OECD REVIEWS OF REGULATORY REFORM

GOVERNMENT CAPACITY TO ASSURE HIGH-QUALITY REGULATION IN AUSTRALIA

ORGANISATION FOR ECONOMIC CO-OPERATION

AND DEVELOPMENT

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FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *Government Capacity to Assure High Quality Regulation in Australia* analyses the institutional set-up and use of policy instruments in Australia. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Australia* published in 2010. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 23 member countries as part of its Regulatory Reform programme. The programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses, drawing on the 2005 *Guiding Principles for Regulatory Quality and Performance,* which brings the recommendations in the 1997 *OECD Report on Regulatory Reform* up to date, and also builds on the 1995 *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation.*

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness and on specific issues, such as multi-level regulatory governance and environmental policy for Australia. These are presented in the light of the domestic macro-economic context.

This report was prepared by Gregory Bounds in the OECD Public Governance and Territorial Development Directorate. It benefited from comments from Josef Konvitz and Stéphane Jacobzone in the OECD Public Governance and Territorial Development Directorate, and comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Australia. The report was peer reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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ABBREVIATIONS

ANAO	Australian National Audit Office
APRA	Australian Prudential Regulatory Authority
APSC	Australian Public Service Commission
ASIC	Australian Securities and Investments Commission
BCA	Business Council of Australia
BCC	Business Cost Calculator
BRE	Better Regulation Executive, United Kingdom
CAC	Commonwealth Authorities and Companies Act 1997
CBA	Cost Benefit Analysis
COAG	Council of Australian Governments
DPD	Deregulation Policy Division
FMA	Financial Management and Accountability Act 1997
LIA	Legislative Instruments Act 2003
MAC	Management Advisory Committee
NAO	National Audit Office, United Kingdom
OBPR	Office of Best Practice Regulation (successor body to the ORR)
OLDP	Office of Legislative Drafting and Publishing
OPC	Office of the Parliamentary Counsel
ORR	Office of Regulation Reform
PC	Australian Productivity Commission
RIA	Regulatory Impact Analysis
RIS	Regulation Impact Statement
SCM	Standard Cost Model

REGULATORY REFORM IN A NATIONAL CONTEXT

The administrative and legal environment for regulatory reform in Australia

Australia is a democratic federation of six states and two territories. Its legal and parliamentary processes were inherited from British traditions. The Australian federal government is also referred to as the Commonwealth government of Australia. In this paper the term federal regulation is used interchangeably with Commonwealth regulation. Regulation is made at the federal level as well as by the states and territories, in the form of legislation and subordinate legislation and at a local government level as regulations and by-laws.

Australia has a long and successful history in regulatory reform, but there is no room for complacency. The challenges wrought by the global financial crisis have increased the pressure on governments to focus on short term issues and increased the risk that longer term reform strategies are given less attention. Yet it is the long term policy initiatives designed to build more efficient and effective regulatory frameworks that are required to underpin the resilience and flexibility of the economy to respond to external economic shocks. More than ever Australia needs to ensure that its regulatory management systems are efficient and effective and capable of delivering innovation. Innovation is required in the way that regulation is designed and performs to ensure that it supports innovation in the economy.

Australia's recent reform history demonstrates a bipartisan commitment to increasing the effectiveness of systemic quality measures and recognition that systems for regulatory management are necessary to manage the flow of regulation. Successive governments have introduced robust institutional measures of oversight and quality control. There have been large scale reform strategies such as the National Competition Policy which have been effective in delivering results, as well as significant periodic reviews of regulatory sectors and of the systems for managing the stock and flow of regulation. These reviews have provided insights and identified areas for improvement in the regulatory management frameworks; they have helped to highlight the gap between the ambitions of the programs and what is delivered in practice, and incrementally improvements have been made particularly to the standards of analysis for new regulatory proposals.[1]

Despite this it is a continuing challenge to marry the stated aims for regulatory management with what occurs in practice at the level of regulators. Most governments in OECD countries are grasping with the challenge of making regulation more efficient and effective by reviewing and reforming their regulatory management systems. There is some convergence around the use of specific tools, institutions and policies promoted by the OECD to achieve better regulation, for example with the use of regulatory impact analysis for new regulation and the setting of burden reduction targets. International comparisons support the view that in a number of countries, including Australia, these efforts are delivering results, with lower perceptions of burdens and fewer hurdles for basic business operations. But it is nonetheless common that even where sophisticated regulatory management systems have been put in place, regulatory costs and burdens remain an issue in most countries.

Sometimes this is an issue of design, but it is also because regulatory quality initiatives require cultural acceptance and have to influence the behaviour of regulators and policy makers to have practical effect. Systems may appear well designed on paper but not change behaviour to the extent that is required at the local level and where the interface with citizens and businesses occurs. Reforms can quickly lose their momentum when political attention is diverted. The necessary political capital is often only invested in the announcement of reform targets, and it can be difficult to find support for the ongoing process of ensuring that standards of regulatory quality are complied with and results are delivered on a day to day basis with a customer-oriented perspective.

In Australia the current government is trying to achieve more than the marginal gains from periodic reviews and reforms. Its ambition is to establish a culture that promotes continuous improvement in regulation and prevents backsliding. This approach has considerable merit. It seems to be the appropriate strategic goal to achieve progressive improvements to the efficiency and effectiveness of regulation, and given the foundations that are in place it appears to be achievable.

The task is neither simple nor easy. But there is opportunity, political will and the right features in the administrative framework to achieve ambitious goals in the area of regulatory improvements in Australia. A number of issues that appear intractable in other OECD countries are of a smaller scale here. Many of the pre-conditions for successful regulatory reform have already been put in place. There appears to be a strong culture of professional commitment among staff in the public administration, there is a highly skilled and professional public administration, with experience of working with regulatory reform in government and a strong and well embedded institutional framework. Australia is in an advantageous situation compared to other OECD countries and has the opportunity to get traction with its regulatory reform agenda. Australia has made difficult reforms in the past which have demonstrated successful results, and this experience has built a strong institutional framework for reform, a familiarity with the processes of reform and a broad acceptance of the need for reform and of its design. The current government has invested strong political capital in the reform process and displays a confidence that it is necessary and can deliver results.

In many respects Australia is a model framework among OECD countries for the application of regulatory reform strategies. With a few exceptions the key features for regulatory management that are promoted by OECD have been adopted and reinforced over time, and a number of novel approaches have also been developed. But the experience of Australia also demonstrates that constant and renewed efforts are necessary to deliver results. Australia like all other OECD countries has found that the process of reform itself requires constant reinvention. Considering all the hard work that has already been done in Australia to construct robust regulatory systems the future challenge is to identify mechanisms that are effective at promoting innovation in regulatory design and to achieve greater ambitions for the development and delivery of regulation that is more effective and efficient. Building on the foundations that Australia has constructed it is well placed to select from the examples of peers within the OECD community to identify strategies that it can adapt to its own circumstances and to refine its current processes.

This chapter is largely confined to a discussion of the regulatory management and reform arrangements that are in place at the federal level of government in Australia, also referred to as the Commonwealth government. There are constitutional limits on federal power, and as a federated nation, the governments of the sovereign states and of the territories also play a significant role in the management of regulation in Australia. The institutional and policy frameworks for the role of the states and territories and a full consideration of Australia's regulatory system will be discussed in another chapter in the review of regulatory reform in Australia.

DRIVERS OF REGULATORY REFORM: NATIONAL POLICIES AND INSTITUTIONS

Regulatory reform policies and core principles

The 2005 OECD *Guiding Principles for Regulatory Quality and Performance* recommend that countries adopt at the political level broad programmes of regulatory reform that establish principles of "good regulation" and clear objectives and frameworks for their implementation. Regulatory policy has been broadly defined by OECD as an explicit, dynamic, continuous and consistent "whole-of-government" policy to pursue high-quality regulation.[2] Regulatory policy is integral to a formal, reliable process to link policy goals and policy actions with regulation to support the policy action.

An effective regulatory policy has three basic components that are mutually reinforcing: it should be adopted at the highest political levels; contain explicit and measurable regulatory quality standards; and provide for continued regulatory management capacity.[3]

Box 1. Good practices for improving the capacities of national administrations to assure regulatory quality

The 2005 OECD *Guiding Principles for Regulatory Quality and Performance* capture the dynamic and ongoing whole-of-government approach to implementation of regulatory quality. Based on the 1995 *Recommendation of the OECD Council on Improving the Quality of Government Regulation*, on the *Report on Regulatory Reform*, welcomed by Ministers in May 1997, and on the OECD work of country reviews and monitoring exercises, the *Guiding Principles* form the basis of the analysis undertaken in this report:

a) Building regulatory management system

1. Adopt regulatory reform policy at the highest political level.
2. Dynamic dimension of regulatory policy.
3. Establish explicit standards for regulatory quality and principles of regulatory decision-making.
4. Build regulatory management capacities.

b) Improving the quality of new regulations

1. Regulatory Impact Analysis.
2. Systematic public consultation procedures with affected interests.
3. Using alternatives to regulation.
4. Improving regulatory co-ordination.

c) Upgrading the quality of existing regulations

1. Reviewing and updating existing regulations.
2. Reducing red tape and government formalities.
3. *Ex post* evaluation.

Recent and current regulatory reform initiatives

A recent history of regulatory reform arrangements in Australia

Australia has a relatively long experience of the application of regulatory management systems to improve regulatory quality supported by institutional arrangements. There has been significant reform experience in Australia over the last twenty years (see Box 2). A selective discussion of some of these initiatives illustrates how the governance arrangements for the management of regulatory quality have been developed over time and strengthened and deepened by successive Australian Governments.

Among OECD countries Australia was a very early adopter of institutions for the oversight of regulatory quality and the use of Regulatory Impact Analysis (RIA). For example, in 1985 Australia was already one of only eight OECD countries with a formal requirement for regulatory impact analysis (OECD, 1997, b:23; OECD, 2007). The Business Regulations Review Unit (BRRU) was established in 1985 within the Federal Department of Industry Science and Technology with responsibility for advising the Government on proposed changes to regulation. From 1986, a directive within the Cabinet Handbook that sets out the administrative procedure for the Cabinet required that agencies and departments were to refer all regulatory proposals to the BRRU for consideration at the earliest opportunity, whether or not the regulatory proposal was to be considered by Cabinet. RIA was also required to be undertaken for Bills and lower level rules with impacts on business[4] and a Regulation Impact Statement (RIS) was required to accompany proposals considered by Cabinet.

Box 2. Milestones in more than two decades of Australian regulatory reform

Establishment of the Business Regulations Review Unit (BRRU) and the RIS processes (1985)

BRRU renamed Office of Regulation Review (ORR) (1989)

Hilmer Review recommending the adoption of the National Competition Policy (1993)

Legislative Instruments Bill (1994)

Competition Principles Agreement, Structural Reform of Public Monopolies and Legislative Review program (1996)

Establishment of the Productivity Commission (1996)

Report of the Small Business Deregulation Taskforce (Bell Review) (November 1996)

Business Costs Calculator (BCC) (2005)

Legislative Instruments Act 2003 (effective 2005)

Report of the Taskforce on Reducing Regulatory Burdens on Business (Banks Review) (January 2006)

Establishment of the COAG Reform Council (2006)

Establishment of the Office of Best Practice Regulation (OBPR) (formally ORR) (2006)

Designation of the Minister for Finance and Deregulation (2007)

Establishment of the Deregulation Group in the Department of Finance and Deregulation (2008)

OBPR moved to the Department of Finance and Deregulation (2008)

In 1989 the BRRU was renamed the Office of Regulation Reform (ORR) and moved to the independent Industry Commission reflecting an emphasis by the Government on reducing the cost of regulation for business, and in 1996 the Industry Commission became the Productivity Commission (see Box 3). In the Industry Commission the ORR adopted the practice of producing an annual report on *Regulation and its Review*. In addition to reporting on the performance of the ORR, these reports covered developments in regulatory policy at the Commonwealth level, commented on regulatory reform initiatives within the States and Territories and disseminated comparative information about international developments in the regulatory reform. This practice of reporting demonstrates a tradition of conscious reflection on regulatory reform progress. It documents the development of reform arrangements within the states and territory jurisdictions and internationally. For example, the 1995 report discusses the ORR's own analysis of the then newly published OECD reference checklist for regulatory decision making (OECD, 1995), and reports that it was "very similar in its scope and intention to the various principles for good regulation that are in use around Australia, including the requirements that should be met by regulatory agencies when they prepare regulatory impacts statements" (Industry Commission, 1995, p. 68).

A number of other relevant developments occurred at the same time. In 1994 a draft *Legislative Instruments Bill* was developed in response to perceived weaknesses in the formulation of Commonwealth delegated legislation. This was an attempt to formalise the regulatory management arrangements in a law similar to the statutory requirements that were already in place in some Australian states.[5] The Bill included formal procedures for the development, drafting and recording of subordinate instruments made under delegated powers. Key elements of this Bill included the requirement that instruments must be registered on a federal register of legislative instruments to be enforceable, and an obligation on

proponents of regulations to issue a "Legislative Instruments Proposal" (LIP). Like a RIS, the LIP was to form the basis for consultation, set out the rationale for the proposed rule and include a benefit cost assessment and the consideration of alternatives. New legislative instruments were to expire after five years through automatic sunset clauses or after one year if an LIP had not been prepared.

However, at that time the draft law did not receive wide support in the Parliament. The Legislative Instruments Act was not subsequently passed until 2003, and then without the provisions requiring a benefit cost assessment of legislative proposals. It did, however, retain the requirement for enforceable instruments to be registered, more limited requirements for the conduct of public consultation and stipulate that (in general) legislative instruments would sunset, but 10 years after being passed rather than five as originally proposed.

In 1995, the impact assessment procedures were extended to cover regulatory instruments with a national application when the Council of Australian Governments (COAG) formally agreed to a consistent approach requiring that a regulatory impact statement was to be prepared as part of the development of all national standards (COAG, 1995).

In 1996, the recently elected Federal Government commissioned a *Small Business Deregulation Taskforce* made up of representatives from the business sector to review and report on measures to *"reduce the compliance and paperwork burden on small business by 50%."*[6] The taskforce was hampered by the absence at that time of any effective methodology to measure the cumulative compliance burden. The recommendations of the taskforce were not specifically directed at achieving the 50% target that was sought, but the report was a stimulus to the further reform of regulatory processes. In 1997, through the Federal Government's response to the report, entitled *More Time for Business*,[7] RIS's became mandatory for Commonwealth primary and subordinate legislation and were required to be certified for their adequacy by the ORR. At the same time the ORR was assigned the additional role of reporting to Cabinet on compliance with RIS requirements and the function was given an increased political profile, with the assistant Treasurer becoming responsible for regulatory best practice, supported by the Prime Minister and Treasurer.

The National Competition Policy Legislative Review Programme

The national competition policy (NCP) legislative review program stands out as the one of the most important regulatory reform initiatives in Australia's history. The program delivered important economic benefits to Australia and it has been promoted by the OECD to its members as a model approach.[8] The conduct of the NCP has been widely hailed as a model of significant achievement in nationally co-ordinated reform with major economic benefits across the Australian community. In addition to the legislative review program the implementation of NCP included important structural reforms to public monopolies, the introduction of a national access regime to natural monopoly infrastructure facilities, the extension of the *Trade Practices Act* to government business and unincorporated enterprises, the introduction of competitive neutrality principles to government business enterprises, and specific reforms to the energy, water and road transport sectors. A full description of the NCP is offered in the chapter on competition policy.

During the 1970's and early 1980's Australia endured a long period of slow economic growth. It faced higher rates of inflation and unemployment, and had slipped in the international rankings of per capita incomes. This led to a program of economic reform in the 1980's, including the removal and lowering of trade barriers and the floating of the Australian dollar. This wave of reform subsequently created a momentum of competitive pressures and also exposed the structural impediments to the creation of national markets.

In 1993 a Committee Chaired by Professor Fred Hilmer delivered what has subsequently proved to be a landmark report on *National Competition Policy* to the Prime Minister and the heads of all the Australian State and Territory Governments. The report identified regulation at all levels of government as the greatest impediment to enhanced competition in the Australian economy. It recommended that the Governments adopt a guiding principle that there should be no regulatory restrictions on competition unless it was in the public interest and that governments should be required to demonstrate, for any specific restrictions on competition they were to retain, why it was necessary and in the public interest to do so. To achieve this it proposed a review to apply the guiding legislative principle to all new and existing regulation. The impacts of restrictions on competition were to be assessed from a national economy wide perspective (Hilmer, 1993, p. 208).

These principles were accepted and in April 1995 the heads of all Australian Governments signed the *Competition Principles Agreement* committing each jurisdiction to implement a program of review by 1996 and to reform all legislation restricting competition by 2000. The model for the assessment of legislative restrictions was based on the RIS framework including an assessment of the policy problem or issue, a statement of the desired objective, a consideration of regulatory and non-regulatory alternatives, an assessment of costs and benefits and the incidence of these impacts, consultation with affected groups and an evaluation of implementation issues.[9]

An important institutional feature of the legislative review program was that significant incentive payments were made by the Commonwealth to the States and Territories based on their performance. Despite the relatively small budget impact of the payments, they proved to have an effective incentive effect on the co-operation by the States and were also able to be used effectively by the States to encourage participation within their own administration. The National Competition Council (NCC) was created as an independent body with responsibility to oversee and report on the performance of review program by the Commonwealth, States and Territories and to advise the Federal Treasurer regarding eligibility for the incentive payments. The independence and expertise of the NCC was an important institutional feature to maintain the focus of the jurisdictions on the reform agenda.

