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# Reducing the regulatory burden: the way forward\*

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## **Introduction**

I am grateful for the invitation to speak to you tonight about the findings of the recent taskforce that I headed up on Reducing Regulatory Burdens on Business. It is particularly gratifying to be doing this at a public forum organised by the newly created Centre for Regulatory Studies at Monash University — my (first) alma mater, and the place where I first studied economics.

That the venue is the university's Law Chambers adds to this feeling. I believe that Monash was also the first Australian university to offer a combined degree in law and economics (that is, economics proper, not just 'commerce'). Each of these disciplines has much to offer the other, especially in the study of regulation and how it is best developed and designed.

My only reservation in accepting the Centre's invitation was whether the Taskforce's report would have been released in time. Although we handed it to the Prime Minister and Treasurer at the end of January, as required, it ended up covering a lot of territory and was clearly going to take some time for government to digest and respond to. In the event, as you know, it was released a few weeks ago, freeing me to discuss its findings.

That said, as you may also know, the Government's response to our recommendations remains a work in progress. Its initial response was supportive — with one-half of our recommendations being accepted — but we will need to wait until July for the second and more comprehensive instalment. What that will entail is not for me to pre-judge tonight. Nevertheless, I will highlight aspects of the

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Government's response thus far and identify a number of issues and priorities going forward, as I see them.

I might add that my remarks tonight, to the extent that they stray beyond the Report, are my own responsibility and are not necessarily shared by others on the Taskforce. That said, I can assert with some confidence that the Report itself is owned strongly by all members of the Taskforce. It evolved from what was essentially a blank sheet of paper, during an intensive few months of activity, in which we engaged extensively with business, government and other community groups. (I therefore acknowledge the integral contribution of my Taskforce colleagues, Rod Halstead, Dick Humphry and Angela MacRae, and of our hard-working Secretariat, headed by Sue Weston from DITR.)

### **The task in context**

The task assigned to us by the Prime Minister and Treasurer was to identify and propose remedies for areas of Australian Government regulation that are 'unnecessarily burdensome, complex, redundant or duplicate regulations in other jurisdictions'. The focus was not on policy as such — which we were to take largely as given — but rather on undue costs for business that arise in the implementation of policy through regulation. This is a critical distinction, which was lost on some commentators who thought we should have been bolder in recommending fundamental policy reforms.

Behind this initiative were mounting concerns from business at the growth of regulation and its cumulative burdens. The concerns emanated from a cross-section of business interests, and culminated in a major report by the BCA in May 2005. The regulatory backlash was broadly-based, but had a particular focus on regulation of financial services, taxation, employment and the environment. Among these, the Financial Services Reform Act appears to have been the last straw for some leading BCA members, who saw the promise of a light-handed, principles-based policy regime being compromised by the emergence of an increasingly intrusive and prescriptive regulatory apparatus.

Following wide-ranging consultations and analysis, the Taskforce became convinced that many of the concerns raised by business and other organisations were fully justified. Australia clearly could not function well without regulation. However, in the Taskforce's view, there is too much regulation and, in many cases, it imposes excessive and unnecessary costs on business. In so doing, it also imposes costs on the wider Australian community, through higher prices, less innovation and reduced choice.

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We identified a forward agenda comprising some 100 specific reforms to existing regulation and proposed that about another 50 areas of regulation be investigated in greater depth. In addition, we considered how the processes and institutions responsible for regulation could be improved to avoid the same problems simply re-emerging. While this is the smallest part of our report, and largely overlooked in initial press reporting, the Taskforce saw it as being the most important in the long term and I will spend proportionately more time on it here.

Before looking at the regulatory problems identified by the Taskforce, however, I feel that a little perspective is in order. Regulation in Australia undoubtedly needs reform and it is important that this be given priority by our governments. However, this country's regulatory regime, taken as a whole, is by no means a poor one by international standards. In part, that is a reflection on the state of regulation in other countries. For example, it is no surprise that a highly-regulated country like the Netherlands is at the vanguard of regulatory reform in Europe. And while Australia's federation brings with it some unnecessary and costly duplication and fragmentation, European countries have an arguably more onerous regulatory overlay emanating from Brussels. In the United States there are eight times as many state governments as we have, each exercising substantial independent regulatory powers. The regulatory morass in most developing countries is legion.

