have previously noted in more colourful terms, has grown to some 7000 pages from the paltry 120 pages that did the job when it was first introduced back in 1936 (Banks, 2003). Some of this growth no doubt reflects necessary additional detail, but it also illustrates the tendency for regulation to feed off itself as one measure invites an unanticipated response that requires a counter measure, and so on.

Rapid growth in regulation is the result

The net result of all of these forces has been what appears to be exponential growth in the stock of regulation, including during the more recent period of deregulation and regulatory reform. (I say ‘appears’ because there is currently no comprehensive information on the amount of regulation in place.)

The BCA has observed that the rate of growth of legislative acts at the Commonwealth level, at around 10 per cent, is more than twice the growth rate of the economy. Perhaps more tellingly, the 55,000 pages of legislation passed in the 1990s — averaging 30 pages per Act — was double that for the preceding decade and triple that for the 1970s.

With respect to statutory rules and disallowable instruments (those subject to parliamentary scrutiny and veto) the most recent information available indicates that over 7000 such regulations were made in the five years to 2001-02. Beyond this is much regulatory activity that doesn’t get seen by Parliament at all.

As a rule of thumb, all of this could then be multiplied eight times to account for State and Territory regulations. For example, there were 1300 Acts and 650 principal statutory instruments in force in NSW at the beginning of this year. Some 115 Acts and 625 subordinate instruments were imposed in 2004 alone. And then of course there is the myriad of regulations at local government level across the country.

The costs of regulation loom large

Is all this additional regulation doing some good? No doubt much of it is. But at what cost? That question turns out to be even harder to get reliable information on than the stock of regulation itself.

For one thing, compliance cost information is not systematically collected by regulators or other official bodies, and industry surveys are plagued by methodological problems and potential response bias. Nevertheless, such information as is available is suggestive of major compliance burdens. A now dated study by Commission staff yielded an estimate of \$11 billion for 1994-95, 85 per cent of which was borne by small and medium-sized enterprises (Lattimore et al., 1998). A 1998 study by the OECD, with the assistance of the ACCI, estimated that taxation, employment and environmental regulations alone imposed some \$17 billion in direct compliance costs on SMEs (OECD, 2001). The Commonwealth's Small Business Deregulation Taskforce of 1996 found that the average small business owner spent 16 hours a week (almost half the standard working week for employees) on regulatory paperwork and other compliance activities.

While cold comfort for business, it should be said that Australian regulation is by no means the worst offender internationally. Indeed, a recent World Bank report has ranked this country fifth in the world for overall 'ease of doing business', although we don't do well in all areas (World Bank, 2005).

Compliance burdens are understandably important to business, but they are not the only source of regulatory cost. More damaging from a broader economic perspective can be the impacts on incentives for entrepreneurship and innovation, the distorting of decision-making away from the most productive avenues, or constraints on firm responsiveness to changing market conditions. In successive inquiries into a variety of areas of economic, social and environmental regulation over the years, the Productivity Commission has found such effects to be pervasive. Much regulation is poorly designed, involves unnecessary costs or unintended side-effects and, in some cases, does not even satisfactorily meet its primary objectives (Banks, 2003). In fact, among the hundreds of reviews the Commission has undertaken over the years, I think it's safe to say that we have never found an

area of regulation that could not be significantly improved. (Key findings from inquiries and other commissioned studies can be found in the Productivity Commission's Annual Reports, as well as on our website — www.pc.gov.au.)

That does not mean that most regulation could simply be dispensed with. Some form of regulation will in many cases be necessary to achieve policy objectives that benefit the community, including business. The challenge is to devise regulations that can achieve their objectives effectively, while minimising burdens on those regulated and any adverse side effects on others.

There have been reforms to regulation-making

With this in view, most OECD countries have now adopted some form of regulatory impact analysis in the pursuit of best practice process. It is designed to ensure that proposed regulation jumps a number of hurdles designed to determine whether it is likely to result in net benefits to the community – and to preclude it from being implemented if it does not. Regulation Impact Statement (RIS) requirements oblige policy makers to consult, and to work through a sequential process of articulating the problem, assessing a range of options, recommending the best option and explaining why other options are not as good.