In 1996 each jurisdiction examined their entire stock of laws for potential restrictions on competition and together identified and scheduled for review around 1800 pieces of legislation. The legislation was divided into priority and non-priority areas, identifying those likely to have the most significant restrictions on competition. Reviews were undertaken by each jurisdiction according to firm assessment and review criteria. Legislative reviews were to be conducted independently of the agencies administering the acts and regulations and the NCC assisted with reviews that were of a national character. By 2004, nearly three quarters of priority reviews and ninety percent of non priority areas had been completed consistently with the guiding legislative principles and the legislation had been reformed accordingly (Productivity Commission, 2005: 18). Although the program was considered a great success overall, a few areas continued to fail the NCC's test for an adequate public interest case for retaining competition restrictions. These vary to some extent across jurisdictions, but tended to be focussed in the following areas: pharmacy ownership, agricultural marketing restrictions, liquor laws and taxis (Productivity Commission, 2005:18-20). Some of these areas are being reformed incrementally, such as agricultural marketing restrictions.

The 2006 OECD Economic Survey of Australia credited the wide ranging reforms, and in particular the reforms to promote competition, as instrumental in promoting economic growth in Australia in the 1990s and delivering the impressive economic performance of Australia since 2000, including annualised GDP growth above 3%, and growth in real domestic income above 4% (OECD, 2006b).

The specific benefits from the national legislative review program have not been modelled but the Productivity Commission (PC) has made estimates of the economic gains from the broader NCP reform initiatives. In 1995 the anticipated benefit from the implementation of NCP was estimated to be an increase

in GDP of 5.5%, once the effect of the reforms on productivity and prices had been realised in the economy. In 2005 the PC modelled the productivity effect of the price changes over the 1990s in selected infrastructure services where competition reforms were acknowledged as being key drivers, including the energy, water, telecommunications and transport sector. Notwithstanding that the modelling did not pick up dynamic effects, or impacts post 2000, it concluded that "observed productivity and price changes in the selected infrastructure services have boosted Australia's GDP by 2.5% (or AUD 20 billion)… (and) the implication is that the total boost to GDP will ultimately be considerably larger…" (Productivity Commission, 2005:xviii:51).

Box 3. Background to the Australian Productivity Commission

The Australian Productivity Commission (PC) is a major source of innovative policy advice and analysis to the Australian Government. It is unique among OECD members for its standing function focussing on developing policy advice to raise Australia's level of productivity and standard of living. The PC is an independent research and advisory body that advises the Australian Government on a range of economic, social and environmental issues that affect the welfare of Australians. It's charter is to improve the productivity and economic performance of the economy, taking into account the interests of the community as a whole, having regard to environmental regional and social dimensions; not just the interests of particular industries or groups.

The PC is an advocate for reform and an authoritative source of advice on reform opportunities and strategies for policy implementation. Importantly, the scope of the Commission's work covers all sectors of the economy, including the public and private sectors and Commonwealth as well as State and Territory responsibility. Primarily the Commission undertakes applied economic analysis of policy issues with a focus on ways of achieving a more productive economy as the key to higher living standards.

Key factors that have been vital to the success of the PC in achieving its goals are a strong analytical tradition, independent commissioners, skilled staff and transparent processes. Its independence is formalised in the Productivity Commission Act, and the Chairman and up to 11 (full and part time) Commissioners are appointed by the Governor General. The PC has its own budget allocation (AUD 31 million in 2008-09) and 180 professional and support staff. The Government directs the PC on what areas to study through the issuance of formal terms of reference, but the PC is independent in its analysis and findings. The processes of inquiry are public allowing the opportunity for the participation of interested individuals and groups, and the final inquiry reports must be tabled in Parliament within 25 sitting days of the Government receiving the report. The PC cannot launch its own enquiries, although if it can initiate supporting research and publish the results via Commission or staff research papers. An advantage is that, since the government invites the inquiries, it has an implied obligation to follow up and act on the recommendations, thereby adding credibility and weight to the work of the PC.

The PC has four main outputs:

- Public inquiries and research studies requested by the Australian Government
- Performance monitoring and benchmarking and other government services to government bodies
- Competitive neutrality complaints and advice
- Supporting research and annual reporting on productivity performance, industry assistance and regulation

The outputs are delivered through published Commission inquiry and research reports, staff research papers, public conferences and seminars. The PC produces an annual reporting series (the "blue book") on the performance of Government services. Each report provides information on the efficiency and effectiveness of services delivery for a range of government services including health, education, justice, housing and a range of community services. The PC also examines and reports on the performance of government trading enterprises and has a continuing program of research into the performance of economic infrastructure industries and the impact of structural and regulatory reforms.

An important function of the PC is modelling the economic costs and benefits of alternative policy options. It may make recommendations on any matter that it considers relevant and it is up to the government to determine how to use the advice provided. The majority of its recommendations have been accepted. The PC has undertaken public inquiries on a wide range of topics including: The impact of competition policy reforms on rural and regional Australia, pro-competitive regulation of the telecommunications industry, assistance for Australia's automotive and textile clothing and footwear industries, cost recovery arrangements for government agencies, the impacts of legalised gambling and public support for science and innovation.

The PC has also undertaken performance benchmarking of Australian regulation and conducts annual reviews on the burdens on business from the stock of Australian Government regulation, focusing on a different sector each year. (A full list of PC reports including recommendations is available at *www.pc.gov.au*).[1]

The PC was created by an Act of Parliament in 1998, but it claims a much longer tradition in researching and analysing the impact of government policy and regulation on economic performance. The PC replaced the functions of three standing economic research and advice agencies: the Bureau of Industry Economics, the Economic Planning Advisory Commission and the Industry Commission (IC). The IC had been created in 1989 and evolved from an earlier institution, the Industries Assistance Commission, which in turn had replaced the Tariff Board in 1974. These institutions also had statutory independence and transparent processes. This history has also promoted the continued expertise of the PC in trade economics. The PC has established a solid record as an authoritative and respected source of advice and advocacy for economic reform, both within Australia and internationally. The structural reform initiatives of many OECD and APEC countries have benefited from a consideration of the analysis that has been published by the PC and from observing Australia's experience.

1. For more information see *Public inquiries in policy formulation: Australia's Productivity Commission* address by Chairman Gary Banks to the International Workshop: Australia's Public Inquiry Experience and Economic System Reform in China, hosted by the China-Australia Governance Program in Beijing, China, on 3 September 2007 (*www.pc.gov.au/speeches/cs20070903).*

Source: Productivity Commission (2003; 2005; 2008a; 2008c; OECD (2008).

The advocacy role of the Australian Productivity Commission

While regulation reform is intended to bring about improvements in the welfare of society, it inevitably has costs as well as benefits and therefore, opponents. Accordingly, OECD countries have found that achieving successful regulatory reform requires the right institutional framework including a role for oversight bodies. OECD (2008) described four main roles of regulatory oversight bodies as to;

- Manage review and reform processes, ensuring compliance with formal requirements.
- Provide advice and support to regulators through the provision of training and guidance.
- Challenge and enforce regulatory quality standards.
- Advocate further reforms to improve the regulatory framework.

Advocating reform is important in helping to identify the opportunities for reform and in supporting and arguing for the development and progress of reform initiatives. However, the capacity of the oversight body to act effectively as an advocate can be impeded by the resource demands of the day to day role in assessing and challenging RIS, and the fact that civil servants in oversight bodies may not be given the necessary independence to call for reforms in another part of government. This may explain why the institutional role of advocating reform is often limited in its application within OECD governments. Most often it is assigned to a separate body outside government and separate to the regulatory oversight functions, usually on a project or *ad hoc* basis, and with private sector representation to provide advice on a specific reform program.[10]

The example of the Australian Productivity Commission (PC) is a unique case of policy advocacy. It has a role in researching and advocating the benefits of regulation reform and until recently it also housed the oversight functions undertaken by the Office of Best Practice Regulation (OBPR) within a separate unit in its organisational structure. It lost the specific function of assessing RIS when the OBPR was moved to the Department of Finance and Deregulation in 2008, but it continues to have a role monitoring and advising on regulation and undertaking benchmarking in specific sectors.

While other OECD countries have established advocacy bodies on an *ad hoc* or standing basis to undertake inquiries or support the progress of reform initiatives, the PC is unique in many important respects among OECD governments in terms of its independence, staffing size, economic expertise,

stability and the breadth of policy issues it considers. Some similar functions are undertaken in other countries such as the National Audit Office in the United Kingdom. But no other OECD member has established a standing body with as broad a mandate to undertake research and advise the Government on opportunities to make better policies in the long term national community interest. A key function of the PC is to promote public understanding of the role of good policy in improving Australia's living standards through sound argument and effective public processes. The Chairman of the PC has argued that the strength and resilience of reforms in Australia has been assisted by the transparency of the policy process in developing reform options and community acceptance of the reform outcomes. The PC has been a very successful partner to Australian Governments by identifying and promoting the benefits of reforms and successive governments of different political colours have expanded its references. The PC has been an important part of the institutional architecture for regulation reform in Australia and it provides a model with many features that could usefully be emulated outside Australia in other OECD countries.

Box 4. The role of Advocacy Bodies

Reasons for Governments to delegate advocacy functions to a mandated institution include:

- Pushing for early breakthroughs in difficult topics or a changing policy context.
- Focusing on incomplete knowledge and data.
- Engaging thorny topics embedded in political constraints and pressures from interest groups.
- Dealing with complex inter-relationships between different issues.
- Building a novel view of complex policy issue and harnessing the potential to facilitate greater public involvement. (Reforms have become more complex as they involve mixing social and environmental issues, and where the governments need to balance efficiency with a society that is increasingly risk adverse).
- Achieving a good blend of private and public advice and experience.
- Letting the private sector's voice be heard and propose solutions.
- Building a constituency for reform through working together.
- Assisting the government to avoid surprises.

A first condition for success of the advocacy function seems to be *de facto* and *de jure* independence from the government in their undertakings. A second is the existence of a formal and clear mandate to advise on further reforms. Without these, the credibility of such advice may be compromised. A further important factor is whether advocacy bodies are permanent or temporary. Governments have tended to use *ad hoc* advocacy bodies to address immediate political pressures and concerns. Permanent institutions have been established where governments have been convinced of the need to build a "macro" challenge function as part of a good regulatory governance approach.

Source: OECD (2008), "The Role of Advocacy Bodies – Building Drivers and Engines for Reform: Integrating Business and Citizens in the Regulatory Quality Process." in *Implementing Regulatory Reform: Building the Case through Results*. Proceedings of the Meeting of the Group on Regulatory Policy OECD, Paris, December 2007, p. 77.

The Banks Review – Rethinking Regulation

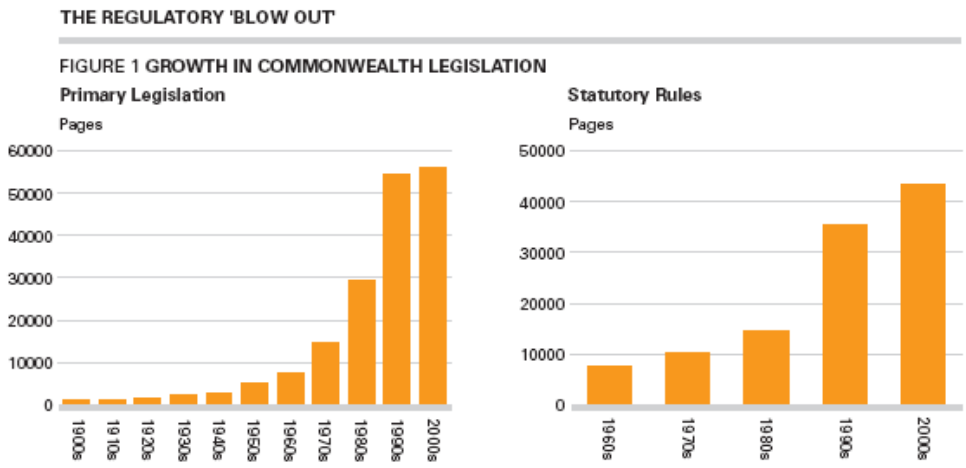
The report of the *Taskforce on Reducing the Regulatory Burdens on Business* (Rethinking Regulation, 2006) was instrumental in bringing about a new focus on the Commonwealth's regulatory management institutions. There is a record of mature debate among stakeholders in Australia which recognises the contribution of systemic regulatory reform to sustained economic development, and this has contributed to refinements and developments in the application of regulatory management principles. Illustratively, in May 2005 the Business Council of Australia (BCA) published a significant research document assessing the performance of existing arrangements for the management of regulatory quality (Business Council of

Australia, 2005). The BCA credited the strong economic performance of Australia with a history of regulatory reform. But it raised alarm at what it saw as a trend to increasing regulation potentially undermining Australia's competitive advantage, citing evidence of an increase in the number of new laws being made across all the jurisdictions and cases of regulatory expediency usurping principles of legal and regulatory quality. It proposed an action plan with three steps:

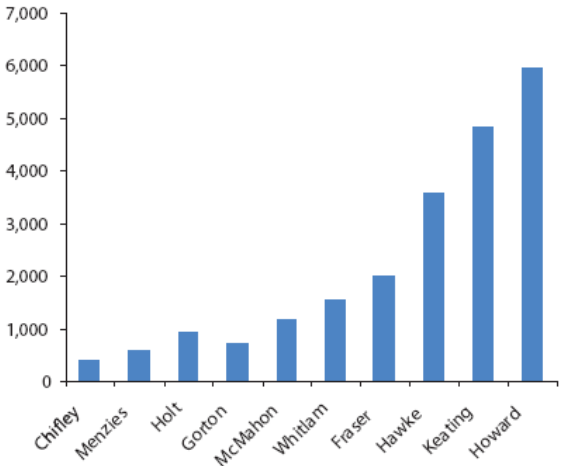
> The first step is to fix the system that continues to produce poor business regulation. The second step is to clean up the existing stock of regulation, weeding out inefficient and inconsistent regulation. The third step is to seriously tackle a long term problem in Australia – the overlapping and inconsistent regulation of the different layers of Government (Business Council of Australia, 2005:vi)

A major focus of the BCA report was a critique of the systemic arrangements for producing regulatory quality at the federal level, in particular the conduct and performance of regulatory impact analysis (RIA). The action plan provided detailed recommendations for the first step to improve the quality and reduce the quantity of new business regulation in Australia largely based on improving the RIA system in line with OECD best practice. The arguments made in the report were persuasive and prompted the government to commission a detailed review.

Box 5. Business estimates of the growth in the volume of Commonwealth legislation



Average number of pages of Commonwealth Acts of Parliament passed per year by Government.



Source: Business Council of Australia, 2005, p. 13. Institute of Public affairs (IPA), 2007, p. 3.

Later in 2005 the Prime Minister and Treasurer requested Gary Banks, the Chairman of the Productivity Commission, to lead a taskforce to "identify actions to address areas of Australian Government Regulation that are unnecessarily burdensome complex, redundant, or duplicate regulations in other jurisdictions" (Rethinking Regulation, 2006:i). Like the BCA report, the review found that there was too much regulation imposing an unnecessary cost on business. It credited the growth in regulation in part to changing societal expectations driven as a "natural and desirable consequence of rising affluence and increasing scientific knowledge." But it also considered that a rising phenomenon of risk aversion in society and an over reliance by governments on the development of regulatory solutions had led to a "regulate first ask questions later culture." Furthermore the development of solutions within regulatory silos meant that the broader effects of regulation were rarely taken into account.

Despite the long history of embedded institutional arrangements for regulatory quality, business groups including the Business Council of Australia (BCA) had argued that the systems had been inadequate in ensuring accountability and transparency in rule making and called for improved processes for assessing the impacts of regulatory proposals and more effective consultation with business. The Taskforce concurred with the views of business that the requirements for good regulatory process had not been effectively discharged. It considered that unless the underlying reasons for regulatory failures were addressed the regulatory problems would simply re-emerge. It recommended changes to strengthen the underlying processes by which regulations are made and administered and enunciated six principles of good regulatory process which governments should publicly endorse and embed in good regulatory practice (see Box 6). The report made 178 recommendations for substantive reform of regulations and of the systems for quality control in regulation. The Australian Government agreed in full or in part to 158 of those.

The recommendations of the Taskforce set in place a new phase of reform initiatives with an emphasis on improving the institutions that promote good regulation. The Government endorsed the Taskforce principles of good regulatory process and agreed to have these reflected in an improved version of its official guide to regulation making which was published as a draft in November 2006 as the Best practice Regulation Handbook. Following feedback from stakeholders, the final version was published in August 2007. Among some of the important process recommendations of the Taskforce were proposals for the adoption of a higher level of analysis in RIS and for improved gate keeping arrangements that would prevent a regulatory proposal from proceeding if the requirements for an RIS and good regulatory processes were not followed.

A key recommendation of the Taskforce that the government implemented was that unless there are exceptional circumstances, a regulatory proposal with material business impacts should not proceed to Cabinet if it has not complied with the Government's RIS requirements. Where a proposal does proceed without an adequate RIS or quantification of compliance costs it must within one or two years be the subject of a post implementation review similar in scale to what would have been required at the implementation stage. The Government also accepted the Taskforce's proposed grounds to deem a RIS inadequate: failure to document and explain why existing relevant regulations at all levels of government are not sufficient; inadequate cost-benefit analysis of regulatory options; failure to quantify compliance costs of options; inadequate risk analysis and assessment; and failure to document and to justify any variation from relevant international standards.