The second reason for our above-average performance internationally is that we have undergone considerable regulatory reform over the past couple of decades, directed at removing long-standing impediments to competition and structural efficiency (through trade liberalisation, the NCP and industrial relations reforms). According to the OECD, we now have the least market-restrictive regulatory environment among member countries. However, in undertaking reforms to reduce or remove the major distortions in our economy, we appear not to have paid sufficient attention to the growth of new regulation and, especially, the costs imposed via firm compliance.

The bottom line is that Australia cannot afford to take too much comfort from international comparisons. As a relatively small scale, trade-dependent economy, lacking proximity to major markets, we need to do whatever we can to drive any unnecessary costs out of our economy. The fact that many other countries are now pursuing reform themselves only adds to this need.

## **The stakes are high**

Quantifying the aggregate burden of 'red tape' on the Australian economy is no easy task. The ACCI's estimate of some \$86 billion understandably got much airplay when it was released during our review, but on inspection lacked solid

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foundations. That said, even more conservative, survey-based estimates, though confined to small and medium enterprises, are in the tens of billions of dollars. What we don't know from these estimates, however, is the extent of *unnecessary* costs. Some regulatory compliance activities are unavoidable or would have been undertaken by business anyway. These should be netted out. The Taskforce had no basis for doing that in the time available. But even if only 20 per cent of the estimated gross compliance costs were attributable to red tape, that is still a sizeable amount.

The most compelling evidence of excessive or unnecessary regulatory burdens on business was at the 'micro' level and supplied by businesses themselves. The costs of regulation to business involve not just extra time, paperwork and capital outlays, but also the diversion of management from the proper business of the firm. Submissions indicated that compliance matters can consume up to 25% of the time of senior management and boards of large companies. The impact is even greater for small businesses, which generally do not have the in-house capacity to deal with and keep abreast of the regulatory morass. Regulation can thus stifle innovation and crowd out productive activity in the 'engine room' of Australia's economy. At the same time, it involves substantial government resources and thus significant burdens on taxpayers. For example, the administrative expenses of 15 of the Australian Government's regulatory agencies was around \$2 billion in 2003-04, with some significant supplementation in this year's budget.

In short, having made important progress in many policy areas, Australia risks undermining these gains through burgeoning regulatory imposts on business. It is important both for business and the wider community to introduce reforms that can provide relief on a sustainable basis.

### **Culling the 'stock'**

The stock of regulation in Australia has expanded greatly over recent years in response to a variety of social, environmental and economic issues and pressures. For example, since 1990 the Australian Parliament has passed more pages of legislation than in the nine preceding decades since Federation. And that is just the tip of the iceberg, with bulging sub-strata of delegated and *de facto* regulation. Add to this the comparable regulatory stockpiles at State and Territory level and the myriad of detailed Municipal regulations — not to mention the 1400 or so regulatory bodies overseeing it all — and one is left wondering how, if all this is necessary, people ever *managed* in earlier decades?

Although the Taskforce was limited to dealing largely with Commonwealth regulation, this still amounted to many thousands of instruments. The breadth of the

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Taskforce’s remit, and the limited time available to it, meant that we had to rely on business to help identify areas of regulation where the burdens were potentially excessive. Now, in the past business has typically been good at complaining about regulation, but not so good at identifying specific problems or solutions. The Taskforce therefore issued a challenge to business groups to do better.

Business responded very positively, putting forward a wide array of suggestions in some 150 submissions. The Taskforce examined them all, and consulted relevant government agencies on the implications and workability of the more prospective ones. An important consideration was to ensure that any proposed changes to regulation did not simply shift costs from business to government or other sections of the community. To recommend a reform, we needed to be satisfied that it would generate a net benefit to society as a whole.

At the same time the Taskforce was determined not to overlook any proposed reform which did look prospective, even if it was not of major significance in itself. Just as the burdens on each business are cumulative, so too can be the relief gained from seemingly minor regulatory reforms.