The 7 steps in a Regulation Impact Statement (RIS)

The RIS documents seven key elements essential to good process in regulation-making. A concise account is required of:

1. the problem or circumstances which give rise to the need for policy action;
2. the desired objective(s);
- 3 the options (regulatory and non-regulatory) for achieving the desired objective(s);
4. an assessment of the costs and benefits of each option – for consumers, business, government and the community;
5. a consultation statement (describing the process and feedback);
6. a recommended option; and
7. a strategy to implement and enforce and review the preferred option and review its operation.

Source: ORR 1998.

From the mid 1980s, Australian States began introducing regulatory impact analysis for subordinate or delegated legislation and, in 1995, all Australian jurisdictions, through the Council of Australian Governments (COAG), took the step of requiring

proposals going to Ministerial Councils and national standard-setting bodies to be accompanied by regulation impact statements.

Of the Australian jurisdictions, the Commonwealth's quality control processes are arguably the most comprehensive. Since 1997, Commonwealth departments and agencies have been required under a Cabinet directive to prepare Regulation Impact Statements for regulation that affects business or inhibits competition. This includes primary as well as subordinate legislation, so-called 'quasi-regulation' and treaties. This calls for an economy-wide or community-wide perspective in identifying who benefits from the regulation, who incurs the costs and whether the regulation achieves its objectives without creating undue burdens.

A critical feature of this process is that Regulation Impact Statements are required to be presented to political decision makers in time to inform their decisions. The statements must also accompany bills and subordinate legislation into Parliament, enhancing the scope for informed political debate and public accountability.

The Office of Regulation Review (ORR), which is part of the Productivity Commission and shares its statutory independence, is the Australian Government's watchdog over this regulation development process. Departments and agencies are required to consult with the Office of Regulation Review from the outset in preparing Regulation Impact Statements, and the ORR must indicate to Cabinet whether RISs are of an adequate standard. The ORR's role is (appropriately) confined to ensuring that good process is followed. It does not make an assessment of the best policy or regulatory approach. That is the policy maker's job.

How is this system performing?

It is now eight years since the present system was introduced. In that time, some 1400 items of legislation or regulation — one-tenth of the volume made known to us — were judged to have a potentially significant impact on business, necessitating the preparation of a RIS. The rate of compliance with the RIS requirements over this period has averaged 74 per cent, being lowest in the first (complete) year and highest (92 per cent) in the most recent year. Taking into account that the standards applied by the ORR for assessing RIS adequacy have been raised over this period, a significant improvement is discernible.

However the aggregate outcomes disguise some less satisfactory aspects. In particular, for much of this period, compliance has generally been markedly weaker for those regulatory proposals with the most significant impacts on business or the community. (See *Regulation and its Review*, various issues.) These have also tended to be among the politically most sensitive and urgent. In such cases, the Minister

concerned or his/her department head may wish to circumvent or pre-empt the RIS process. They may even get central agency support. However it is precisely in such circumstances, where governments are under most pressure to act, that good process is needed to ensure that the potential costs as well as benefits are given adequate consideration.

A second deficiency lurking behind the published aggregate compliance numbers is in the *timing* of RISs. In many cases, the RIS is prepared too late in the policy development process to be of any real assistance to decision makers. In those circumstances, it effectively becomes little more than an *ex post* justification for a policy decision already taken, subverting its role.

When this happens, the telltale signs in the RIS tend to be inadequate consideration of alternative options, and lack of consultation, both of which are critical to good decision-making. (Needless to say, the ORR is likely to find such draft RISs inadequate. Some are then worked over to get them across the line, but the *process* remains deficient and the regulatory outcomes may reflect this.)

A more common deficiency is in the area of particular concern to small business; namely the assessment of compliance costs. In 2004, only 20 per cent of tabled RISs involved an attempt at quantifying compliance costs. Another 70 per cent gave some consideration to compliance cost implications, without seeking to measure them. In the remaining 10 per cent, compliance costs were not even considered. Given indicative estimates of the potential magnitude of compliance costs, this looms as a major deficiency in regulation-making in Australia — and an area where we are behind a number of other OECD countries.

So is the system ‘broke’?

Clearly business has legitimate grievances with Australia’s expanding regulatory morass and the processes responsible for it. That said, there have been significant improvements in those processes in recent years, which in my view have laid the foundation for much better regulatory outcomes in the future.