A full explanation of the criteria used to assess the adequacy of RIS was subsequently expanded in the revised Best Practice Regulation Handbook (Australian Government, 2007, p. 51). It includes a number of additional assessment criteria. A RIS must also include: compliance with the Government's best practice principles and policy on consultation; an assessment of the impacts of each option on the compliance costs for business (particularly small business) using the Business Cost Calculator (BCC) or an approved equivalent; demonstrate that any restriction on competition is necessary and in the public interest; and demonstrate that the benefits of the proposal to the community outweighs the costs and that the preferred option will deliver the greatest net benefit for the community, taking into account all of the impacts.

Box 6. Principles of good regulatory process
Report of the Taskforce on Reducing the Regulatory Burden on Business

In the Taskforce's view, good regulatory process requires governments to publicly endorse and embed the following six principles in good regulatory practice:

- 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.
- A range of feasible policy options — including self-regulatory and co-regulatory approaches — 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.
- 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 or periodic reviews need to be built in to 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

Source: Rethinking Regulation (2006) pg v.

An important feature of the new RIS requirements was the breadth of their application to regulatory instruments. For example, some OECD countries only apply RIS requirement to one class of regulatory instrument. Often its application to subordinate legislation is justified on the basis that this is the exercise of delegated legislation. However a narrow application of the RIS requirements only captures and analyses a subset of the range regulatory instruments that governments use to influence behaviour.

The Federal RIS requirements were clarified to apply to any rule endorsed by government where there is an expectation of compliance. This is a broad definition based on the intended effect of the regulatory proposal to influence behaviour rather than its legal character. The RIS requirements apply to all regulatory proposals where the decision maker is the Federal Cabinet, the Prime Minister, another minister, a statutory authority, board or other regulator. Regulatory proposals include: proposals given effect by primary legislation, subordinate legislation and also quasi regulation where the government influences business and individuals to comply, but which are not part of explicit government regulation. The best practice regulation requirements are intended therefore to apply to all instruments where there is an expectation of compliance and can include guidelines, negotiated agreements with industry and government and industry based codes.[11]

As can be seen, the recommendations of the Taskforce were instrumental in strengthening the regulatory management arrangements and the subsequent refocusing of the role of the ORR. The Government increased the gatekeeper functions of the ORR within the PC giving it stronger powers to effectively veto regulatory proposals prepared for consideration by Cabinet, where the quality of the RIS does not comply with requirements. The ORR was also renamed the Office of Best Practice Regulation (OBPR) reflecting a new focus to assist agencies to develop regulatory best practice, and a specialised cost benefit analysis unit was created in the OBPR to provide advice and support to agencies preparing RIS.

Mechanisms to promote regulatory reform within the public administration

Current regulatory policy settings

The regulatory reform objectives of the present Australian Government were set out by the Prime Minister the Honourable Kevin Rudd, while still in opposition. In an election speech to the National Press Club on 17 April 2007, he identified regulation as an increasingly pervasive obstacle to enterprise and set out an agenda for reducing the burden of regulation on Australia's business community describing it as the 'third arm of Labour's productivity agenda' (Rudd, 2007, p. 7). The election platform reflected a view that despite the long history of regulatory reform initiatives, these efforts had not been sufficient to deliver a material reduction in the regulatory burden on business. He gave a commitment to strengthening the institutional mechanisms for regulatory management and increasing the role of the Productivity Commission in monitoring its progress. When the new government took office under Prime Minister Rudd in November 2007, a number of these initiatives were given immediate effect.

Box 7. Key Policy Initiatives of the Federal Labor Party to improve Business Regulation April 2007

The federal Labor party election policy on business regulation reform included the following key initiatives:

- a commitment to working in partnership with the States and territories to harmonise regulations in key areas;
- enhancing the accountability of federal and state governments for harmonising regulation by commissioning the Productivity Commission (PC) to estimate the costs and benefits of harmonisation;
- provision of financial incentives to reward State and Territory Governments that implement reforms based on the model used for National Competition Policy;
- a commitment to a rigorous Regulation Impact Statement (RIS) process to protect businesses from new, unnecessary regulation and the establishment of a small business advisory council to review and comment on regulatory impact statements;
- introduction of a 'one in, one out' principle so that proposals for new regulations are accompanied by proposals to remove existing regulation;
- introduction, where possible, of a common commencement date for new regulation, to provide greater certainty for business; and
- measures to address compliance burdens for small business in relation to the Goods and Services Tax (GST).

Source: Rudd, K. The Honourable (2007) Facing the Future, Address to the National Press Club, Parliament House Canberra, 17 April.

The previous government had not accepted some recommendations of the 2006 report *Rethinking Regulation* including that oversight of regulatory reform processes be elevated to a Cabinet position.[12] The new Prime Minister created a new Cabinet portfolio position of Minister for Finance and Deregulation and appointed the Honourable Lindsay Tanner MP to the role. He also created a supporting ministerial function in the Minister Assisting the Minister for Deregulation, filled by the Honourable Craig Emerson MP.

This represents the first time that the Australian Federal Government has had a dedicated position in Cabinet with responsibility for regulatory reform. Under the former Government, the Treasurer's portfolio had lead responsibility for regulation reform matters with all ministers having responsibility for regulatory policy as it affected their portfolios. This is in line with the general trend across OECD countries, where more than half of all OECD governments report that they have established a Minister with responsibility for reporting to Parliament on the progress of regulatory reform (OECD, 2009) Furthermore the Ministerial

assignment makes intuitive sense. The OECD has found that to be successful regulatory reform policies and institutions require support at the highest political level. Oversight and control functions are also more effective when they are located at the centre of government and have an active role in driving the achievement of the reform policies (OECD, 2002b:29). Having a dedicated Minister with responsibility for regulation reform creates a champion inside the Cabinet and helps to ensure that Ministerial colleagues comply with the regulatory quality processes in preparation for and during the Cabinet process.

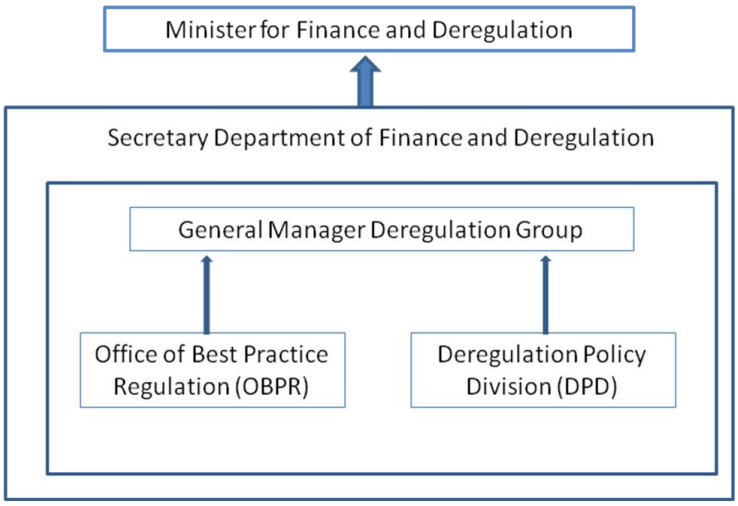
The deregulation responsibility was assigned to the portfolio of the Finance Minister on the basis that the two functions could impose a complimentary discipline on departments: the finance portfolio is responsible for budget policy advice and process, including the review of government programs and the deregulation portfolio for regulatory efficiency. Because the Finance portfolio has only a limited regulatory role this minimises any potential for conflict of interest in administering the deregulation agenda. It also brings regulatory reform close to a powerful ministry with budgetary authority at the centre of government, which could be compared to the situation of OIRA within OMB in the US.

A persistent criticism from the business community and one that is appreciated by the new Government is that, despite years of experience of reform institutions and periodic review efforts, the institutional mechanisms for regulatory quality had not successfully gained sufficient traction to reverse the growth in unnecessary regulation. The new Minister for Deregulation outlined the ambitions of the Government's deregulation agenda as achieving culture change among regulators. The Minister has described this as a commitment to introducing "a culture of 'continuous improvement' in regulatory activity… in which government is always looking for opportunities to streamline regulatory processes... in the same way manufacturers seek to continuously refine production processes" (Tanner, 2008).

Important elements that the government has emphasised about its deregulation agenda are: the goal of continuous improvement, as distinct from one off reviews and target driven reform programmes; an emphasis on deregulation focusing on "regulation which is outdated, excessively burdensome on business or unfair to consumers;" and, a commitment that there will be "no net increase in the regulatory burden arising from new Commonwealth Regulation" (Tanner, 2008a). The new Government has also given its own endorsement to the six principles of good regulatory process that had been recommended by the Taskforce on Reducing the Regulatory Burden on Business (see Box 6 above).

Changes to the departmental arrangements for the new portfolio were made with the purpose of strengthening the institutional framework for continuous improvement in regulatory activity. The Department of Finance and Administration became the Department of Finance and Deregulation, with lead responsibility for the government's deregulation agenda. A new Deregulation Group was created in the Department of Finance and Deregulation. The regulatory oversight and advisory functions of the OBPR were relocated from the PC to this group, and a new (de)regulatory policy function was also established in the department (see Box 8). Treasury continues to have departmental oversight of the activities of the PC.

Box 8. Reporting Structure of the Deregulation Group



As noted above the OBPR has responsibility for the oversight of compliance by agencies with the government's RIS requirements. The OBPR has around 20 staff including a cost benefit analysis unit with a staff of four that reviews the analysis in RIS and also provides training and assistance to agencies on the preparation of CBA. The functions of the Office are set out in the Charter of the Office of Best Practice Regulation (see Box 9).

Box 9. Charter of the Office of Best Practice Regulation (OBPR)

According to its charter, the role of the Office of Best Practice Regulation (OBPR) is to promote the Australian Government's objective of effective and efficient legislation and regulations. Its functions are to:

- advise Government, departments and agencies on appropriate quality control mechanisms for the development of regulatory proposals and for the review of existing regulations;
- examine Regulation Impact Statements and advise whether they meet the Government's requirements and provide an adequate level of analysis, including cost-benefit and risk analysis of appropriate quality;
- advise departments and agencies on the Government's requirements for compliance costs assessment, and maintain the Business Cost Calculator as a regulation costing tool;
- manage other regulatory mechanisms, including Annual Regulatory Plans and Regulatory Performance Indicators;
- promote the whole-of-government consultation principles and provide clear guidance on best practice consultation with stakeholders to be undertaken as part of the policy development process;
- provide training and guidance to officials to assist them in meeting the assessment requirements to justify regulatory proposals;
- provide technical assistance to officials on cost-benefit analysis and consultation processes;
- report annually on compliance with the Government's requirements for Regulation Impact Statements, compliance cost assessment and consultation, and on regulatory reform developments generally;
- provide advice to ministerial councils and national standard-setting bodies on Council of Australian Governments guidelines that apply when such bodies make regulations;

- monitor regulatory reform developments in the states and territories, and in other countries, in order to assess their relevance to Australia; and
- lodge submissions and publish reports on regulatory issues having significant implications.

The OBPR is to focus its efforts on regulations that restrict competition, have a significant impact on business and individuals or involve medium compliance costs. The OBPR is to ensure that effects on small business of proposed new and amended legislation and regulations are made explicit and given adequate consideration.

Source: Australian Government (2007) p. 6.

Each government Department and regulatory agency has designated a Best Practice Regulation Co-ordinator at the executive level responsible for championing good regulatory practices within their agency. This followed a request in 2006 by the then Secretary of the Department of Prime Minister and Cabinet to each head of department and agency that they nominate a senior executive officer to co-ordinate regulatory matters in their organisation and to help oversee the implementation of the new arrangements. The OBPR and the Department of Finance and Deregulation meet regularly with this network to disseminate information on regulatory best practices and obtain feedback.

Regulation reform is one of the priority areas identified by the Department of Innovation, Industry, Science and Research (DIISR). The Industry and Small Business Policy Division is a key policy advice division located within the Department. The Division's work encompasses a broad range of issues relevant to industry and small business in Australia, with a particular interest in regulation reform and improving the efficiency of the operating environment for small business. A key role of the Division is to work with the OBPR to improve the recognition and analysis of small business compliance costs of regulatory policy proposals.

The OECD has noted that protection from political influence and the capacity to exercise independent judgement and hold departments to account on the analysis of their regulatory proposals is an important part of the role of bodies responsible for the oversight of the quality of regulatory proposals (OECD, 2002:90). The OBPR (and its predecessor the ORR) has no statutory independence of its own, but when the OBPR was located in the PC, it operated under the general independence that applies to the functions of the Commission. Located within the Department of Finance and Deregulation the OBPR does not have the statutory independence that it had within the PC, but the importance of its independent capacity to undertake a technical assessment of regulatory proposals has been recognised in informal arrangements as explained below.

The Minister for Finance and Deregulation has advised the Australian Parliament that decisions on the adequacy of the RIS and compliance with best practice regulation requirements would continue to be made independently by the Executive Director of the OBPR, without intervention or influence from Ministers or their staff. The Minister also committed that the OBPR will continue its function to prepare an annual report on compliance by agencies with best practice regulation requirements, and that the RIS prepared by agencies and the OBPR's assessment will be made public before regulations come into effect. The Ministerial statement clarifies that the role of the OBPR is fundamentally a technical one, to conduct an assessment of the adequacy of the analysis in the RIS, not to support particular regulatory policy options or outcomes (Tanner, 2008b:1890).

This latter role is the responsibility of the Deregulation Policy Division (DPD) of the Department of Finance and Deregulation, which was created to advise the Government on deregulation policy and provide secretariat and policy support to the COAG Business Regulation and Competition Working Group.[13] The Deregulation Policy Division is an entirely new entity reflecting the new focus on deregulation. It has around 30 staff and its key roles are to advise Government on how regulatory costs can be measured and minimized, and to challenge the quality of regulatory proposals and the continued relevance of existing

legislation. The head of the DPD and the Executive Director of the OBPR each report to the position of General Manager Deregulation Group, who is accountable to the Secretary of the Department of Finance and Deregulation (see Box 8).

Specific policy initiatives introduced under the deregulation initiative include a requirement on Ministers to quantify the regulatory burden of new regulatory activities in Cabinet proposals, and an examination by the Department of the feasibility of quantifying the regulatory burden of new regulations to assess the change in the aggregate burden over time. Specifically, Ministers are required when proposing new regulation to consider regulations that can be removed in accordance with the "one in one out" principle. From 1 January 2009 departments are required to notify the Department of Finance and Deregulation in advance of all proposals for new or amending regulation, in addition to the requirement to publish annual regulatory plans. Other initiatives include the development of a central register of the commencement dates of all new regulation to reduce search costs for business. A stock take undertaken by the Department of Finance and Deregulation in 2008 identified 200 pieces of redundant regulation that will be removed in 2009, subject to the passage of legislation.

The Minister for Finance and Deregulation will use the information provided by Departments and other information collected by the Department of Finance and Deregulation to make bi annual reports to Cabinet on regulatory activity. The purpose of the reports is to brief Cabinet on progress, and also presumably to make the activities of Departments more transparent and provide incentives for performance as well as identifying opportunities for strengthening the deregulatory policy agenda. The first of these reports was delivered in April 2009 and covered the following:

- advice concerning the nature and level of regulation that has been introduced by each portfolio since December 2007;
- an analysis of the trends and directions in approaches to better regulation processes and outcomes, including Departmental performance in meeting the one-in one-out principle;
- an analysis of the extent to which consultation across government has occurred on new regulation; and,
- a review of recent developments to improve the quality and quantity of the stock of regulation.

The creation of *Better Regulation Ministerial Partnerships* is a new initiative resourced from within the Department of Finance and Deregulation Policy Group to identify and develop improved regulatory outcomes across portfolio responsibilities. The identification and selection of partnerships is based on the following criteria:

- the regulation has an impact on a large number of Australian businesses or individuals, or a significant impact on the businesses or individuals that it affects;
- the deregulatory proposal improves broader economic outcomes in addition to reducing regulatory costs (administrative and compliance);
- practical reform options are readily apparent; and,
- the deregulatory proposal does not undermine policies which are central to the Government's agenda (Advancing the Deregulation Agenda: Guidance note for Agencies, 2008).

Currently partnerships have been initiated with the Minister for Superannuation and Corporations Law to simplify the regulation of financial disclosure, and with the Minister for Health and Aging to streamline the timeliness of the approval of new health technology. While indications are that these particular initiatives will be successful, it is likely that this would remain a selective reform approach. In essence the partnerships model depends upon the goodwill of Ministers and co-operative relationships

between the reforming department and the deregulation policy group. It is most likely to have application in circumstances where agencies already have the will to reform, but resource constraints prevent them from proceeding. Other impetus may come from a concern from Ministers that departments will not initiate reform on their own, or where partnerships naturally come about due to personal affiliation of the Ministers concerned or a direction from the Prime Minister. In this respect it is a good model to have available even if it cannot be relied upon to have broad application.

Box 10. Regulatory offsets or the 'one in one out' rule

According to the United Kingdom (UK) RIA requirements, agencies must identify offsetting simplification measures for all *major* proposals, and are expected to consider the scope for offsetting measures for all other proposals. This followed a recommendation of the Better Regulation Taskforce in 2005.[1] The aim of the strategy is to create a balance between the creation of new regulatory measures and the reduction of existing requirements. The RIS guidance states that plans for simplification are meant to be broadly equivalent in scope to the new proposals. Simplification means reducing compliance costs through various possible measures, including:

- Deregulation; the removal of regulatory obligations
- Consolidation of rules making them more manageable and easy to understand
- Rationalisation, bringing obligations under a broad framework and reducing overlap or uncertainty
- Clarification or correction of errors and ambiguities.