## **Priority reforms to existing regulation**

That said, we went to some trouble to identify what we saw as the priorities among the 178 recommendations in our report, in terms of their likely impact on individual business and the number of businesses potentially affected. These covered a variety of areas of regulation. However, they shared some common themes in relation to compliance issues or burdens, and the actions needed to address them.

### *Reducing regulatory creep*

The most effective relief from regulatory burdens, of course, is not to be covered by regulation in the first place. We identified a number of regulations that appeared to catch more activity than warranted, or where the coverage of smaller businesses had become more extensive over time as the real value of thresholds had been eroded by inflation. Such ‘regulatory creep’ can have pervasive effects, particularly on small business.

The Taskforce considered that priority action was needed to restore or raise the thresholds in such areas as:

- goods and services tax registration requirements;
- fringe benefits tax minor benefits reporting;
- quarterly pay as you go withholding;

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- the superannuation guarantee exemption (SGE); and
  - the definition of ‘large proprietary company’ for the purpose of determining the stringency of financial reporting requirements.

The first three of these reforms could involve some loss in government revenue, but they offer broad-ranging reductions in compliance costs, particularly for small business, that we believe more than warrant the direct reduction in tax revenue entailed. In any case, potential tax revenue losses from addressing onerous compliance requirements should not be regarded as a ‘cost’ of reform. If need be, foregone revenue can be made up through much more efficient means.

Of these proposals, the only one to excite much controversy has been the raising of the SGE threshold, which some have seen as depriving too many workers of potential retirement income. However, the Taskforce’s proposal only restores the real value of the threshold to its level when introduced in 1992. Below these wage levels, the costs to employers of making small, often one-off, contributions appeared disproportionate to the potential benefits to employees. For example, many contributions made to itinerant farm workers are never claimed. To the extent that it reduces costs to employers, increasing the threshold may also encourage greater employment of affected workers.

#### *Inter-jurisdictional overlaps and inconsistencies.*

While the Taskforce identified some overlapping and inconsistent requirements between different areas of Australian Government regulation, the more vexed instances occur across jurisdictions. Of these, the undisputed priority is the multiple regimes for occupational health and safety and the need to implement nationally-consistent OH&S standards, in particular by adopting a consistent definition of ‘duty of care’.

Other reforms warranting priority attention include:

- completing bilateral agreements under the Environment Protection and Biodiversity Conservation Act;
- finalising and implementing the intergovernmental agreement on building regulation;
- developing a model for achieving national consistency in workers’ compensation arrangements; and
- harmonising the administration of payroll tax, stamp duty and other state taxes.

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### *Removing regulation that is redundant or not justified by policy intent*

The Taskforce identified only a few regulations that were clearly ‘redundant’, in the sense of having fallen into disuse or duplicating an existing requirement. More regulations were assessed as not being justified by the policy intent behind them. In some cases, poor regulatory design has given rise to unintended or even perverse consequences. In others, the regulation has become ineffective or unnecessary as circumstances have changed over time. The upshot is that businesses continue to incur compliance costs for no good reason.

Within this category, some of the reform priorities that we identified include:

- rolling the Medicare Levy into income tax rates;
- curtailing country of origin food-labelling requirements;
- pursuing identified reforms to native vegetation and biodiversity regulations;
- implementing identified measures to reduce red tape on general practitioners; and
- further refining the regulation of financial services.

### *Reducing reporting and recording burdens*

The Taskforce was alerted to numerous areas of regulation where recording and reporting obligations on business were clearly excessive. Businesses often face multiple demands from different arms of government for similar information, as well as information demands that are excessive or unnecessary.

High priority should be given to a number of reforms which have the potential to significantly reduce compliance burdens across a range of businesses. They include:

- developing a ‘whole-of-government’ business reporting standard to make it easier for businesses to submit information to multiple government agencies;
- implementing and extending the Accredited Client Program for importers, to reduce the paperwork and physical checks of consignments at the time of entry;
- limiting fringe benefits tax reporting to cover remuneration benefits only; and
- allowing companies to make annual reports available on the internet and only provide hard copies if requested.