If each piece of regulation that was implemented had undergone rigorous testing and scrutiny to ensure not only that policy action was needed but that the regulation adopted was the best option, taking into account all the benefits and costs of the alternatives, it would be hard to complain. Yet that is precisely what the current arrangements are designed to do — at least for regulation that impacts on business. The problem is in the *delivery* and that is clearly where action needs to be directed. In other words, I don’t believe the system is *broke*, but it could and should be made to work a lot better.

This is easier said than done. It will require further cultural and attitudinal changes within government which will take time and can really only be generated from the top down.

Stronger Ministerial oversight?

From this perspective, the BCA's proposal for a Ministerial Task Force, based on arrangements in the UK, appears to have some merit. Comprising the Prime Minister and three or four Cabinet Ministers, the suggestion is that it would screen proposals for major business regulation before they got to Cabinet, and develop and oversee a broader agenda of regulatory reform.

This would represent a considerable scaling up of Ministerial oversight from the arrangements that have applied since 1997, whereby the Minister responsible for monitoring and encouraging compliance with good regulatory process has not been a member of Cabinet. It would provide a clear signal of government's commitment to good regulation and encourage all Ministers to ensure that agreed processes are followed. With this in mind, and to avoid duplicating the work of Cabinet itself in assessing policy proposals, one option would be for it to focus on significant regulatory proposals which have failed to produce an adequate RIS.

Currently there is no automatic sanction on non-compliance, other than delayed public exposure of the fact in *Regulation and its Review*. In some jurisdictions, gatekeeping arrangements preclude regulatory proposals from proceeding to Cabinet in the first place without an adequate RIS. This could be a useful adjunct to Ministerial oversight, or be instituted as a measure in its own right at the Federal level.

Strengthening 'best practice'

Whether emanating from a separate Committee of Cabinet or not, it would also be helpful to have formal Cabinet support for a strengthening of the RIS requirements, particularly in relation to compliance costs and consultation.

Of its own accord, the ORR has been progressively raising the hurdles for RIS adequacy in these areas. Since July last year, regulators have been asked to quantify compliance costs or else provide a satisfactory explanation as to why this is not feasible. Cabinet endorsement of the need for greater quantification would give the ORR more licence to take a firmer line.

As noted, Australia compares relatively poorly in its attention to regulatory compliance costs. Claims that it is just too hard don't stack up too well against the

systematic approaches now being adopted in other OECD countries. One that has attracted the attention of the BCA is the Standard Cost Model (SCM), which was developed in the Netherlands and is being introduced in several other countries, including the United Kingdom. It was conceived as a somewhat stylised model for measuring ‘paperwork’ burdens on business, as a basis for identifying problem areas and measuring success in simplification programs across the existing stock of regulation (BRTF, 2005). The methodology is not rocket science. It simply focuses on identifying time spent on various tasks and costing the hours for a ‘representative’ firm, and then aggregating the costs across all firms affected. This necessarily involves regulators talking to the managers of firms and is clearly not a costless exercise. However, if the sort of numbers coming out of the Netherlands are even approximately correct, they suggest a pretty worthwhile cost-benefit outcome.

That such innovations in assessing compliance burdens have originated in Europe is perhaps unsurprising, given the regulatory overload that has emanated from Brussels. It is clear that controlling this trans-national source of regulatory growth has become a major issue in several European countries. That said, the SCM could also usefully be studied here as one means of getting some base-line estimates of key compliance costs in the RIS process. Some such requirement seems necessary to overcome the practical problem that costs that are not identified and quantified have little bearing on decisions.

The failure of regulators to get an adequate appreciation of likely compliance costs is in part a reflection of wider consultation failures. While experience varies, in too many cases consultation is perfunctory and not adequately focused on options under consideration. Again, Australia lags behind other countries in this area. In recent years several OECD governments have released explicit policies on community consultation which provide stakeholders with a degree of certainty about how and when governments will engage in consultation. Such policies typically establish general principles and standards for consultation (including identification of circumstances where consultation need not occur); provide a framework for how consultations should be undertaken, and a capacity for the effectiveness of the consultation processes to be monitored and enhanced over time (PC, 2004c). At the very least, the COAG requirement for Ministerial Councils and national standard-setting bodies to release a draft RIS for consultation purposes needs to be adopted more widely by individual governments.