If agencies fail to find offsetting measures this can be grounds for rejecting the proposal.[2] The aim of this approach is to discipline agencies to identify reform opportunities to reduce the regulatory burden at least in equal measure to the burden of new regulations. It follows the general policy commitment of 'no net increase in regulation' that the Australian Government has proposed, but can it work in practice and what sort of incentives does it hold?

Practically it cannot be a hard rule. The merits of a regulatory proposal should be assessed on a cost benefit test that it delivers a net benefit to society, and the failure to identify an equivalent offset would not invalidate the need for or the benefits of the proposal. Potentially, if the requirement to find offsetting requirements were applied rigidly agencies would have an incentive to 'bank' future reforms until they need them to obtain support for new proposals. As regulatory offsetting is only a part of an overall program for reform, it would not be desirable to have reforms that deliver burden reduction delayed and gamed in this way.

This suggests that the requirement for regulatory offsets and the one in one out principle, have to be kept at the level of an in principle requirement. To attempt to impose it too rigidly will have negative effects. In this light, it is most likely to be complied with when agencies see the merit of being able to win support for their regulatory proposal from the community by identifying some compensatory burden reduction measure that affects the same group as that affected by the regulation. The incentive for agencies to conform with this reporting requirement are likely to come from the opportunity to communicate to the industry and citizens affected by new regulation of 'offsetting' changes to regulation that will specifically affect them, and so help to build support for the new regulatory proposal. To gain support for this approach this is the message that should be communicated to agencies to encourage them to search for offsets that affect the same group that bears the incidence of the regulation at the same time that they are developing the regulatory proposal. This would work best if applied when agencies are consulting with affected groups on the new regulation.

1. United Kingdom (2005) Report of the Better Regulation Taskforce, Regulation – Less is More, Reducing Burdens Improving Outcomes. *archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/lessismore.pdf*.

2. The requirements are outlined in the United Kingdom Impact Assessment Tool Kit at: *www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44258.html#CompensatorySimplificationMeasures.*

The role of the new DPD is still in development as the Government works out how it will put into operation its different policy strategies. A key challenge is establishing a mechanism for the assessment of a baseline measurement of regulatory costs, against which the Minister for Finance and Deregulation can report to Cabinet on the government's commitment to no net increase in the regulatory burden. It has already been identified that the 'one in one out' principle is not on its own likely to have a material effect on the growth of regulation. This is not surprising; given the general characteristics of regulatory offsets it can only ever be an in principle rather than a binding approach. The UK has had significant experience with regulatory offsets, which led to a consideration of regulatory budgeting (see Box 10). However, agencies will always find it difficult to comply with an obligation to identify offsets so in practice it is difficult to achieve compliance.

Other OECD governments have had a goal of no net increase in the burden of regulation but these have been confined to administrative burdens. Administrative burden is a relatively narrow class of costs imposed by regulation and relates only to the costs to business of complying with the information obligations resulting from Government imposed legislation and regulations.

In Australia the DPD will be responsible for ensuring that agencies provide an adequate account of the estimated costs of new regulatory proposals. Regulatory costs here are not confined to administrative costs. While the DPD can try and promote compliance with the government's reporting requirements and monitor activity by agencies, the accuracy and completeness of these reports will depend on the co-operation of departments. The DPD faces an immediate challenge to establish clear incentives for agencies to meet the governments overall policy commitment to no net increase in regulatory burden. This will require the development of clear responsibilities at the departmental level to identify and implement reforms that reduce the burden of regulation, and to ensure that any new regulatory initiatives impose the least regulatory burden necessary. The challenge for the DPD is to establish a process for measuring the performance of agencies and holding them to account. As part of this process the DPD has commenced a regulatory stock take as a part of an effort to establish a baseline against which changes in the regulatory burden may be measured.

The DPD has formally notified Departments of their new obligations in a *Guidance Note on Advancing the Deregulation Agenda*. These include the requirement to consider regulatory offsets when considering new regulatory proposals and a requirement to notify the Department of Finance and Deregulation of all policy proposals with regulatory implications, using a format set out in the best practice regulation preliminary assessment form used in the OBPR Handbook. The guidance note also alerts Departments to the enhanced reporting on regulatory issues in Cabinet submission, biannual reporting by the Minister for Finance and Deregulation on government regulatory performance, and Ministerial partnerships discussed above.

The OECD and other sources have described the difficulties of providing incentives for regulatory agencies and departments not to add to the stock of the regulation. This is one of the reasons why the SCM model was developed, as a way to provide leverage and facilitate the reduction of administrative burdens. Regulators are necessarily given the powers to regulate and there are political and social demands to use these powers. Regulators are not impacted by the opportunity costs that can be imposed by regulation and can undervalue or be indifferent to the cumulative impact. The costs of regulation are not subject to the Treasury and Parliamentary controls that apply to the use of government fiscal resources. Theoretically, however, it is possible to impose a regulatory budget on agencies in the same way that fiscal budgets are applied with some controls on the level of regulatory costs that agencies impose. This can be an absolute budget ceiling after which there is a cut off and no further regulatory costs are incurred, or alternatively it can be the application of a cost benefit principle which determines that the only regulations that will proceed are those where the benefits exceed the costs by a certain ratio. Where the costs of regulation are consistently undervalued or treated as though they were free goods the discipline of regulatory budgeting

may produce a better selection of regulatory approaches by regulatory agencies. A significant challenge to setting a regulatory budget is that it requires that the government have a solid understanding of the costs of regulation and the facility to use this to set priorities (OECD, 1992, p. 19). In the United States, OIRA has for a long time published the costs of regulation over time, as an aggregate of the cost estimates produced for the RIA studies, but it has remained analytical and not led to any direct regulatory budget effort.

However, the United Kingdom has explored this direction. In 2008 the UK released a comprehensive consultation paper on the concept.[14] The fundamental principle of the regulatory budget proposal from the UK was to require departments to forecast an estimate of the expected gross costs of regulation to be imposed over a predetermined period, for example three years. Departments would be required to manage within the headroom of this budget. If unforeseen initiatives were to be implemented then savings in regulatory costs would have to be found through reforms to other areas, or through trading with other departments. Like a financial budget, Departments could also carry forward savings. Major challenges for the regulatory budget model are obtaining a reliable estimate of regulatory costs, determining what the appropriate setting for the budget ceiling is and deciding whether the costs should be applied at the time that the proposal is implemented or when the costs are incurred. Despite the technical difficulties, a major potential benefit of the regulatory budgeting approach is the discipline that would be placed on departments to have to plan and forecast regulatory activity and its associated costs and to make an effort to remain within a budget ceiling. Some of the positive effects from this planning discipline could be achieved even if it proved too difficult to impose a firm budget constraint. However, implementation by the UK has been deferred.[15]

In Australia, the Department of Finance and Deregulation is testing the regulatory budgeting concept starting with a pilot within its own department and in the Department of Innovation, Industry Science and Research. Unfortunately there is little practical experience of regulatory budgets as they have not been implemented in any country to date inside or outside OECD.

Assessment

The Australian Government has not set the kind of burden reduction targets that have become common for many EU countries in order to reduce administrative burdens, which are one part of overall regulatory costs. However, some Australian States have explored it. The regulatory budgeting model has a number of technical challenges, accordingly, the DPD has to find other ways of creating incentives for Departments to identify reductions in regulatory burdens and stimulate the culture and behavioural change in rule making that is sought. However, the structure of the DPD and its separation from the technical functions of the OBPR make it well placed to act as an advocacy body for the deregulatory policy agenda. A major part of the challenge is to maintain the momentum for the deregulation policy agenda and communicate its aims and its successes to the business community and citizens. But within government it cannot achieve the policy goals on its own as these changes have to occur within the regulatory agencies.

The report of the Taskforce on Reducing Regulatory Burdens on Business noted that a number of key elements of good practice needed to be more widely implemented across regulatory agencies and that a more balanced incentive structure was required to encourage regulators to take a risk based approach. Particular areas of concern were identified with consultation procedures, the provision of information on enforcement and compliance requirements, processes for dealing with complaints and the time frames for responses. The Taskforce recommended the development of a code of conduct for each regulator, and the reporting against a wider range of performance indicators. These were to include details of efforts to reduce the compliance burden on business and better regulation practices, (Regulation Taskforce, 2006 p. 163). Not all of these elements appear to have been implemented.

The Australian Auditor-General also noted a need for the improvement in the performance and culture among regulators. It reported that: "performance audits of Australian Government regulators (overall) indicate that scope exists for regulators to improve their administrative performance. Specific areas for improvement include systematically applying risk based management procedures to address cost effectiveness; measuring and reporting regulatory performance; ensuring consistency in decision making; documenting key operational and regulatory decisions; planning and implementing compliance monitoring programmes and managing enforcement actions" (ANAO, 2007). The Audit Office has produced a better practice guide for regulatory agencies which identifies a number of potential areas for development. This guide was developed in conjunction with a number of Commonwealth regulators, which suggests that the regulatory practices of many agencies are sometimes well documented and perhaps already of a very high standard.[16]

There are instances where regulators have already taken the initiative to report on better regulation initiatives, but it is by no means widespread. As an example, however, the Australian Securities and Investment Commission (ASIC), the national corporate regulator, already produces a number of guidance documents under the banner of Better Regulation to communicate their practices to regulated business and other stakeholders. These include an *ASIC Service Charter*, and a statement on *ASIC Better Regulation Initiatives* published in 2006. The service charter includes a list of performance indicators including timeframes for acting on requests and responding to requests. ASIC publishes a report on its performance against these indicators annually on its website. The *Better Regulation Initiatives* identifies the organisation's aims for reducing the regulatory burden on business including: improving transparency and consultation, analysing impacts, making regulation easier to understand, reducing duplication and streamlining processes. It includes a list of initiatives that ASIC has undertaken or plans to undertake to meet its aims.[17] The most recent initiative is the publication of a 'regulatory documents road map' to simplify the format of documents and make them easier for stakeholders to find.

As an example of the promotion of cultural change among regulators, the United Kingdom has recently passed an Act to create a legislative obligation on regulators to look for opportunities to reduce the regulatory burden. Part four of the *Regulatory Enforcement and Sanctions Act 2008*[18] imposes a general obligation on regulators *not to impose or maintain unnecessary regulatory burdens*. A regulator covered by the Act is required to keep their regulatory functions under review to secure that they comply with the general obligation and must also publish an annual statement advising how they plan to avoid imposing additional unnecessary burdens, and to ensure that any existing burdens which have become unnecessary are removed. The head of the regulatory agency is required to have regard to these statements when exercising their duties. Each new annual statement must include an account of how the regulator has complied with the statement over the preceding twelve months. The Act initially applies to the following regulators: the Gas and Electricity markets Authority, the Office of Fair Trading, the Office of Rail Regulation, the Postal Services Commission, and the Water Services Regulation Authority. However, the Minister can extend the duties of the Act to any other regulator by order where it is considered that it will further the government's better regulation agenda. In addition the UK requires Departments and agencies to prepare and publish annual "simplification plans" which detail how the department plans to achieve the government's better regulation requirements.

Communicating and gaining support for a reform strategy and its goals is vital as successful reform depends upon the participation and commitment of the public and the administration. The use of the term deregulation to describe regulatory management policy differs from recent approaches across a range of OECD countries. Regulatory quality focuses on embedding regulatory policy in governance arrangements and institutional settings and may involve deregulation, re regulation and the development of better designed regulation (OECD, 2002; OECD, 2005). In Europe the label of 'Better Regulation' has been adopted by the European Commission and member states to communicate the regulatory management agenda. The goal of 'Better Regulation' is to improve the conditions for business in order to promote a

more productive society that benefits business and citizens. It includes the removal of regulatory overlap and duplication (deregulation), making laws more understandable and easy to comply with (simplification) making decision making processes more open and accessible to stakeholders (transparency) assessing the impacts of regulatory proposals and examining alternatives (cost benefit tests) and reducing the administrative burden on business and citizens (cutting red tape) (European communities, 2006). In Europe the 'Better Regulation' label has been used to promote a business friendly agenda, and it may sometimes not fully embody the need for broad public support by all citizens. But it effectively communicates an appreciation that regulation should be used when it is the right instrument in the right circumstances, while 'deregulation' may draw other inferences.

Risk and Regulatory Policy

The topic of risk and regulatory policy is notable in the context of promoting culture change at an agency level and changing the behaviour of regulators. The Taskforce on Reducing Regulatory Burdens on Business identified an 'increasing risk aversion in many spheres of life' as a major contributor to excessive and costly regulation in Australia. Other commentators have noted that the actual evidence of risk aversion is difficult to establish empirically (Carroll, 2008 p. 75). Nevertheless the reduction of risk is a key rationale for regulatory control, and OECD countries are increasingly finding that there is a case for improving the way that risk is managed by regulators to reduce the costs of regulation and increase its effectiveness.

Guidance is therefore of particular importance to assist agencies in the process of identifying and assessing the scope of the risks that they seek to address, developing tools and processes for implementing risk management strategies and communicating with the public. There is a growing body of example among OECD governments on how to frame these guidelines. A number of OECD governments have issued formal policy statements and guidelines that provide sources of reference.[19] Each of these guidance documents is aimed at encouraging a more consistent treatment of risk across government. While individual agencies may have very good processes in identifying and managing risk, better overall policy guidance can be a tool for promoting culture change.

However, the experience of other countries demonstrates that the development of risk guidelines should be done in careful consultation with the agencies concerned, taking into account that some agencies will already have in place well developed processes for managing risk. Early attempts of the US OMB to develop guidelines were amended following concerted opposition from the scientific community for being potentially too strict in its application. The Treasury Board of Canada has recently gone through a process to develop risk assessment guideline that models good consultation practices. The process has involved a reference group of regulators which identified the principles of risk assessment guidance. A draft guideline will be circulated to regulators to identify that it captures current good practice and is able to be used effectively. The United Kingdom has developed a number of useful guidance documents on risk assessment and management, and has also enforced the adoption by regulators of the *Regulators Compliance Code* which requires that regulators incorporate risk based approaches in their compliance and enforcement activities (see Box 11).

Assessment

The OBPR Best Practice Regulation Handbook gives clear guidance on the importance of a risk analysis in determining the need for regulation and designing a proportionate regulatory response. It states:

Government-legislated principles frequently call on departments and agencies to 'reduce overall risk' or 'prevent unreasonable risk'. However, achieving any level of risk reduction entails costs, and in reality individuals make decisions about the level of risk (versus the cost) they are prepared to accept every day.

The achievement of zero risk is neither an appropriate, nor technically feasible, goal of government intervention. The aim of a RIS is to identify 'how much' risk is acceptable to society, and the cost that society is prepared to pay to achieve that. In the end, transparency and consultation are the best way of identifying this trade-off (Best Practice Regulation Handbook, 2007:138).

This guidance gives a good introduction to the concepts of risk and uncertainty and makes it very clear that an assessment of risk is expected to be undertaken as part of the process of identifying the problem that is required to be addressed by regulation. However, there is room for further discussion of the topics of managing and communicating risk and developing risk based compliance strategies. This latter aspect has been considered by a number of other OECD countries and within some sub jurisdictions in Australia. As it is directly concerned with how regulators organise their business and allocate their resources among alternative regulatory demands it is an important potential contributor to improving regulatory efficiency and promoting culture change.

Box 11. The United Kingdom – applying the principles of risk in compliance and enforcement

The United Kingdom Hampton review on reducing administrative burdens through better compliance and enforcement practices[1] was published in March 2005. In April 2008, the United Kingdom issued *The Regulators Compliance Code*;[2] a statutory code of practice intended to ensure that inspection and enforcement is efficient, both for the regulators and those they regulate and based upon risk principles. The Code gives the seven Hampton principles relating to regulatory inspection and enforcement a statutory basis and is binding on UK regulators. It requires the following of regulators:

- Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.
- Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources in the areas that need them most.
- Regulators should provide authoritative, accessible advice easily and cheaply.
- No inspection should take place without reason.
- Businesses should not have to give unnecessary information or give the same piece of information twice.
- The few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions.
- Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take.

It is important to review the success of these measures in practice and in July 2008, the United Kingdom National Audit Office reported on reviews of the performance of the five largest regulators in implementing the Hampton principles.[3] The regulators were the Environment Agency, Health and Safety Executive, Financial Services Authority, Food Standards Agency and the Office of Fair Trading. The general conclusion was that regulators had accepted the need for risk based regulation and in most cases had established mechanisms to assess risk and direct resources accordingly. There were however a number of common challenges faced by regulators. Among these was the development of a comprehensive risk assessment system to deal with a wider range of risks including those applying to the regulated sector generally and at the level of the firm so that resources could be applied effectively. The review concluded that there was considerable value in regulators sharing their knowledge and experience.

1. United Kingdom Government (2005), "The Hampton Review – Reducing Administrative Burdens Effective Inspection and Enforcement", March, available online at *www.hm-treasury.gov.uk/media/7/F/bud05hamptonv1.pdf.*
2. United Kingdom (2007), "Regulators Compliance Code – Statutory Code of Practice for Regulators", Department of Business Enterprise and Regulatory Reform, 17 December, available online at *www.berr.gov.uk/files/file45019.pdf*.
3. United Kingdom Government (2008), National Audit Office, "Regulatory Quality: How Regulators are Implementing the Hampton Vision", *www.nao.org.uk*.

Source: OECD (2008).

Controlling Regulation Inside Government

Mechanisms for managing and tracking reform inside the administration are needed to keep reform on schedule and to avoid a recurrence of over-regulation. It is often difficult for ministries to reform themselves, given countervailing pressures, and maintaining consistency and systematic approaches across the entire administration is necessary if reform is to be broad-based.