There are also some sector-specific reforms that deserve priority attention, including:

- in the health sector, introducing single Medicare provider numbers for each general practitioner;

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- in the education sector, rationalising reporting requirements for universities and also for non-government schools; and
  - in the finance sector, aligning breach reporting requirements imposed separately by the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission.

### *Aligning definitions and criteria*

There is a surprising degree of variation in definitional and operational reporting requirements across areas of regulation. Some of these are a minor source of annoyance. Others, however, create considerable uncertainty, require variations in products or procedures for businesses operating in different jurisdictions, and can add materially to the risk of unintended compliance breaches. Stand-outs for reform include the need to:

- align the definitions of ‘employee’ and ‘contractor’ used for superannuation guarantee and pay-as-you-go withholding purposes; and
- limit the use of ‘uniquely Australian’ variations from international standards in such areas as chemicals and plastics and therapeutic products.

Other common themes that emerged across different areas of regulation that explained excessive burdens on business included:

- *Specific regulations duplicating generic regulation*, in ‘belt and brace’ fashion. For example, the overlap of corporate governance requirements imposed by ASIC, the Australian Stock Exchange and APRA; and the imposition of Commonwealth building quality certification procedures in aged care facilities on top of Building Code of Australia requirements.
- *Excessive prescription and micromanagement*, where such detail and interference is not warranted. For example, the prescriptive nature of the capital gains tax small business concessions in relation to controlling individuals; and the level of prescription in the financial services reforms regime, which has led to lengthy product disclosure statements and other documents.
- *Blunt or poorly targeted regulation*. For example, the Building Code of Australia being used to deliver standards beyond minimum effective standards, and non-compliance with reporting requirements resulting in ineligibility for school funding.
- *A lack of timeliness of regulatory decisions* creating and prolonging uncertainty for business. For example, delays in securing short-term business migration visas which commonly occur can disrupt business production and investment processes.



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## Priorities for further review

In the course of the review, the Taskforce identified many more regulatory problem areas than it could confidently make specific recommendations about. As noted, some proved too complex to assess in the time available. In other cases, measures to reduce compliance costs also raise significant policy issues. To deal with such cases, the Taskforce recommended over 50 reviews.

Of the reviews covering mainly Australian Government regulation, the identified priorities include:

- *Superannuation tax provisions*, which are extremely complex and impose high compliance costs on business, requiring comprehensive reform.
- *Anti-dumping regulations* and the *wheat export ('single desk') arrangements*, for which scheduled reviews under the National Competition Policy process have yet to be consummated.
- *Directors' liability provisions under the Corporations Act*, which appear to be creating uncertainty and driving excessively risk-averse compliance behaviour.
- *Privacy laws*, the requirements of which contribute significantly to the cumulative regulatory burden on business and also constrain beneficial information-sharing by government agencies.
- *Private health insurance regulations*, which are very complex and inhibit innovation in models of care.

Of the reviews involving Commonwealth-state overlaps, or focusing principally on state and territory regulation, priorities include:

- *Food regulation*, where, despite the adoption of an intergovernmental agreement in 2001, the regulatory framework remains complex, fragmented and inconsistent across jurisdictions.
- *Consumer protection policy and administration*, which involve growing divergence among jurisdictions.
- *Chemical and plastics regulations*, which envelop the sector in a complex web, significantly impairing its competitiveness.
- *Childcare accreditation and regulation*, where there is a need, among other things, to examine practical ways of reducing overlapping regulations between governments.
- *Energy efficiency standards for premises*, with a recently announced increase in national standards for new homes appearing premature given doubts about their cost-effectiveness.

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All of the interjurisdictional reviews should focus on options for achieving harmonisation, or at least greater consistency. They should also include consideration of the scope to rationalise the number of regulatory bodies involved. There would be value in CoAG sponsoring the reviews, although in some cases the Australian Government could take the initiative in consultation with state and territory governments.

## **Tackling the underlying causes**

Reforms in all these areas of regulation would clearly yield a significant payoff to business and the wider community. However, that was also true of the Bell Taskforce's report of a decade ago. Most of its recommendations were implemented, but the problems have clearly not gone away.