A further issue raised in the BCA report is whether RIS requirements should apply more widely at the Commonwealth level than just to regulation with a significant impact on business. As pointed out, this criterion results in only a fraction of regulatory proposals being covered (around 7-10 per cent). The BCA’s proposal that preliminary RISs be required for regulatory proposals with *any* effect on

business could more than double this ratio. However it raises the question as to whether a small impact on business should be more deserving of scrutiny than a major impact on other sections of the community. In principle, good process in regulation-making should apply as widely as possible. This was recognised in the early versions of the Legislative Instruments Bill, recently enacted, which required the preparation for public comment of a RIS-type document ('Legislative Instrument Proposal') for all subordinate regulation. That requirement no longer applies, but perhaps deserves reconsideration.

A number of States and Territories have long had more embracing coverage of subordinate regulation, but poor coverage of primary legislation. Also as the NCC has pointed out, there is considerable scope to strengthen regulatory gatekeeping mechanisms at the State level, including through more independent and better resourced review units. Victoria has taken a lead from the Commonwealth in this respect, by moving its regulatory review function into a new independent statutory authority (the Victorian Competition and Efficiency Commission).

A final point under the 'best practice' heading relates to the actual administration of regulation. Small business, in particular, has long complained about difficulties in accessing information about regulatory requirements, delays in processing approvals, excessive information requirements and inconsistencies in decision-making, all of which can raise costs and inhibit activity. Regulators, being human, may also develop their own attitudes and agendas, and in most cases face incentives to be risk averse (strict) in their enforcement activities. Such issues have recently come to the fore in relation to the dampening impact of regulation on infrastructure investment. For these reasons, it is important that regulations do not give more discretion to regulators than is necessary for them to perform their duties, and that they contain adequate guidance for the exercise of such discretion. Beyond this, the notion of developing some generic 'good practice' principles for the governance, conduct and operation of regulatory bodies would appear to have merit.

A Business Regulation Advisory Council?

The BCA has argued that the Government should go further and establish a Business Regulation Advisory Council, drawing again on UK experience. A similar body, comprising business, union and community representatives, existed for a short time towards the end of the Keating Government. Its main purpose was to advise on the coverage of the Commonwealth's program of legislation review under the NCP.

The BCA proposes a much wider charter for its new Council, including not only advising on priorities for regulatory reform, but also coordinating consultation on

regulatory proposals, reporting on the adequacy and quality of existing regulation, coordinating reviews of regulation and recommending changes. It would have a full time Chairman, appointees from business and other groups, and a standing secretariat with a research capability.

The challenge for government in evaluating this proposal is to determine where such a body could best complement (rather than intrude into) the policy development responsibilities of government itself. This is not straight forward and the BCA's treatment is brief. It would also require a better understanding of the UK system than I have been able to obtain. However, at face value, the main strengths of any such body are likely to be in enabling government to tap the experience of its members so as to assist it in understanding how regulation is perceived to be working, to identify emerging problems and determine possible targets for reform.

In terms of the need to improve consultation, it is unlikely to be a substitute for regulators working directly with relevant stakeholders. Similarly, while it is suggested that such a body could enable the rationalisation of other high level advisory bodies, like the Financial Sector Advisory Council, this might lead to a loss of concentrated expertise in important specific areas of regulation.

Depending on the extent to which the proposed Council was open to representation from outside business (consumer, environmental, etc.) it could have difficulty in reaching consensus on some regulatory issues. (This was an emerging issue with the previous council.) On the other hand, if it were predominantly a business group, its advocacy on regulation may not always accord with wider community interests.

Depending on its remit, the resource needs of the Council could also be significant. The suggestion that the ORR might be drafted to act as secretariat wouldn't overcome this, as that body is already fully engaged. Also the independence of the ORR from the policy arms of government in its regulatory review function is a keystone of the Australian Government system and is supported by the BCA. It is also a feature endorsed by the OECD and, as noted, the National Competition Council. That independence could potentially be compromised if it were also obliged to work for a body external to government, with its own agenda. (The UK equivalent to the ORR, which apparently does act as secretariat to that country's advisory council, is located within the government's Cabinet Office and arguably already lacks independence.)