The Australian Public Service Commission regularly surveys the public sector agencies and publishes the results in its annual State of the Service Report. In 2008, all agencies responded that they had taken specific actions to improve their efficiency and/or effectiveness. The most common initiatives were through: enhanced ICT capability or greater use of technological solutions; improved financial arrangements (*e.g.* improved internal budget and/or procurement processes); improved governance and accountability arrangements within the agency; and organisational restructuring or realignment of priorities to better meet the needs of the Australian Government (APSC, 2008).

In 2007 the Management Advisory Committee (MAC) of the Australian government developed a policy to address the problem of red tape in government. One aim was to dispel myths which it asserted were leading administrators to believe that they must follow more onerous internal regulatory requirements than are in fact in place. It also developed a principles based framework for the design and review of internal requirements in government and the scrutiny of new requirements. A policy document *Reducing Red Tape in the Australian Public Service* sets out three "underlying principles" for intra government regulation. That it should effectively address the issue of concern, be the most efficient option and have benefits that substantially exceed costs. Drawing on the framework for Regulatory Impact Assessment, the policy provides guidance to agencies to systematically examine proposed internal regulation, including consultation with affected stakeholders, to demonstrate that there is a need for the internal requirement and that the requirement selected is the least cost option. It proposes that agencies should review administrative requirements regularly to ensure that they continue to meet their objectives efficiently according to a 3-5 year timetable for internal departmental requirements and a 5-10 year timetable for whole of government requirements. It was envisaged that portfolio secretaries would be responsible for determining their own annual programme of review.

Assessment

The above initiative on reducing red tape in government was comprehensively reviewed as part of the OECD *Review of Budgeting in Australia* (OECD, 2008, p. 185). The review described the initiative as 'pioneering' and a sound and significant step forward in extending the systematic and rational analysis to internal processes. Two aspects were identified for improvement: supplementing the process based approach with targeted initiatives to highlight and resolve major specific issues, and developing a better understanding of the extent of the problem of excessive internal regulation.

An apparent risk with the administration of the policy is that there may not be sufficient incentives for agencies to undertake the reviews that are required. It is not clear that the oversight responsibility for the implementation of the reviews has been established as originally envisaged. There appears to be no review schedules published and no mechanism set up to report on compliance or the result of reviews. To be effective the policy will have to be implemented, and then examined for its effectiveness. It is likely that some experimentation in processes will occur which could usefully inform changes to the policy over time, if an agency were given responsibility for monitoring and reporting on its application.

ADMINISTRATIVE CAPACITIES FOR MAKING NEW REGULATION OF HIGH-QUALITY

Institutional design, administrative transparency and predictability

This section reviews how current processes for making legislation and subordinate regulations support applications of core principles of good regulation. It describes and evaluates systematic capacities to generate high-quality regulation, and to ensure that both processes and decisions are transparent to the public.

Transparency of the regulatory system is essential to establishing a stable and accessible regulatory environment that promotes competition, trade, and investment, and helps insure against undue influence by special interests. Transparency reinforces the legitimacy and fairness of regulatory processes. Transparency involves a wide range of practices, including standardised processes for making and changing regulations; consultation with interested parties; plain language in drafting; publication, codification, and other ways of making rules easy to find and understand; and implementation and appeals processes that are predictable and consistent.

Forward planning

A number of OECD countries have established mechanisms for publishing details of the regulation they plan to prepare in the future. Forward planning has proven to be useful to improve the transparency, predictability and co-ordination of regulations. It fosters the participation of interested parties as early as possible in the regulatory process and it can reduce transaction costs through giving more extended notice of forthcoming regulations.

In Australia all Federal department and agencies responsible for regulation which impacts on business and individuals or the economy are required to publish an Annual Regulatory Plan (ARP) in July each year. The plan is required to include details of proposed changes to regulation and opportunities for consultation. More detail on the ARP is contained in the section on consultation.

The Cabinet Process

The Federal Cabinet plays a vital role in maintaining and co-ordinating the quality of regulatory policy in the Australian Government. The central purpose of Cabinet is to ensure consistency in public policy formulation, support ministers in meeting their individual and collective responsibilities, facilitate co-ordinated and strategic policy development and enable informed decision-making on all issues requiring collective determination (Australian Government, 2004). The Cabinet process is the product of convention and practice, its principles and procedures are formalised in the Cabinet Handbook, not in legislation.[20] However, given the Westminster culture, it is worth noting that the procedures have a binding effect, and that conventions play a powerful role to ensure that due process is respected. As a result, the arrangements in place are often stricter than in other countries, even if they are not supported by legislation. The Cabinet is supported by a dedicated secretariat located in the Department of the Prime Minister and Cabinet that manages the business flow to Cabinet and ensures that Cabinet processes and rules are followed. Specialised work of the Cabinet is delegated to various standing and *ad hoc* committees.[21]

The deliberations of the Federal Cabinet are one of the key mechanisms for the consideration of policies that have a regulatory impact and its processes reinforce the broader regulatory quality control measures of the RIS process. The Cabinet processes require that a submission brought to Cabinet or its committees by a Minister must include a clear recommendation and accompanying justification for the recommendation. This must include an assessment of the regulatory impacts, including a summary of the regulatory impact statement, and/or the results of the Business Cost calculator (BCC) or its equivalent. Where the impacts are considered highly significant the RIS should include a quantified cost benefit analysis. Further details must also be provided about the proposed implementation of the regulatory policy, its financial implications, and impacts on small business, regional Australia and families.

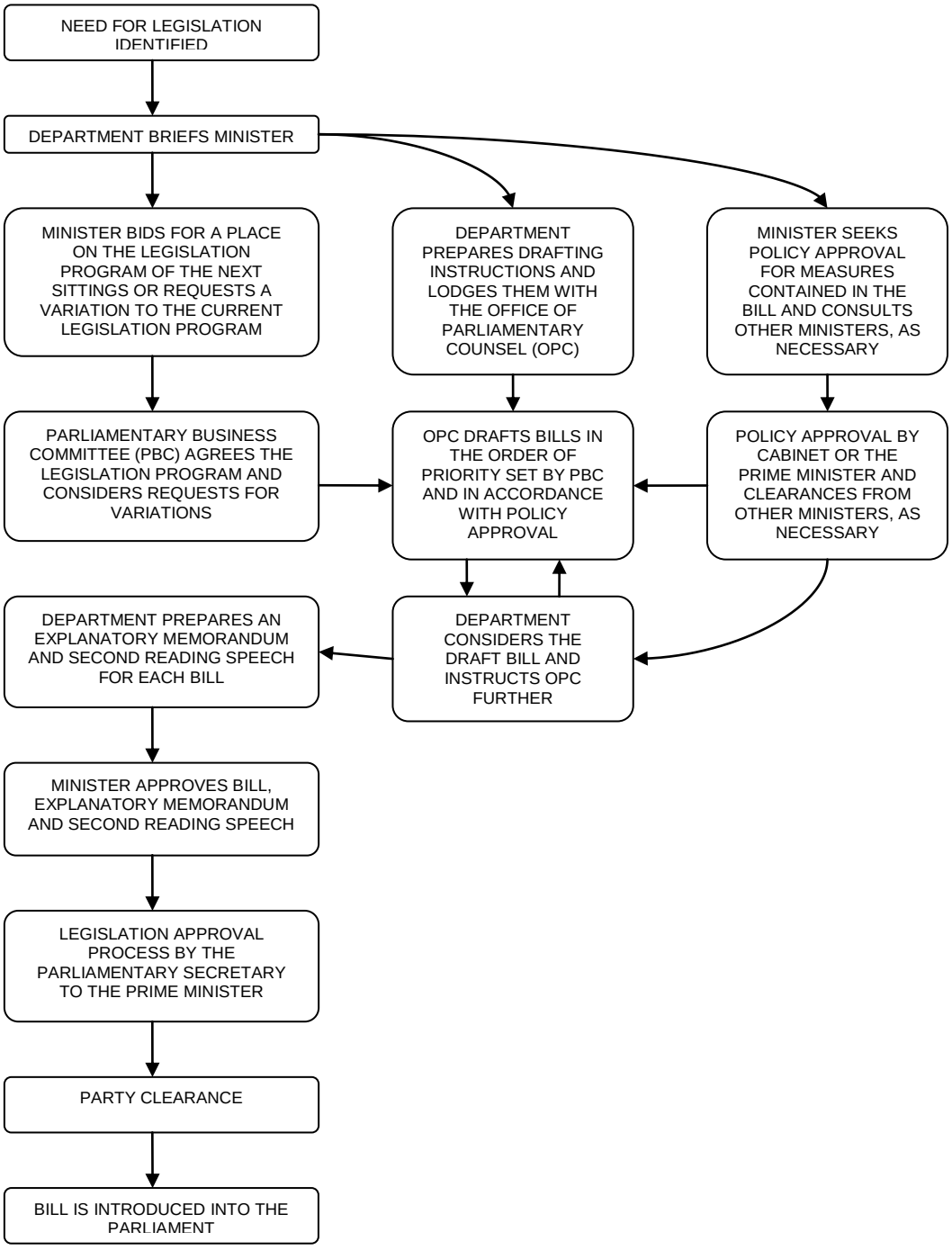
Cabinet submissions on significant regulatory proposals are circulated for their formal co-ordination comments and the submission must identify whether there is agreement among relevant departments and agencies for the proposal. The Cabinet Handbook specifies certain consultation timelines within government including a minimum five day 'consideration period' for Cabinet submissions, unless designated by the Prime Minister or the Cabinet Secretary for immediate consideration. All submissions to Cabinet must be assessed by the Department of Prime Minister and Cabinet, the Treasury and the Department of Finance and Deregulation for financial impacts. The Attorney-General's Department has responsibility for assessing if submissions have legal or constitutional issues. Where the requirements for the preparation of a RIS have not been met, the Cabinet Secretariat has a gate keeping role of ensuring that regulatory proposals do not proceed for deliberation by Cabinet. Similarly, the Cabinet Secretariat may reject a submission where it has not undertaken appropriate consultation, or addressed strong criticism by other departments.

Transparency of procedures for making new laws and regulations

Transparent and consistent processes for making and implementing legislation are fundamental to ensuring confidence in the legislative process and to safeguarding opportunities to participate in the formulation of laws. In the majority of OECD countries, such procedures are established in legislation supplemented by decrees, guidelines or policy statements issued by the government or individual ministries.

The process of preparing a law is outlined in the *Legislation Handbook*.[22] The handbook gives detailed instructions as to the process and the broad stages are outlined in the attached chart from the handbook (see Box 12). To assist officers preparing regulation the handbook provides guidance on matters that should be included in primary legislation and those which are appropriate for subordinate legislation. It also outlines the procedures and the actions which are required by departmental officers `when involved in making Commonwealth Acts, thereby ensuring quality control and consistency in the process. Like the cabinet process, the legislative process reinforces the requirement for early consideration of the feasibility of non-legislative options, as well as whether there 'might be alternative approaches which would permit simpler legislation.' Related to this is guidance to consider whether a policy could be better implemented by legislation drafted in general principles than 'black-letter' provisions. The handbook directs departments to undertake consultation within and outside government when considering the preparation of legislation. It also reiterates the requirement for the early development of a RIS, when preparing any request for policy approval of a legislative bid that may have an impact on business. Where required the RIS is tabled in the explanatory material.

Box 12. Summary of the legislative process prior to the introduction of a Bill into the Australian Parliament



Source: Appendix A: A Summary of the legislation process prior to introduction of a Bill in Parliament, Department of the Prime Minister and Cabinet (1999) *Legislation Handbook,* Commonwealth of Australia *www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf.*

Transparency in the implementation of regulation: communication.

Another dimension of transparency is the effectiveness of communication and the accessibility of the rules for regulated entities. Regulatory transparency requires that governments effectively communicate the existence and content of all regulations to the public. At the Federal level in Australia, all Bills are published in hard copy and on the Parliament's website after being introduced to Parliament. Bills are subjected to the scrutiny of both houses of Parliament as well as by relevant Parliamentary committees and the Senate standing committee for the scrutiny of Bills, which has a general focus on the rights of individuals and the Parliament. A Member of Parliament may also present a private member's Bill, though they are rarely passed by Parliament. This would avoid the Cabinet policy approval processes, and would not be drafted by the OPC, but the Parliamentary process is the same. Some other forms of regulation which are not subject to the above arrangements are some classes of subordinate legislation which are not classified as a legislative instruments and quasi regulation, such as enforceable industry codes of practice, although the latter is still subject to RIS procedures.

The Australian *Legislative Instruments Act* 2005 provides mechanisms for the scrutiny of laws made under a delegated power of Parliament. A legislative instrument must be registered on the Federal Register of Legislative Instruments to be enforceable, and individuals that rely on information on the register that which is later proved to be wrong are at no disadvantage.[23] Unless exempted legislative instruments are subject to a ten year sun setting period. The Act requires explanatory statements to be registered on the Federal Register of Legislative Instruments and tabled in the Parliament with the legislative instrument. A rule maker is required to report in the explanatory memorandum on what consultation they undertook when making a rule. A lack of compliance with the Act may attract the attention of the Senate Committee on Regulations and Ordinances which can write to the Minister seeking an explanation, and may make a motion to Parliament to disallow the instrument if not satisfied.

Primary laws and subordinate legislation are accessible at no cost from a searchable database on the ComLaw Website maintained by the Attorney General's Department.[24] Some codification of laws has taken place to produce a single Criminal code, but codification is not considered a major issue due to the online availability of Australian law.

Plain language

Governments need to ensure that regulatory goals, strategies, and requirements are clear to the public. This is essential to maintaining public confidence in the necessity and appropriateness of regulation, and an important element in ensuring compliance. Fundamentally this requires that legal texts be able to be read and comprehended by non-experts.

The Australian Government has two professional legal drafting offices. The Office of the Parliamentary Counsel (OPC) is responsible for drafting all government Bills and government amendments to Bills. The OPC ensures that the Bills and amendments are consistent with the policy approval. The Office of Legislative Drafting and Publishing (OLDP) draft all regulations, proclamations and Rules of Court. The offices also consult with the Office of International Law within the Attorney-General's department to confirm that legislative proposals are consistent with Australia's international obligations on trade and investment and other matters.

The OPC and OLDP aim to maintain best practice standards in legal drafting. This role of the offices is important for promoting consistency and identifying and incorporating recent innovations in legal drafting. This ensures that legislative drafting is of a high-quality and that each subsequent new law benefits from the lessons of previous drafts and the continuing development of new and more effective drafting conventions. The need for clarity and comprehensibility in the law appears to be very well

understood and incorporated in the Australian system. Since the 1980's the OPC has promoted the use of "plain English". The OPC has published 'drafting manuals' for the preparation of Bills including a 'Plain Language Manual.'[25] The website of the OPC also includes links to papers on the topic of legislative clarity going back to 1990, as well as links to several international sites which promote clarity in legislative drafting.

Transparency as dialogue with affected groups: use of public consultation

Effective consultation is the key to ensuring that the interests of citizens and business are taken into account in the development and design of regulation. It improves the effectiveness of regulation by drawing on the information that regulated entities have about the likely impacts of regulation. By exposing issues and potential deficiencies so that they can be taken into account, it increases stakeholder commitment and promotes a greater likelihood of compliance. The positive effect from transparency and stakeholder engagement is not just confined to regulation, but is also applicable to policy and programme development and delivery.

There is a growing recognition among OECD governments that engagement with citizens and groups affected by regulation is an important part of improving the design of rules and promoting acceptance of and compliance with rules. However, the administration cannot be relied upon to take up consultation practices unassisted. Increased public participation in rule making can present political challenges and is also an additional administrative delay to the legislative process. It therefore requires careful planning and preparation and can require culture change to be successfully integrated within the administration. Accordingly, the OECD has found the adoption of common procedures and the publication of guidance documents to be very important in promoting a consistent commitment to public consultation within the administration. Two purposes are served by guidelines on consultation: they clearly express the policy commitment of the government to require civil servants to engage the public; and they provide valuable technical guidance to public officials on how to design effective public consultation and integrate the views of the public.

The Australian Government adopted a whole of government policy on consultation in 2006. The policy is included in the *Best Practice Regulation Handbook* and sets out seven principles for best practice consultation to be followed by agencies when developing regulation.[26] The policy is intended to cover all aspects of regulation including *"from the policy proposals/'ideas' stage, through to post implementation reviews"* (Australian Government, 2007:5) (see Box 13). Key aspects of the consultation procedures are outlined in the handbook and include the obligation to release a policy options paper, or 'green paper' for regulatory proposals of major significance, and the use of exposure drafts to refine how regulation will work in practice. The policy acknowledges the problems created for business when timeframes for consultation are too short. It suggests that 12 weeks should be allowed for consultation on significant proposals, but does not mandate any particular time period. For the most part the consultation policy is in the nature of general advice and guidance that should be followed when considering new regulation. However, some specific consultation instruments are actively encouraged if not actually mandated.

Agencies are directed to post information on the business consultation website (*www.consultation.business.gov.au*) which is a source for electronic notification of consultation opportunities. The website provides a facility for Government agencies to link to current consultation activities. Businesses and individuals are invited to register themselves and identify their areas of policy interest. The website will automatically notify registered participants of any consultation programmes that correspond to their identified area of policy interest. It also provides the contact details of interested parties to the government agency. The onus is then on the government agency to follow up with interested citizens and businesses. The website provides a link to the best Practice Regulation Handbook for further guidance material on consultation principles. Between February 2008 and April 2009, 65 Australian Government agencies have conducted more than 80 public and direct consultations through the *business.gov.au* consultation portal.[27]

Departments are also required to publish and maintain on their website an Annual Regulatory Plan (ARP). The OBPR posts a link to the plan of each agency from its website and the business consultation website, (*www.obpr.gov.au*). The OBPR published updated guidelines for the preparation of regulatory plans in August 2008. The guidelines state that the ARP will include details of regulatory changes affecting business from the previous financial year and information about activities planned for the next year. The ARP is required to include a timetable, contact details of a responsible officer and planned consultation opportunities that business can participate in.