While periodic culling of bad regulation is beneficial, in the meantime the costs of living with such regulatory deficiencies can be high. Moreover, changes to even badly-designed regulation to which business has eventually adjusted can bring costs of their own. 'Prevention is better than cure' was a common refrain from business groups. Most submissions urged us to address the underlying causes of excessive or unnecessarily costly regulation and many made suggestions, based on their own experiences both with regulation and regulators.

It would be idle to suggest that such issues were straightforward or that this (or any other) taskforce could come up with a simple solution. On the contrary, Australia's regulatory problems, in common with those of many other countries, are entrenched and multidimensional. Achieving a lasting improvement will require actions at different levels and over a considerable period of time.

Most regulation did not just *happen*. As one Departmental Secretary expressed it, "no regulation is an orphan". Each got there because a problem or need was brought to government's attention, to which it responded. There is of course nothing inherently wrong with that. That it is what governments *do* in democratic societies. And more affluent and well-informed societies tend to be more demanding of their governments. That too is only natural. The problem is one of proportion, both in society's demands and in governments' responses.

A fundamental driver of the demand for regulation in recent years has been increasing 'risk aversion' in many spheres of life. Regulation has come to be seen as a panacea for many of society's ills and as a means of protecting people from inherent risks of daily life. Any adverse event — especially where it involves loss of life, possessions, amenity or money — is laid at government's door for a regulatory

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fix. The pressure on government to ‘do something’ is heightened by intense, if short-lived, media attention (sometimes referred to as the ‘Alan Jones Syndrome’).

These societal pressures augment more traditional demands for regulation, including those of interest groups lobbying for regulation to achieve particular ends. Business groups have traditionally been active players in this game.

In responding to such pressures, governments themselves are often attracted to regulatory solutions as a tangible demonstration of government concern. Regulatory solutions are also more convenient politically, because the costs are typically ‘off-budget’, diffuse and hard to measure. Moreover, each regulatory solution tends to be devised within individual government agencies. Within such policy ‘silos’, the cumulative impact of regulation across government is poorly understood and rarely taken into account.

In this climate, a ‘regulate first, ask questions later’ culture has developed within governments. Even where regulatory action is clearly justified, options and design principles that could lessen compliance costs or side-effects appear to be given little consideration. Further, agencies responsible for administering and enforcing regulation have tended to adopt strict and often prescriptive or legalistic approaches, to lessen their own exposure to criticism if things go wrong. This, in turn, has contributed in some areas to excessively defensive and costly actions by business to ensure compliance.

In sum, the regulatory problems that we observe, and that have re-emerged after successive red tape cutting exercises, cannot be blamed on government alone. They reflect strong societal pressures. That said, regulation is *made* by government, and most examples of inappropriate regulation can be sheeted home to deficiencies in the processes and institutions whereby governments respond to these demands.

### *Principles of good regulatory process*

Good regulatory process is demanding but it is not rocket science. In the Taskforce’s view, six principles are integral to it:

- Governments should not act to address ‘problems’ through regulation unless a case for action has been clearly established. This should include evaluating and explaining why existing measures are not sufficient to deal with the issue.
- The range of relevant policy options need to be assessed within a cost-benefit framework (including analysis of compliance costs and, where relevant, risk).
- Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted.

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- Effective guidance should be provided to regulators and regulated parties to ensure that the policy intent of the regulation is clear, as well as what is needed to be compliant.
  - Mechanisms such as sunset clauses and periodic reviews need to be built into legislation to ensure that regulation remains relevant and effective over time.
  - There needs to be effective consultation with regulated parties at the key stages of regulation-making and administration.

On the evidence available to our review, it is apparent that these requirements for good regulatory process have not been well discharged. Business groups are justified in seeing this as a major contributor to the problems they face. Governments need to publicly endorse the principles and take action to embed them in regulatory practice.

### *Better analysis and consultation*

At face value, poor regulation often reflects poor analysis. The Taskforce therefore supported the government's decision in announcing its review to require more rigorous cost-benefit analysis of regulatory proposals. It is important, however, that this is applied to different options and includes quantification of compliance costs and analysis of risk where relevant.