In short, the value that a single high-level advisory body on regulation could add to more specialised consultative bodies or forums is not clearly established, particularly if the latter could be strengthened or extended.

Rationalising the ‘stock’

Much of the poor regulation in place got there, at least in part, because of past deficiencies in regulatory process. Improvements in regulation-making should reduce this problem going forward, but may not do much to improve the existing stock of regulation. That will require further actions. The BCA saw its Advisory Council assisting the government to identify priorities, which as noted, was the principal function of the previous Council.

A basic obstacle to such a review at the Commonwealth level has been the lack of consolidated information on the stock of regulation. That will be largely remedied under the Legislative Instruments Act, which requires all subordinate regulation to be placed on a common register. (This has remained intact as a central feature of the legislation throughout its ten year gestation.)

The new Act also requires regulation to contain sunset provisions, whereby each regulation would automatically lapse after 10 years and would need to be re-made. This has been a feature of some state regulation for a while and has proven a useful mechanism for periodically re-evaluating the need for regulation in its existing form. Such an approach would be less appropriate for much primary legislation, but a requirement for all new legislation to be periodically *reviewed* would be a step forward. Where such reviews have been built into past legislation, such as under the NCP, they have generally revealed a need for significant changes.

A possible device for using new regulatory proposals to help rationalise the stock of existing regulation could involve some variation on the ‘one-in-one-out’ rule that has recently been proposed in the UK (BRTF, 2005). This could involve a requirement for any new regulatory proposal to give explicit consideration to possible reductions or amendments to existing regulation, to inhibit the ‘stacks-on-the-mill syndrome’ referred to earlier.

An important avenue for improving regulation in Australia has been the many *ad hoc* reviews of specific policy areas that have taken place over the years, often in response to perceived problems or changes in circumstances. The Productivity Commission itself has been involved in many of these. Examples from our current work program include reviews of health workforce issues, consumer product safety, heritage, and regulatory issues in the areas of energy efficiency and access to new medical technology. What such reviews demonstrate, apart from the scope to do things better, is the significant time and resources required for effective policy development in such complex areas.

Beyond such selective approaches to improving the regulatory stock, and with the completion of the existing review of anti-competitive legislation under the NCP,

consideration needs to be given to implementing more systematic reviews. The Commission has proposed that unfinished business from the NCP reviews should be one basis for further review (PC, 2005). Dutch and UK initiatives have focused on reducing paperwork burdens and this would also seem worthy of study. As noted, a key feature of their approach is the development of a benchmark, the Standard Cost Model, for assessing progress in meeting targets. The absence of such a comparator was an obvious failing in the Australian Government's earlier campaign to reduce red tape by 50 per cent, as part of the 'More Time for Business' strategy.

Australia's successful experience with the NCP Legislative Review Program could also provide a possible model for a review targeting areas of significant compliance cost, using a similar decision rule; namely, that such regulations can be retained only if it can be demonstrated that the benefits exceed the costs, and that no alternative measure could do the job at lower cost.

Finally, consideration of rationalising the stock of regulation leads naturally to the question of the stock of regulators. On the basis of available information for the Commonwealth and some States, it is likely that Australia has at least five or six hundred regulatory bodies. To put this in perspective, I am advised that the United Kingdom has just 31, and currently intends to consolidate them to nine. As noted previously, the greater the number of regulators, the greater the potential for regulatory inflation and discoordination. In the area of energy regulation, Australia has recently moved to a single regulator. This doesn't mean that such centralization would necessarily be desirable elsewhere. But I would be surprised if some further beneficial consolidation at the state, federal or national levels was not possible, and this could prove a fruitful subject for review.

In conclusion

Notwithstanding the contemporary adage, in my view regulation-making in Australia ain't broke, but it *does* need fixing. Past reforms have laid the foundations for the good process on which good regulatory outcomes depend. Notable among these are the requirements for regulation impact statements and the independent monitoring of compliance. After a shaky start, we have seen steady improvements in compliance with these requirements over the past few years. However, much of this remains on the surface. What is needed is a deeper recognition within government of the value of good process itself, which the RIS 'paperwork' simply records. That will require more fundamental cultural change, which can really only be inculcated from the top down. Fortunately, there is no shortage of suggestions from business and elsewhere as to how this might be implemented! It is now up to governments to respond to the challenge.

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