This initiative is clearly a positive systemic arrangement to require departments to embed in their procedures important notice of intended regulatory initiatives. A review of the OBPR website reveals that all Commonwealth Departments have complied with the requirement for an ARP and a review of a random sample of ARP suggested that the entries included the required detail about the initiatives that are listed. However, a more detailed audit of the extent to which the plans are comprehensive, including feedback on user satisfaction would be beneficial to verify how complete and useful the information contained in the plans is to business and the public.

In addition to the policy on consultation, the *Legislative Instruments Act 2003* has a reference to the need for consultation with business on proposed rules. However, it appears that the Act is not intended to be legally compelling as it leaves considerable discretion to the rule maker to decide whether consultation is required, and what form it should take. Section 17 of the Act requires that, where a proposed instrument is likely to have a direct or substantial indirect effect on business or restrict competition, the rule maker must be satisfied that any consultation that is considered appropriate and practical has been undertaken. The forms of consultation that may be taken are not at all limited. Examples of possible practices are as narrow as seeking the advice of an expert or notifying representative organisations. Section 18 of the Act states that if consultation does not occur it will not affect the validity of the instrument. Section 3 of the Act requires the Explanatory Statement is to contain a description of the nature of the consultation which has been undertaken or provide an explanation for why consultation has been undertaken. Overall however, the provisions do not appear to compel rule makers to undertake very wide consultation if they are not so inclined, or are not otherwise guided by a more forceful policy. However, the prospect of a query from the Senate Committee on Regulations and Ordinances which can potentially result in a recommendation for disallowance may act as an incentive to consult.

Other consultation initiatives are worthy of noting because they appear illustrative of a culture of consultation on policy development. In April 2008, the Prime Minister convened an *Australia 2020 Summit*, bringing together more than 1000 Australians to 'debate the best ideas from the community' on how to 'shape a long term strategy for the future of the nation.'[28] The Federal Cabinet regularly holds Community Cabinet Meetings in various locations across Australia to give local people an opportunity to meet Cabinet members and discuss issues. In November 2008 the inaugural Australian Council of Local Government meeting provided the opportunity for consultation and collaboration through a meeting in Canberra with the Mayors of Australia's 609 local governments. Recent (and ongoing) prominent policy reviews in the areas of tax policy, greenhouse gas abatement, aviation and energy policy have also been identified as exemplifying broad consultation practices. These include the use of 'green papers' to expose policy options for discussion issues of policy and open processes which invite submissions from all interested stakeholders.[29]

Box 13. Australian Government Best Practice Consultation Principles

The Australian Government adopted a whole-of-government policy on consultation in 2006. The policy sets out the seven principles which agencies are required to follow when developing regulation:

Continuity — Consultation should be a continuous process that starts early in the policy development process.

Targeting — Consultation should be widely based to ensure it captures the diversity of stakeholders affected by the proposed changes. This includes state, territory and local governments as appropriate and relevant Australian Government departments and agencies.

Appropriate timeliness — Consultation should start when policy objectives and options are being identified. Throughout the consultation process, stakeholders should be given sufficient time to provide considered responses.

Accessibility — Stakeholder groups should be informed of proposed consultation and be provided with information about proposals through a range of means appropriate to these groups.

Transparency — Policy agencies need to explain clearly the objectives of the consultation process and the regulation policy framework within which consultations will take place, and provide feedback on how they have taken consultation responses into consideration.

Consistency and flexibility — Consistent consultation procedures can make it easier for stakeholders to participate. However, this must be balanced with the need for consultation arrangements to be designed to suit the circumstances of the particular proposal under consideration.

Evaluation and review — Policy agencies should evaluate consultation processes and continue to examine ways of making them more effective.

Source: Australian Government (2007), p. 4.

The Deregulation Policy Group has collected information on the use of tailored consultation processes by regulatory agencies, and reports that a variety of consultation approaches and strategies are used effectively by Australian Government agencies. Examples include targeted and regular discussions in stakeholder forums established by Ministers or agencies (for example the Board of Taxation, National Tax Liaison Group, Gas Market Leaders Group and the Automotive Industry Innovation Council) and public information provided directly through agency websites. In the period December 2007 to April 2009, the Federal Government released five Green Papers on issues ranging from the Carbon Pollution Reduction Scheme to Financial Services and Credit Reform. Several White Papers were also issued and significant consultation has also been undertaken through other discussion papers, including the extensive consultation undertaken as part of the Australia's Future Tax System Review and in the development of the Fair Work Australia legislation.

In addition to the anecdotal evidence, obtaining reliable time series data about the extent of the use of consultation processes within government is very important to understanding its capacity to improve regulation. The Australian Government has demonstrated some interest in this area. The Australian Public Service Commission (APSC) runs an annual online survey which includes questions on the extent to which federal public service agencies conduct formal consultation on the development of policy and programmes. From 2005, the annual survey was expanded to include consultation during the development of government regulation (APSC, 2005:54) The survey collects information on formal consultation with non-government agencies, industry stakeholders, tertiary education and research groups, agencies from State, Territory and local governments, unions and members of the public. Policies and programmes are as relevant to good administration as regulation, but as the focus here is on regulatory policy, the presentation

of the survey results is limited to that area. Selected results of the survey are represented in the table below and cover the consultation on the preparation of regulation by agencies with the public, industry and non government agencies, for the years 2005-08.

Table 1. APSC reports on the percentage of Commonwealth agencies that conduct formal consultation with stakeholders on government regulation

	Public		Industry		Non Govt	
Year	Usually	Sometimes	Usually	Sometimes	Usually	Sometimes
2004-05	24%	67%	67%	87%	52%	82%
2005-06	29%	73%	76%	93%	48%	78%
2006-07	No data	41%	No data	57%	No data	48%
2007-08	No data	43%	No data	62%	No data	52%

Source: Adapted from APSC 2005:56, APSC 2006:272, APSC 2007:272, APSC 2008:242.

In the period 2004-06 the APSC filtered the survey results to only include responses from *relevant agencies*; that is only those agencies that self identified as having a regulatory role. The 2004-05 survey found that only 24% of relevant agencies *usually* consulted with the public on government regulation, and the proportion of relevant agencies that *usually* consulted with industry was 67% (APSC, 2005, p. 56). The equivalent survey in 2005-06 did not report much change. It revealed that the proportion of relevant agencies that *usually* consulted with the public on the development of new regulation was 29%, and 76% of relevant agencies responded that they *usually* consulted industry stakeholders on the development of government regulation (APSC, 2006, p. 272).

Unfortunately, from 2006-08 the survey reports reveal less detail and only indicate the aggregated percentage of agencies that consulted with external stakeholders *usually* or *sometimes*. Also the APSC discontinued its practice of filtering the results to only apply to relevant agencies with a regulatory function. These methodological variations explain the apparent reduction in the consultation practices and limit the effective use of the data as a comparable time series assessment of consultation practices over the four year period.

Assessment

The fact that the survey is being undertaken is evidence of a commitment on the part of the Commissioner of the Australian public service to obtain better information on the effectiveness of government policies on consultation. Furthermore, the survey results suggest that consultation is an important part of the practice of government agencies and this is reinforced by the evidence of consultation practices concerning specific policy areas. However, the practical use of the results is limited because of methodological variations in the collection and presentation of the data. One interpretation of the survey results could be that in the past there has not been widespread appreciation and full compliance with the RIS requirements to consult with affected groups on the development of regulation. The methodological limitations make it inadvisable to interpret the data too strictly.

The commitment of agencies to formally consult the public on the development of programmes, policies and regulation is in principle fundamental to transparency, democracy and the successful design of government administration. OECD peers such as the United Kingdom, Ireland and Canada have also emphasised the importance of a whole of government policy for consultation and developed their own programs to promote consultation practices by the administration.

Since 2000 the United Kingdom has had a code of practice on consultation that sets out how consultation should be run and what people can expect from government consultation. The list of agencies that have agreed to adopt the code is published on the BERR website, along with supplementary guidance material on managing public consultation. Fifty five agencies have formally adopted the code, which is an extensive if not exhaustive slice of the administration. Agencies nominate a 'Consultation Co-ordinator', to ensure that the Code is followed within their organisation, and to act as an internal advisor to other staff planning consultation. A network of Consultation Co-ordinators is managed by the Better Regulation Executive (BRE). The Code is not a legal obligation and cannot prevail over statutory or mandatory requirements of agencies. The code is updated periodically and was last updated in July 2008.

The Canadian Cabinet Directive on Streamlining Regulation requires that interested and affected parties be consulted on the development or amendment of regulations, the implementation of regulatory programs, and the evaluation of regulatory activity against stated objectives (Government of Canada, 2007, p. 4). In support of this the Canadian Government publishes detailed guidelines to advise managers and specialists on how to plan, administer and analyse the results of the public consultation. The guidelines include a number of highly adaptable checklists to walk the policy or rule maker through the preparation and conduct of a consultation process. Ireland has also published a comprehensive guide to public consultation for public sector bodies, which provides, among other things, a comparative chart of the relative merits of different consultation approaches for different groups (Ireland, 2005:45). Both the Canadian and the Irish guide provide useful examples for the design and administration of consultation practices.

Co-ordination between levels of government

The regulatory management arrangements applying to the states and the co-ordination arrangements between the Commonwealth, states and territories will be the subject of a separate chapter in the full report on the Review of Regulatory Reform in Australia. This purpose of this brief discussion is simply to introduce the topic for context.

Regulatory systems are composed of complex layers of regulation stemming from sub-national, national and international levels of government. Complex and multi-layered regulatory systems have long been a subject of concern with respect to the efficiency of national economies and the effectiveness of government action. High-quality regulation at one level can be undermined or reversed by poor regulatory policies and practices at other levels and co-ordination can vastly expand the benefits of reform. Australia has been working toward the goal of regulatory harmonisation from before 1 January 1901, when the different British self-governing colonies of Queensland, South Australia, New South Wales, Tasmania, Victoria and Western Australia formed a federation. The "rail gauge problem," where NSW reverted to a standard gauge railway line while neighbouring states South Australia and Victoria remained on broad gauge, epitomizes the potential for different regulatory decisions to impede market efficiency and create barriers to trade across the nation. Through a series of significant reforms over the past thirty years these differences have been substantially removed, but not entirely overcome.[30] The single biggest demand for reform from the business lobby is for the development of nationally consistent regulatory regimes where there are shared responsibilities between the Commonwealth and the States. The achievement of this remains the major reform challenge for the governments of Australia (BCA, 2005, p. 36).

In fact there is a significant program of national reform currently underway in Australia involving co-operation between the Commonwealth and the States and territories and aimed at establishing a national alignment of objectives for regulatory reform. The institutional and policy frameworks for this will be discussed in another chapter in the regulatory reform review of Australia. In brief, however, it involves a program of co-operative federalism under the auspices of the Council of Australian Governments (COAG). The current program was initiated in 2006, when COAG agreed to support a National Reform Agenda

(NRA) aimed at further raising living standards and improving the nation's productivity over the next decade. The NRA comprises three streams – competition, regulatory reform and human capital. The regulatory reform stream includes all Australian jurisdictions improving existing processes for regulation and review, and a plan to address overlapping and inconsistent regulation in six jurisdictional 'hotspots.'[31]

The current government has expressed a renewed commitment to 'co-operative federalism' and the COAG goal of achieving a 'seamless national economy.' A COAG Business Regulation and Competition Working Group, chaired by the Minister for Finance and Deregulation was established in December 2007 and expanded the list of 'hot spots' to 27 deregulation priorities to be implemented nationally. Under a National Partnerships Agreement (NPA) between the Commonwealth the states and territories, the states and territories will receive funding of up to AUD 550 million over five years based on satisfactory progress on the 27 specified reform areas.

Box 14. The Council of Australian Governments (COAG)

COAG was established in May 1992 as the peak intergovernmental forum in Australia. It comprises the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association (ALGA). COAG is Chaired by the Prime Minister and the Department of the Prime Minister and Cabinet provides the Secretariat. The role of COAG is to initiate, develop and monitor the implementation of policy reforms that are of national significance and which require co-operative action by Australian governments.

Over 40 Commonwealth-State Ministerial Councils and fora facilitate consultation and co-operation between the Australian Government and state and territory governments in specific policy areas and take joint action in the resolution of issues that arise between governments. In particular, Ministerial Councils develop policy reforms for consideration by COAG, and oversee the implementation of policy reforms agreed by COAG.

Source: *www.coag.gov.au*

Transparency in the implementation of regulation: compliance, enforcement and appeals

To achieve its intended objective, a regulation must receive compliance. A mechanism for the redress of regulatory abuse should also be in place as a democratic safeguard of a rule-based society and as a feedback mechanism to improve regulations.

Compliance and enforcement

A crucial performance instrument for any regulation is the degree of compliance it generates. An *ex ante* assessment of compliance is increasingly a part of the regulatory process in OECD countries, although the level of resources and attention focused on it varies significantly.

Australian regulators use a variety of compliance 'tools' including significant sanctions such as pecuniary penalties and jail. Depending on their enabling legislation regulators may also have considerable discretion concerning remedies for which they may seek orders in relevant courts/tribunals. These can include injunctions, remedial orders and the payment of damages and/or compensation. The consideration of appropriate compliance strategies and the cost of implementation are required to be evaluated as part of the RIS procedures for new regulation.

All federal legislation that creates or varies offences, imposes penalties, or confers coercive powers on enforcement and regulatory agencies must receive the approval of the Minister for Home Affairs. This is to ensure that legislation achieves the Australian Government's policy objectives and maintains the integrity of the federal criminal law system.

The federal Attorney-General's Department has published *The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* to assist regulatory agencies to design their compliance activities to be accessible, efficient, and afford procedural fairness.[32] The Australian Government's general approach is to require regulatory agencies to provide a strong justification for the need to exercise coercive powers. A legitimate need must be demonstrated, including reasons why the current regulatory system is inadequate. Coercive powers will only be granted to regulatory agencies if they are accompanied by suitable safeguards, including guidelines for the implementation of powers, adequate training for staff exercising coercive powers and appropriate internal controls (for example, limiting the class of persons who may exercise powers).

The impost of civil penalties on corporations may be financially substantial. The Attorney-General's Department encourages regulatory agencies to consider the use of civil penalties as an alternative means of ensuring compliance with legislative provisions where criminal punishment is not merited for contravention of a regulatory requirement; and where corporations are being penalised.

Box 15. Initiatives of *ex-ante* assessment of legislative proposals' enforceability in OECD countries

In the **Netherlands**, "The Table of Eleven" is used both to guide reviews of compliance and enforcement relating to existing legislation and as an analytical tool in the development of new regulation. The Table is in three parts: *spontaneous compliance dimensions*, *control dimensions* and *sanctions dimensions*. This "checklist" approach can help regulators consider compliance issues in detailed, systematic fashion, and also provide a useful review and quality control tool. In the **United Kingdom**, government policy and guidance on the preparation of regulations include explicit considerations on securing compliance. Policy makers are encouraged to consider a variety of compliance factors, including taking a balanced approach between high compliance and (over-) active enforcement. In **Canada**, implementation and compliance strategies are also required to be explicitly and publicly discussed as part of the preparation of a regulatory proposal.

Source: OECD (1999), *Regulatory Reform in the Netherlands*, Paris; OECD (2001), *Regulatory Reform in the United Kingdom*, Paris; OECD (2002), *Regulatory Reform in Canada*, Paris.

Public redress and the judicial system

A feature of regulatory justice is the existence of clear, fair and efficient procedures to appeal administrative decisions and regulations. Under the Australian system, appeals against regulatory enforcement decisions may be administrative or judicial, depending on the legislative framework under which the enforcement decision has been made.

The Administrative Appeals Tribunal provides independent merits review of a wide range of administrative decisions made by Australian Government ministers, departments, agencies, authorities and other tribunals. It has jurisdiction to review decisions made under more than 400 laws including decisions related to trade, customs, industry assistance and passports. In some cases, the Tribunal cannot review a decision until an internal administrative review has been conducted.[33] Many cases are resolved at the Tribunal through the use of alternative dispute resolution without proceeding to a hearing. If a matter does proceed to a hearing, the Tribunal may have three members; generally one member is a lawyer, and at least one other member will have expertise in the matter before the Tribunal. The Tribunal is not usually required to make a decision within a specified time period, but aims to make a decision within 60 days of the last day of a hearing.

Most Commonwealth decision making is also subject to judicial review. A person who is aggrieved by a decision of an administrative character made under a Commonwealth law may apply to the Federal Magistrates Court or Federal Court for review of that decision under the *Administrative Decisions* (Judicial Review Act) 1977. A single judge usually hears appeals. Unless specified in legislation, the Court is not usually required to make a decision within a specified time period.

Australian courts interpret and apply laws passed by the Parliaments of the Commonwealth, state and territory governments and the common law. An important role of Australia's High Court is to decide disputes about the meaning of the Constitution, for example, whether an Act passed by the Commonwealth Parliament is within the legislative powers of the Commonwealth. The Australian federal courts do not have responsibility for reviewing regulations, but they are able to overturn decisions (including regulatory decisions) made under regulations and may also hold regulations invalid if they do not fall within the statutory power under which they were allegedly made. Judicial review of decisions made by officers of the Commonwealth is also available in the Federal Court pursuant to section 39B of the *Judiciary Act* 1903 and in the High Court under section 75(v) of the Constitution.[34] Grounds for review include: breach of natural justice, error of law, acting for an unauthorised purpose, failure to consider a relevant matter or acting under a direction. Under section 75(v) of the Constitution, the High Court is able to grant remedies to a person when a Commonwealth officer has failed to perform an enforceable legal duty, has exceeded their powers or has otherwise acted unlawfully.