Poor analysis is generally only a symptom, however, of more deep-seated cultural and other problems in policy development. A key deficiency that needs to be addressed is consultation. Regulation without consultation is like a shot in the dark. Yet a recent government survey found that only one-quarter of regulatory agencies consult outside government when developing regulations. As business has demonstrated, the consultation that has occurred has been sporadic and half-hearted in many cases, and often too late or leaving too little time for business to respond. This smacks of 'government knows best' and has been a major cause of some of the most costly regulatory decisions. (A contemporary example, hopefully caught in the bud, is the drafting of anti-money laundering legislation.) A whole-of-government policy on consultation is called for, setting out best practice principles for effective and timely consultation across the regulatory cycle.

### *Enforcing good regulation-making*

Given the pressures and incentives for government to 'regulate first', mechanisms to enforce good regulation-making processes are essential. To this end, following the Bell Report in 1997, government agencies proposing any regulation with potential impacts on business have been required to prepare a regulation impact

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statement (RIS), with compliance monitored by the Office of Regulation Review. Business expressed strong support for these arrangements, but argued that they needed strengthening. The Taskforce endorsed this view. It considered that this should be achieved by:

- ‘raising the bar’ on the standard of analysis considered acceptable for a regulation impact statement to be approved (we indicated what this should entail); and, most importantly,
- making it harder for a regulatory proposal to proceed to a decision (for example, in Cabinet) if the government’s requirements for good process have not been adequately discharged.

### *Ensuring good performance by regulators*

Many business groups considered that the culture and behaviour of regulators were compounding the problems they faced with regulation itself. The Taskforce was inclined to agree. But it also recognised that regulators are only human. Like anyone else, they respond to the incentives in their operating environments. As indicated, these influences have tended to promote unduly risk-averse approaches. Changes are needed to promote a more balanced approach.

In a number of areas, it was apparent that regulators needed clearer guidance about the policy intent behind regulation, including in enabling legislation. Too much legislation is too vague about its objectives and the principles or practices which regulators should apply to satisfy them. The foreshadowed Ministerial Statements of Expectations, following the Uhrig Review of governance of statutory bodies, should help. They will be of particular benefit in guiding the financial market regulators. The responsiveness of regulators to the need for a balanced approach would also be assisted by annual reporting against a wider range of performance indicators that reflect this balance.

To enhance consultation by regulators and their interaction with stakeholders, among other things:

- standing consultative bodies comprising senior stakeholder representatives should be established or maintained; and
- each regulator should have a code of conduct, setting out the rights and responsibilities of the agency and those it regulates, and report annually against it.

Regulated entities should also have timely access to internal and third-party review on the merits of key decisions. Regulators are not omniscient and regulatory processes and institutions should allow for that.

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## The Government's response (thus far)

The Government released the Taskforce's Report, *Rethinking Regulation*, on 7 April. In announcing their initial response, the Prime Minister and Treasurer observed:

“Over-regulation is a major concern to all businesses and especially small businesses. Effective regulation is also an important tool for delivering Australia's social and economic goals. We are committed to getting the balance right. ... This interim response [to a range of recommendations of the Taskforce] is a downpayment on our commitment to reduce regulatory burdens on business.” (*Joint Press Release*).

The Government's 'downpayment' was a substantial one, covering 86 of the 178 recommendations in our report. In all these cases, our recommendations were accepted. Indeed, nothing in the report has yet been ruled out. Both the Report and the Government's response appear to have been well received by business, including (hard to please) small business groups. Most press accounts have also been supportive, although possibly more muted in their coverage than if the Government had rejected some of the Taskforce's findings!

The Government was criticised by some in the press, and by the Opposition, for a perceived lack of 'concrete' actions. Only about 10 per cent of its responses involved the immediate implementation of changes. However, many of the 86 recommendations were not amenable to early action or the Australian Government acting on its own account. For example, about one-third required it to take a leadership role, either through giving directions or advice to regulatory agencies, or within CoAG or other interjurisdictional forums.

That said, the Government clearly has some way to go to achieve successful implementation in most of the downpayment areas. And there remains much to be done, of course, in relation to the balance of the report. My observations (from the sidelines) suggest that, across government, considerable efforts are currently being directed to these ends.