Choice of policy instruments: regulations and alternatives

Critical to the administrative capacity for good regulation is the ability to choose the most efficient and effective tool, whether regulatory or non-regulatory, to meet a policy objective. The use of alternative policy tools is expanding among OECD countries. This follows experimentation, shared learning and an increased understanding of the potential role of markets. Typically, however, there are disincentives for public servants to be innovative: the use of untried methods carries risks and bureaucracies can be inherently conservative. Reform authorities must take a clear leading role in supporting and promoting alternatives to traditional regulatory approaches if innovative alternatives are to be developed and practised.

The Australian *Best Practice Regulation Handbook* requires that the RIS for regulatory proposal must include consideration of a range of regulatory and non-regulatory alternatives. The handbook promotes the early consideration of alternatives when examining the need for regulation. It provides guidance and identifies the strengths and weaknesses of a range of alternatives approaches, including examples of where they could be applied. There is no preference expressed for a particular regulatory approach, the appropriate solution should be identified based on the features of the policy problem and deliver the greatest net benefit compared to other possible options. In all cases where new regulation is being considered, self regulation is required to be examined in a RIS. The training for departments provided by the OBPR includes discussion of the range of alternative instruments and their application.

The Australian Government has co-operative and/or self-regulatory arrangements with a number of non-government bodies across a range of sectors and industries. In many cases, industry professions have responsibility for self regulating accreditation to practice, for example: lawyers, accountants, and pharmacists. The communications industry (internet, radio, telecoms, and broadcasting) is cited by the Australian government as an example of a balanced approach between regulation, co-regulation and self-regulation (see Box 16).

Box 16. Co-regulation and self regulation in the communications industry

The Australian Communications and Media Authority (ACMA) employs a multi-layered regulatory and information-sharing strategy for the regulation of broadcasting, the internet, radio communications and telecommunications. Industry co-regulation and self-regulation are major features of the *Broadcasting Services Act 1992* (BSA) and the *Telecommunications Act 1997* (TA). Both frameworks encourage industry participants to assume responsibility for regulation within their own sectors, within limits and subject to legislative guidance. The frameworks place industry closer to consumers and consumer views, and leave the regulator in a position to deal with elevated disputes or systemic issues. Bodies, associations or groups representing sectors of industry are able to develop codes of practice that meet 'appropriate community safeguards' and submit them to ACMA for registration. ACMA will investigate public complaints about any matters covered by a registered code of practice or a code notified by a public broadcaster if the person has first complained to the broadcaster and is dissatisfied with the response they receive. ACMA publishes reasons for its decisions and enforcement activities taken as a result of breach investigations and when considering broadcasting licence renewals.

Source: Australian Government : Response to Questionnaire.

Regulators may refer to and mandate compliance with documents prepared by third parties such as national or international standards. Standards Australia is an autonomous not-for-profit standard setting body that maintains over 7 000 standards. It co-ordinates standardisation activities, develops internationally aligned Australian Standards, and facilitates the accreditation of other standards development organisations.[35] There is a preference for the use of consumer organisations to undertake assessment of products and provide information to educate consumers to make informed choices. For example: *Choice* the largest Australian consumer organisation, tests and rates a range of consumer products; different state based motor clubs publish safety test information on vehicles; and the National Heart Foundation administers an endorsement food labelling scheme for food products that meet the National Heart Foundation test.

Box 17. Examples of the use of Alternatives to formal regulation in Australia

Community awareness activities are being used to address the impacts of firewood collection and develop a more sustainable firewood industry. Safety on waterways is being improved through the use of guidelines from Standards Australia for electrical installations in marinas and on recreational boats. The Industry Waste Reduction Plan is a voluntary plan between government and industry that sets clear targets and reporting mechanisms and is helping Australia reach world records in newspaper recycling. Energy labelling standards encourage producers to develop more efficient products to meet consumer demand for low emitting and cost effective devices. The labelling standards have helped increase the range of efficient appliances available to consumers and reduce greenhouse gas emissions. The self-regulatory Agsafe Guardian program ensures the safe storage, handling and transport of agricultural chemicals.[1]

1. Further information on these initiatives can be obtained from the following websites:
www.environment.gov.au/land/pressures/firewood
www.standards.org.au/downloads/080112_Electrical_installations_for_marinas_and_boats.pdf
www.pneb.com.au/pdf/publishers_sustainability_plan_2006-10.pdf

Overall assessment

The Australian government's approach of providing guidance and training is the way that the OECD has recommended that governments encourage and support the use of alternatives by regulators. There is considerable evidence of the use of co regulation, self regulation and education practice. On this measure Australia is doing well, and there is no evidence of the over use of prescriptive regulation. However the government has ambitions to increase the use of regulatory alternatives. The Minister for Finance and Deregulation has publically promoted the importance of an analytical approach to regulation involving the

public and regulated business in a consideration of how to make regulation more effective through innovation.[36] As part of the government's plan to promote a culture of continuous improvement to regulation, innovation in the design and implementation of regulatory systems is an important goal for the Australian government. Key areas are responsiveness to the demands for new regulatory approaches that reduce barriers and entry costs and allow entrepreneurial products to come to market more quickly. Clearly this cannot occur simply through the relaxation of regulatory standards where this results in an inacceptable risk to the public. Accordingly, it has to come about through the development by regulators of more client focused approaches.

Understanding regulatory effects: the use of Regulatory Impact Analysis.

Regulatory Impact Analysis (RIA)

This section discusses the current arrangements in place at the Federal level in Australia for Regulatory Impact Analysis (RIA), and assesses it against OECD best practices.

Among the various tools for regulatory management, the use of RIA has particular prominence in OECD countries as a systemic mechanism for assessing the benefits of regulatory proposals *ex ante*, to evaluate that the estimated benefits of proposed regulation exceed the estimated costs. The OECD has been a long standing advocate of the use of RIA for this purpose. The 1995 *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* emphasized the systematic role of RIA in ensuring that the most efficient and effective policy options were chosen. The 1997 *OECD Report on Regulatory Reform* recommended that governments "integrate regulatory impact analysis into the development, review, and reform of regulations." In 1997 the OECD published a list of ten RIA best practices in *Regulatory Impact Analysis: Best Practices in OECD Countries*.[37]

The 2005 *Guiding Principles for Regulatory Quality and Performance* reinforced the benefits of RIA. It recommends that RIA is incorporated into the development, review and revision of significant regulation; that it is used to assess impacts on market openness and competition objectives; and supported with training programs and with *ex post* evaluation to monitor quality and compliance. It also promotes the use of risk assessment and risk management options in RIA. Finally it recommends that RIA is conducted in a timely, clear and transparent manner.[38]

As noted, Australia was an early adopter of RIA among OECD countries, having first instituted RIA as a requirement for Cabinet proposals in 1985. Successive governments have progressively strengthened the requirements for RIA and its application to regulatory instruments. The most recent changes followed the Government's response to the recommendations of the Taskforce on Reducing Regulatory Burden on Business. These changes resulted in enhanced regulatory impact analysis requirements and a preliminary assessment of all regulatory proposals to assess the level of regulatory impact analysis that is required. Another key change was the strengthening of gate keeping requirements such that a regulatory proposal with potentially medium business compliance costs or significant impacts on business and individuals or the economy cannot proceed to the Cabinet or other decision maker if it does not comply with the RIS requirements. If it does proceed without an adequate RIS or BCC report it must be subject to a post implementation review within one to two years. Other significant changes included the development of a whole of government policy on consultation, and the alignment of regulatory impact analysis for tax measures with the requirements applying for all other forms of regulations.

The stated objectives in implementing the principles of good regulatory process and consultation are described in the *Best Practice Regulation Handbook* as follows:

- achieve a robust system of regulatory oversight that encourages sound policy development and implementation by ensuring officials and ministers consider the potential costs and adverse implications, as well as the benefits, of regulatory proposals;

- ensure the Government maintains appropriate control over decision-making processes and the capacity to implement policy quickly where necessary; and,

- ensure that ultimate responsibility for regulatory quality rests with individual ministers, departments and agencies, boards, statutory authorities and regulators (Australian Government, 2007:5).

The requirement for RIA at the Federal level is not embodied in a legal instrument. It is reflected in the policy statement that has been endorsed by the government and the requirements outlined in the *Best Practice Regulation Handbook* and the Cabinet processes which give authority to the OBPR to advise on whether an RIS has been prepared for a regulatory proposal, and whether it is adequate or not. Draft changes to the Best Practice Regulation Handbook outlining the enhanced processes were released in draft form in November 2006. Following testing with departments revisions to the handbook were finalised in August 2007. Other details about the Australian Federal RIS procedures are described below.

Assessment against best practice

Maximise political commitment to RIA.

Because of its capacity to prevent rent seeking and promote the highest social benefit in regulation, RIA has many potential opponents. Departments may have an incentive to evade the requirements of RIA, either because of resource demands or because it precludes a favoured use of regulatory powers. It is difficult for regulatory oversight bodies on their own to compel agencies to use RIA effectively. To overcome opposition to RIA and assist it to be effective and useful in supporting reform it should be endorsed at the highest levels of government.

In Australia, a designated Ministerial position is trusted with responsibility for regulatory policy. Since the election of the Government in November 2007, the Federal Cabinet has included the Minister for Finance and Deregulation, with responsibility for ensuring that the Governments deregulation agenda is being met. In addition the government has made a policy commitment to the use of RIA to assess the costs and benefits of all regulatory proposals coming before Cabinet. The elevation of the regulatory reform portfolio to Cabinet provides a very clear political message that the government takes the RIA requirements seriously and expects that the requirements will be complied with by Departments and regulatory agencies. The Minister has given a commitment to report to Cabinet on the compliance by agencies with the RIA obligations. This is among the strongest possible expressions of political commitment for the RIA process and helps to create a culture of compliance among Departments, which in turn assists the work of the OBPR in promoting further active compliance by agencies.

Some jurisdictions give strong political endorsement to the RIA requirements as a binding statutory responsibility. This is already the case in some Australian States. However, at the Federal level in Australia compliance with the OBPR best practice regulation requirements is an obligation that is imposed by the procedures described in the *Best Practice Regulation Handbook* and Cabinet processes set out in the Cabinet Handbook. Information about the regulatory impact is required to be made explicit in the Cabinet Summary Sheet. These details are also provided to the OBPR. Notwithstanding that the Cabinet Handbook

is an expression of administrative convention, rather than a set of binding legal practices, the convention is nonetheless very strong. It is also supported by robust administrative processes and a history of practice that makes it practically binding on the administrative behaviour of departments and officials. While arguably the incorporation of the RIA requirements in administrative law would be a more binding obligation and by association a more robust expression of political commitment to the process, it would also potentially lose some flexibility. The government has given a commitment to follow the existing arrangements and they appear to achieve a high level of compliance in practice.

Another expression of political support is an obligation on Ministers to 'certify' the adequacy of the analysis in the RIA. This already applies in some jurisdictions in Australia which require the Minister as the proponent of the regulation to sign the RIA to certify that it adequately meets the RIS requirements and assesses the likely impacts of the proposed rule but this obligation does not as yet apply to RIA prepared at the Federal level in Australia.

Allocate responsibilities for RIA programme elements carefully.

The experience of OECD countries shows that RIA must be part of the policy development process that is undertaken by regulators. RIA will fail to genuinely influence policy outcomes if it is too centralised, but it will also fail if regulators are left entirely on their own to complete the task. An effective system for RIA is one that promotes the ownership of the activity by regulators and its incorporation in the policy development process, and also maintains a quality control function close to the centre of government. In this way the responsibilities for RIA should in practice be shared between the ministries responsible for regulation and the central quality control unit.

In Australia the careful allocation of responsibilities is well integrated in the system for RIA. The obligation to complete the RIA applies to the proponent of the regulation. According to the OBPR Handbook the policy is intended to ensure "that ultimate responsibility for regulatory quality rests with individual ministers, departments and agencies, boards, statutory authorities and regulators." As it is outlined in the Handbook RIA is intended to improve the development of a regulatory proposal by informing decision makers about costs and benefits of alternative options. The RIA process is carefully 'staged' to assist its effectiveness in improving the regulatory proposals prepared by agencies.

Among the activities which the agencies are responsible for are a preliminary assessment of all regulatory proposals to identify the expected level of impact, consult early with the OBPR on regulatory proposals and use annual regulatory plans to forecast forthcoming regulatory proposals. Agencies are also required to use the Business Cost Calculator (BCC); a programme available for download from the OBPR website, to calculate an estimate of the compliance costs of regulation for business. For regulatory proposals of major significance, departments and agencies are required to prepare a 'green paper' as the basis for consultation on the policy options. The green paper and subsequent consultation responses can later form the basis of the RIS.

The establishment of Best Practice Regulation co-ordinators within agencies also assists with identifying training needs within departments to ensure that they are aware of the available guidance material and have the necessary capacity to undertake RIA. The most effective incentive for the regulatory agencies to actively undertake RIA comes from the fact that if the RIA process is not followed, the regulatory proposals may not proceed to Cabinet. The Prime Minister may grant an exemption in exceptional circumstances, but the proposals are then required to be subject to a post implementation review in one to two years.

The OBPR has the dual role of providing advice and training on the preparation of RIA and assessing the quality of the RIA that is prepared according to specific criteria. For each RIS prepared, the sponsoring agency is required to seek clearance from the OBPR that the analysis is adequate before proceeding to the decision maker. Each year the OBPR produces a report on the regulatory activities of departments and regulatory agencies which include details of whether an RIS was required to be prepared and the assessment of the adequacy of the analysis in the RIS. The OBPR operates a helpdesk function and maintains a four person cost benefit analysis unit staffed with experts to assist agencies with the preparation of more complex technical analysis. The location of the OBPR in the Department of Finance and Deregulation places it in a central agency with ready access to the Minister for Finance and Deregulation and provides authority to the role of the OBPR.

Train the regulators.

Regulators must have the skills to prepare high-quality economic assessments, including an understanding of the role of RIA in assuring regulatory quality and an understanding of methodological requirements and data collection strategies. All complex decision-making tools, such as producing adequate RIA, demand a learning process.

One of the aims of the 2006 reforms to the RIA processes and to the role of the OBPR was to improve the guidance available to regulatory agencies and to promote greater compliance with the RIA requirements. The revised OBPR Handbook provides ready guidance for regulators on the preparation of RIA, including the analysis that is required and step by step instruction on the matters that should be taken into consideration. The guidance is of high-quality and covers a number of useful topics. The BCC is a standardised process for assessing the compliance costs for business of any policy proposal. It is derived from the standard cost model and can be downloaded as an electronic tool from the OBPR website and installed and used by officials from their personal computer.

The OBPR provides formal training to policy officers that are involved in preparing regulatory proposals for the Australian Government, COAG, Ministerial Councils and national standard setting bodies. There are three training programs; high level briefings on the framework for best practice regulation requirements; general training on RIA and the BCC, and a comprehensive seminar series on preparing RIS, using the BCC and undertaking cost benefit analysis. Training sessions are offered on a scheduled basis as well as at the premises of agencies, and guidance material is kept available on the OBPR website. In the period 2007-08 the OBPR provided formal training to more than 460 officials. (The Best Practice Regulation report series identifies that training was provided for the following number of officials in the previous five years: 437 officials in 2003-04, 415 officials in 2004-05, 367 officials in 2005-06, 889 officials in 2006-07).[39]

In 2007, the OBPR reported plans to extend training programmes to include minister's offices and non government organisations (Office of Best Practice Regulation, 2007:30). Training has not as yet been extended to cover these groups however the proposal seems eminently sensible, particularly as ministerial offices are often the primary source of many persuasive policy initiatives and could therefore benefit from the tools that are provided in the RIA process.

Use a consistent but flexible analytical method.

The OECD recommends as a key principle that regulations should "produce benefits that justify costs, considering the distribution of effects across society." Cost-benefit analysis is the preferred method for considering regulatory impacts because it aims to produce public policy that meets the criterion of being "socially optimal" (*i.e.* maximising welfare).[40]

Cost-benefit analysis is part of the Australian RIS process. The OBPR Handbook states the requirement that the RIS will include a comprehensive assessment of the costs and benefits of each feasible policy option. It is expected that the benefits to the community of the recommended option will exceed the costs and will also have greater net benefits than each of the possible alternative policy options. The level and detail of the analysis is required to be proportionate to the magnitude of the policy problem and its potential impacts. At a minimum the analysis is required to reflect an attempt at quantifying all significant costs and benefits and all medium and significant business compliance costs. The evidence for the calculation of costs and benefits, including data sources are required to be identified. An appendix to the handbook provides further guidance on the conduct of cost benefit analysis. The matters covered here are fairly complete. A sample of the topics covered includes: guidance on identifying the types of categories of costs which may be imposed and the categories of benefits, and where their incidence may occur; discounting the stream of costs and benefits; and techniques to reveal preferences for the valuation of costs and benefits where there is no ready market value. Sensitivity analysis is required with the net present value of regulatory options being calculated at real discount rates of 3, 7 and 11%.