### *Culling the stock*

The interim response by the Government ranged across all the areas held responsible for excessive regulatory burdens. There was a particular focus on 'regulatory creep' — including by raising the thresholds for taxation and corporate reporting, etc. — and areas of overlap or inconsistency across jurisdictions (including OH&S and the EPBC Act). Indeed, of the ten examples of priority reforms highlighted in the report's overview, only two were not addressed in the interim response — and one of these, the freezing of country-of-origin food labelling,

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has since been implemented by the Ministerial Council on Food Regulation (*Joint Communiqué*, 5 May 2006).

In a couple of areas, the Government actually went further than the Taskforce had required or anticipated. One example is the halving of fees for business incorporation — which, as the PM recognised, complemented the industrial relations agenda. Others, announced in the 2006-07 Budget, are the (welcome) simplification of the tax rules for superannuation, and certain measures to reduce tax complexity for small business.

The policy area where there was least action in the interim response (only 1 or 2 out of 25 recommendations) was health and ageing. However, there has been a separately announced initiative to extend private health insurance coverage to more cost-effective out-of-hospital settings, which the Taskforce had recommended be examined.

This prompts me to observe that the achievements of such a review should not be judged solely by the formal or explicit responses to its recommendations. Such a review can be a catalyst for beneficial initiatives that may not be formally acknowledged as having a link. Possible examples in our own case include the Board of Taxation's scoping study on reducing small business compliance costs, and the privacy regulation review announced by the Attorney-General on 31 January, which is addressing key issues raised in our report. It would also seem that the current 'second wave' review of corporate and financial services regulation was given impetus by the Review and it picks up a dozen of our specific recommendations. Other examples can be found among recent initiatives announced by regulators (see below).

### *Controlling the flow*

Perhaps the most promising aspect of the Government's interim response was its broad endorsement of the identified need for systemic and institutional reform. At the joint press conference, the Treasurer began by observing:

“Not only today are we announcing a downpayment on the reduction of red tape but this report also recommends a process, a framework by which new forms of regulation can be assessed and we can guard against new, excessive regulation being introduced in the future. And I think that process coming out of this report will be one of the long term structural reforms in relation to easing the business environment in Australia.” (Transcript, p. 2)

In its interim response, the Government accepted 18 of 29 recommendations for systemic reforms across government, as well as a number of such recommendations relating to the operations of specific regulators (mainly APRA and ASIC).

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Importantly, the Government endorsed the overarching principles of good regulatory process identified by the Taskforce (see above). In particular, it agreed to ‘raise the bar’ on the analytical and procedural requirements on regulation-makers – including through the development of a whole-of-government policy on consultation – and accepted that failure to comply with these requirements under (re-vamped) RIS processes should preclude a regulatory proposal from going forward to Cabinet or other decision-maker.

What this will mean, when implemented, is that no regulation can be promulgated that, among other requirements:

- fails to document and explain why existing regulations would not suffice;
- has inadequate risk analysis and assessment where this is required; and
- fails to quantify (estimate in dollar terms) the compliance costs of proposed options.

If followed through and enforced, this would all constitute a landmark change in the workings of government. To be confident of this, we will have to wait until the government presents more detail about implementation mechanisms. To my mind, there are two critical areas in this respect.

- One is the development of the whole-of-government policy on consultation. This presents a number of challenges and will require extensive public consultations in itself.
- The second is the design of gate keeping arrangements to stop regulatory proposals that ‘fail’ due process from getting to Cabinet. In principle there is provision for this to happen now, but it generally doesn’t (as is evident from the failed RISs documented in the Productivity Commission’s annual report *Regulation and its Review*). It will require strong political support and governance arrangements to protect a ‘gate keeper’ from the inevitable pressures to turn a blind eye, particularly on significant matters.

As noted, from the outset of our review, the Government had already decided to “put in place arrangements that will involve a more rigorous use of cost-benefit analysis ... before new regulations are introduced.” Such arrangements are still to be settled. Key issues to resolve include the training of officials in what for many departments will be new territory, and enhancing the capacity of the ORR to advise on and assess agencies’ performance. This will take time.

A welcome feature of the Government’s new emphasis on the role of cost-benefit analysis is a requirement for regulation-makers to employ an IT-based spreadsheet methodology for identifying and quantifying certain business compliance costs. This had its origins in the Netherlands and has been further developed by the Office



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of Small Business in DITR. If adequately adopted (\$1.5 million has been allocated for this purpose in the Budget) it would ensure that regulators assess compliance costs as a matter of course, and would oblige them to consult those who bear those costs. That said, the ‘Business Cost Calculator’ represents an input to, but not a substitute for, a regulation impact statement. There appears to be some confusion about this within government. There is also evident scope to integrate the Calculator much better within the RIS process. We should not lose sight of the fact that regulations have benefits as well as costs, that not everything that matters is necessarily quantifiable and, ultimately, that good regulatory process has more ingredients than a cost-benefit analysis.

In its interim response, the Government also accepted most of our recommendations to improve the performance of regulators. This includes providing greater guidance about handling risk, tradeoffs in objectives and achieving proportionality. An early test of this will be the Statements of Expectations that are currently being formulated and will be transmitted in July. However, implementation of some of the Taskforce’s recommendations will depend on the regulators themselves.

At this level, the ‘catalytic’ impact of the review, referred to earlier, has again been evident. For example, even before the Taskforce reported, ASIC and APRA had undertaken a number of initiatives seemingly in response to submissions put to our review.

The most significant actions *since* our report was delivered are ASIC’s ‘Better Regulation’ initiatives, announced on 3 May. Although there is no direct reference to our report, the initiatives include measures to enhance ASIC’s transparency (including better guidance to regulatees and a service charter), to reduce overlap and duplication with APRA, and to facilitate engagement with stakeholders through a Business Consultative Panel. All of these featured heavily among our recommendations.

The one systemic area where there was no explicit ‘downpayment’ was in relation to stricter provisions for sunset clauses and post-implementation reviews. The latter should be essential where exceptional circumstances get regulatory initiatives off the hook of normal RIS compliance. The bureaucracy generally finds such provisions onerous, and the original sunset provisions in the Legislative Instruments Act were no doubt watered down for that reason. However, the Taskforce’s observations confirmed that many regulations have unintended consequences that are only revealed over time. Also many regulations do become less effective (or even unnecessary) over periods as short as five years. It is important to have an in-built reappraisal mechanism if regulations are to be cost-effective over time. The costs to government agencies can be reduced by designing ‘filters’ to ensure that reviews focus only on areas with a likely net pay-off.

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## Moving forward

Last October, when the Government announced that a taskforce would review business red tape, some business groups were understandably a little sceptical. “What will another review achieve? Especially in 3 months?” Nevertheless, the cooperation and input received from business was substantial and of high quality. The Taskforce sought to do this extensive input justice in our report, and I believe the Government has been similarly motivated in its response thus far.

That said, we will have to wait for the next instalment on the Government’s ‘downpayment’, expected in late-July, to properly judge the outcome. About one-half of the Taskforce’s recommendations remain to be addressed and, of those that have been, many remain to be implemented. Critical to the effective implementation of the integrated package of reforms proposed by the Taskforce, will be the institution of clear processes to carry them forward. These should include not only a forward agenda of specific reforms and reviews, but also indicative timelines, and institutional arrangements to monitor and facilitate progress.

All of this presents considerable challenges, both for the Australian Government and for CoAG, and will require strong political commitment and support. The Government’s next response in July provides an important further opportunity for the political leadership that is needed.

As the Taskforce emphasised in concluding its report, that response should demonstrate government’s commitment to the principles of good regulatory process. In particular, it should convey clearly that government will not take regulatory action (including in reaction to perceived ‘crises’) without careful assessment of all the options and only after appropriate consultation. It should also clarify in the public mind that regulation is not a panacea, and that it cannot seek to eliminate risk without exposing Australians to even greater threats to their wellbeing in the years ahead.

Finally, were these principles to be reflected in the approach of all Australian governments to their regulatory responsibilities, we are confident that this country could build on the successful reform efforts of the past, and better meet the undoubted challenges of the future.