Clearly there is a commitment to promoting the use of cost benefit analysis as the preferred analytical method in the RIA. In addition to the guidance provided the OBPR also provides direct advice and training on the use of costs benefits analysis tools and will assist agencies with their application to regulatory proposals. The BCC is designed to generate compliance cost data that can be used to assist in the calculation of the costs of the regulatory proposal. A failure to provide an adequate analysis of the costs and benefits of feasible policy options is one of the seven elements of an RIS that the OBPR uses to make a judgement as to the adequacy of the RIS.

A failure on behalf of regulators to quantify costs and benefits adequately or even to make an attempt to do so is one of the challenges for RIA systems generally. This is illustrated in the annual performance report of the National Audit Office (NAO) on a sample of impact assessments in the United Kingdom. The NAO found that in 2006, 41% of the sample did not contain any quantified data to support an assessment of costs and benefits. However, it is possible that the exposure of the deficiencies is promoting improvements in the systems there. By 2008 only 21% of the sample did not include any costing and there had been an increase in the number of supporting calculations used in the impact assessment (National Audit Office, 2009:15).

The emphasis on the use of cost benefit analysis in the Australian RIA system was renewed by the reforms to the RIS processes in 2006. It has been noted in the past that agencies routinely failed to quantify the costs and benefits of regulatory proposals. The Chairman of the Productivity Commission reported that in 2004 only 20% of the RIS received by the ORR contained even an attempt at quantifying the costs relating to proposed regulation (Banks, 2005:10). There may have been an improvement to the quantification of costs and benefits by agencies following the 2006 reforms. However, it cannot be determined on basis of the information included in the annual reports of the OBPR on the number of RIS assessed as adequate by the OBPR as the reports on compliance do not go into this level of detail about the use of quantification. It would be useful for the OBPR to expand the detail in its reports on the compliance by regulatory agencies with the RIS requirements to include data on the quantification of costs and benefits in the RIS that they assess. This would enable an evaluation by external reviewers of changes in the quality of the RIA over time and hold agencies to account on their analysis.

Target RIA efforts

RIA can be a technically difficult process and is often opposed by ministries because of the time and resources it requires, or because agencies object to the external review implied in RIA and the constraints on the use of regulatory authority it can impose. Because of the resources that it requires from agencies and the central oversight bodies that promote RIA, it is necessary to target RIA efforts carefully. One area to be particularly avoided is the generation of a large number of RIA for trivial or low impact regulations.

The Australian Federal system has a number of checks and balances to ensure that the efforts that are applied to RIA are proportionate to their potential to improve the quality of regulatory proposals. In one respect the application of RIA to regulatory instruments is very broad. RIA is intended to apply to the full range of policy instruments including laws, subordinate legislative instruments, and quasi regulation (which can include any government policy where there is an expectation of compliance). However, there is a general principle that where a RIA is prepared the level of analysis in the RIA is required to be proportionate to the magnitude of the policy impact expected from the regulatory proposal. There is also a type of triage process based on a three tiered assessment system to determine the level of impact of a regulatory policy proposal. All regulatory proposals are required to undergo a preliminary assessment based on a simple checklist to reveal the potential for the proposal to increase compliance costs for business or other potential impacts on business and individuals or the economy. The officer completing the checklist signs and files it with the Best Practice Regulation Co-ordinator within their department. If the checklist identifies no or very low impacts, then no further analysis is required. Impacts would be considered low when only a few businesses are affected and the impacts are negligible or trivial. Where it is possible that the impacts are 'more than low' the checklist is required to be forwarded to the OBPR for advice on the level of analysis that is required.

Box 18. How much does it cost to prepare a RIS?

The OBPR reports that the cost of preparing an RIS is quite small compared to the total budgets of regulatory departments and agencies. In 2005-06 the ORR asked Australian Government regulators preparing a RIS to provide estimates of the number of person days taken to prepare each RIS. On average, each RIS took 14.9 person days to prepare (compared to 13.6 person days in 2004-05). Based on an average wage cost of AUD 46.50 per hour, the cost of preparing a RIS, on average, was around AUD 5200. This implies that the total wage cost of preparing 79 Government RIS in 2005-06 was about AUD 410,500. (This does not take account of on costs, overheads, capital costs and consultants fees).

Source: PC (2006), p. 27.

If the proposal is likely to have medium compliance costs a quantitative assessment of the compliance costs is required to be prepared using the Business Cost Calculator or an equivalent approved instrument that assesses all compliance costs in addition to the administrative burden. The full assessment of the compliance cost implications should be documented in a BCC report. For all regulatory proposals that are likely to have a significant impact on business and individuals or the economy, an in depth analysis documented in a RIS is required. The BCC report forms part of the calculation of the costs in the RIS. The OBPR is the source of guidance on whether a proposal are significant or not and will provide advice to agencies based on its assessment of the nature and magnitude of the problem and the proposal and the scope and scale of impacts on affected parties and the community. Some examples are given by the OBPR to illustrate how it makes its assessment, but the level of impact identified in the Handbook has deliberately been set relatively low to encourage agencies to consult with the OBPR.

The OBPR reviews the compliance by agencies with the RIA process every six months and publishes the results in its annual report. Because the focus of the Australian Government's RIA process is on significant proposals less than 5% of Bills tabled in Parliament and disallowable instruments require a RIS or a BCC report. The number of regulatory proposals requiring further RIA each year varies from 60 to 130, with around five to ten highly significant proposals. Further details are illustrated in the table. Most regulations are considered to be of a minor or machinery nature. The data indicates that the average compliance rate with the RIA requirements by agencies each year has been around 87% (see Table 2).

The application of RIA to a narrow class of regulatory instruments can act as an incentive for agencies to use other regulatory devices, such as quasi regulation to avoid the scrutiny that RIS imposes. The Australian RIS process overcomes this using a broad definition of regulation that captures all rules, while the significance test prevents the unnecessary use of RIA resources on trivial regulations. However the application of the RIA to less formal instruments poses a challenge to determine that it is actually being applied in practice. The gate keeping process of Cabinet provides a check that all regulatory proposals that proceed to Cabinet have an adequate RIS, but the OBPR is reliant on the advice of agencies and other intelligence that it collects to determine that the RIA requirements have been correctly applied to all quasi regulation.

Table 2. Australian Government Regulatory and RIA activities, 2001-02 to 2006-07

	2000-01	*2001-02*	*2002-03*	*2003-04*	*2004-05*	*2005-06*	*2006-07*
Regulations introduced	*no.*	*no.*	*no.*	*no.*	*no.*	*no.*	*no.*
Bills	169	207	174	150	172	149	191
Disallowable instruments[1]	1 438	1 711	1 615	1 538	2 458	2 497	2 147
Total introduced	1 607	1 918	1 789	1 688	2 630	2 646	2 338
RIA workload							
Total number of new queries received by the OBPR[2]	740	709	861	845	851	948	780
Number requiring further analysis	171	175	132	169	134	128	163
Proposals finalised in period[3]							
RISs required	157	145	139	114	85	96	80
RISs prepared	133	130	120	109	71	79	71

1. The large numbers of disallowable instruments reported since 2004-05 relate, in part, to the re-making of existing delegated legislation (delegated instruments made before 1 January 2005) under the Legislative Instruments Act 2003.

2. In 2006-07, the OBPR received 780 queries. Of these, 388 were received before 20 November 2006 and 392 queries were received on or after 20 November 2006.

3. Proposals introduced into Parliament or made into law in the reporting period.. In 2006-07, 62 RISs were required for proposals finalised under the previous RIS requirements, while 18 RISs were required for proposals finalised under the best practice regulation requirements. Two BCC reports were also required under the new arrangements.

Source: Australian Government response to OECD regulatory indicators questionnaire 2008.

Develop and implement data collection strategies.

The use of quantitative data in impact assessment sharpens the analysis, improves the comparability of the results and imposes a higher standard of accountability on proponents of regulatory proposals. Agencies have to be provided with strategies and guidance for the collection of good quality data to support an effective RIA program.

The requirement for good data to inform regulatory analysis is addressed in a number of areas in the OBPR Handbook. The Handbook directs regulators to commence consultation early in the process "to improve the quality of the solution adopted," and provides guidance on the kinds of groups that may be affected. Guidance on the valuation of intangible impacts is also provided and a practical checklist for regulators to work through the types of compliance tasks that a regulatory proposal may entail and consider the associated costs. The BCC guides users to detail the following information about the regulatory options under consideration and to provide supporting evidence for all information (see Box 19).

Box 19. What is the Business Cost Calculator?

The BCC is an IT-based tool designed to assist policy officers in estimating the business compliance costs of various policy options. It provides an automated and standard process for quantifying compliance costs of regulation on business using an activity-based costing methodology. Compliance costs are defined as the direct costs to businesses of performing the various tasks associated with complying with government regulation. The BCC has nine categories of compliance tasks for which compliance costs are incurred by business. As a first step, users are asked to provide a description of the problem and the potential policy options for addressing that problem. The Quickscan function of the BCC is then used to indicate whether or not any of the proposed options will impose compliance costs in any of the nine cost categories.

Where users indicate that at least some options will involve compliance costs, the calculator then assists in quantifying these costs. Users are asked to detail:

- the number of businesses affected by each option;
- the tasks that business will have to complete to be compliant with the regulation;
- whether the task is an internal cost or an outsourced cost;
- whether the task is a start-up or ongoing cost;
- how long each task will take to complete;
- how often each task will need to be undertaken;
- the associated labour and other costs; and
- supporting evidence for all information.

From this information, the BCC will provide an estimate of the compliance costs associated with each option. The BCC data can be displayed, printed and downloaded to other applications in a range of reports. A key report is the 'BCC report', which is required to be provided to the OBPR to confirm that the best practice regulation requirements have been met. It is this report that is sent to the decision maker and made public.

Source: Australia Government (2007), p. 26.

The Chairman of the PC has raised general concerns that there are basic deficiencies in the data collected by Governments in social and environmental domains (including administrative collections by departments in the course of implementing programs) to measure the effectiveness of policy initiatives. He has also pointed out that it is a general failing of governments that they do not collect baseline data necessary for 'before and after' comparisons. This is further hindered by a tendency to have unclear objectives in policy against which to measure outcomes (Banks, 2009, p. 13).

The Australian Bureau of Statistics (ABS) maintains very sound national data bases of economic and social indices, and Australia has a well developed statistical system, however, there may be unexploited opportunities for improving the collection of administrative data and making this available for economic assessment purposes. Many countries take advantage of the data that is derived through their core administrative processes, for example collecting information in terms of taxation and licences, and process this data to inform the impact of regulatory frameworks in given sectors. In the United States, much of the data from core government agencies responsible for managing taxes, health or social security records is available to inform the design and development of policy proposals. In other European countries, such as France, partnership agreements exist between the statistical agency and core administrative ministries with responsibilities for administering these processes so that the data can strengthen and complete the economic assessment apparatus. In practice data sharing arrangements can require complex sets of agreements both between bodies at the federal level, and also with specific state enforcement and administrative agencies.

Integrate RIA with the policy making process, beginning as early as possible.

The benefits of RIA are only realised to the extent that it is integrated with the policy making process and able to positively influence decisions. The development of a culture of the use of RIA will ensure that the disciplines of weighing costs and benefits, identifying and considering alternatives and choosing policy in accordance with its ability to meet objectives become a routine part of policy development. Integration is a long-term process, which often implies significant cultural changes within regulatory ministries.

All OECD countries find the integration of RIA in the policy process to be the most significant challenge and as such it requires considerable support and clear guidance. This is well recognised in the Australian system where the explicit goal of RIA is to encourage sound policy development and implementation taking account of the costs as well as the benefits of regulatory proposals. Officials are required to commence preparing an RIS or BCC "once an administrative decision has been made that regulation may be necessary, but *before* a policy decision is made by the Government or its delegated officials that regulation is necessary" (Australian Government, 2007, p. 31). The analytical framework of RIA is promoted for use throughout the policy development process. Departments and agencies are strongly encouraged to release RIS and BCC reports for consultation, although there is no formal requirement to do so at the Australian Government level. Initial 'green papers' are required to be released for major policy proposals and the RIS framework is recommended for the analysis in these papers and in discussion papers.

The improved gate keeping arrangements for RIA combined with the mechanisms that the OBPR has put in place to consult with agencies early in the development of regulatory options provide a clear incentive for agencies to integrate RIA early in the policy process. Discussions with OECD officials and representatives of a sample of regulatory agencies in Australia suggest that the analytical framework of RIA is well integrated in the practices of agencies for assessing the case for regulatory interventions. After nearly 25 years of experience in using the RIA methodology for the design and development of regulation at the federal level there is a wide appreciation of the application of the techniques of RIA. Nonetheless there are still methodological challenges, such as with estimating the benefits of regulation, and the use of risk assessment tools. Furthermore, as is the case in all OECD countries, the use of RIA does not trump

politics. There is some scepticism over the effectiveness of the RIA process among business groups who cited examples of recent regulatory proposals that were difficult to justify on the merits of a cost benefit assessment.

Communicate the results.

The assumptions and data used in RIA can be tested and improved through public disclosure and consultation. This can be done by releasing RIAs with the draft of regulatory texts.

As noted above, the Federal RIA processes do not formally require that the draft RIA be released prior to its consideration by the decision maker. The OBPR Handbook encourages agencies to do this but there are no details about how often it occurs. The obligation to consult on the preparation of the RIA and to use the RIA analytical framework should go some way to achieving the same objectives of testing the assumptions and evidence that is the basis for the regulatory proposal. There is also a requirement that after a decision is made the RIS or BCC report is made public, either with the explanatory memorandum on the CommLaw website when the regulation is tabled in Parliament, or if it is not required to be tabled, then when the regulation is announced.

Presumably this is intended to address confidentiality issues relating to releasing regulatory proposals before Cabinet has considered them, and to provide the opportunity for public scrutiny of the quality of the analysis, the assumptions and the data after a decision has been made. The fact that officials know that there is a commitment to release the RIA even after a decision is reached is likely to improve the quality of the document. It also allows for feedback on the quality of the RIA (to the extent that there is interest when proposals are a *fait accompli*) to be taken into account in the drafting of subsequent RIA. A common format is used for the presentation to address the seven elements of a RIA specified in the OBPR Handbook which aids in the communication of the results of the RIA when it is released.

Cabinet confidentiality is obviously an impediment to releasing draft RIA before legislative proposals are determined, but it is not clear why RIA prepared for draft subordinate legislative instruments would not be required to be released for public consultation. In Canada for example, the RIA is considered to be an evolving document. It is published at both the draft and at the final regulation stages (OECD, 2002b:44). Other jurisdictions within Australia have a statutory requirement that RIA must be prepared for subordinate legislation and made public prior to the regulation being made. For example, section 11 of the Victorian *Subordinate Legislation Act 1994*, requires that for the RIA and the draft of the regulation be made available for comments and submissions for a period of not less than 28 days.

Involve the public extensively.

Public involvement in the preparation of RIA promotes transparency in the process which improves its legitimacy, the quality of the analysis and the likelihood of compliance, as well as identifying possible alternative approaches.

Consultation for the preparation of the RIA is required to be based on the Government's seven principles for best practice consultation adopted by the government in 2006 and listed in this report in the section on consultation (see Box 13 above). The OBPR Handbook set out procedures for consultation and the RIA is required to include a consultation statement which documents what processes of consultation were followed, who the main affected parties are, what their views are and how these have been taken into account. If consultation was limited or not undertaken then the statement is required to explain the reasons why. The consultation model outlined in the OBPR Handbook and the requirement to demonstrate in the RIA the consultation that was undertaken appear best practice. However, as noted in this report the results of the APSC survey of government agencies suggest that there is not full compliance with the requirements

specified in procedures. It may be that in practice consultation practices vary across departments and are not as broadly applied as the guidelines require. This is not to suggest that there is a widespread concern as there is clearly evidence of good practice on significant policy issues. However, this appears to be an area where there are differences across government and further consistency in processes could be promoted.

Apply RIA to existing as well as new regulations.

The stock of regulation can result in a cumulative burden far in excess of that imposed by new regulation as it may not have been scrutinised initially or have become out of date. Accordingly RIA should be applied to the review of existing regulation.

In general Australia has a good record on the use of RIA for *ex post* review of legislation. The NCP legislative review program was an extensive review of the entire stock of legislation to verify that it did not impose restrictions on competition. All legislative instruments are subject to 'sun setting' ten years after the date they are made, and if remade would be subject to the RIS process. Acts of Parliament are not subject to a formal requirement for sunset or reviews, but a number of Acts include review provisions. For example the Legislative Instruments Act 2003 requires reviews to be conducted in 2008 and 2017 and for the result to be tabled in Parliament. The Australian Government has advised that few instruments would be expected to remain in place for more than ten years without having undergone some sort of review.

There is a general policy that all regulation not subject to sunset or statutory review provision will be reviewed every five years. Commencing in 2012 the OBPR will send departments a list of all regulations made five years previously. Departments will be required to determine the scope of the review that will be undertaken and to publish the timing for the review in their annual regulatory plan, or provide an explanation why no review is being undertaken.

The OBPR Handbook directs regulators to include in the RIS a review strategy that will allow the regulatory proposal to be assessed after it has been in place for some time. This should include arrangements for monitoring the progress of the regulation and how it can be amended or abolished if the circumstances which led to its introduction change, such as through the use of sunset clauses (Australian Government, 2007, p. 92).

Overall assessment

Measured against each of the above best practice principles, Australia rates highly among OECD countries on the design and performance of its RIA procedures. This reflects nearly 25 years of experience with RIA and a commitment to progressively refining the use of the instrument for the improvement of regulatory policy. There appears to be a wide acceptance among regulators of the use of RIA as a tool for assisting policy development. The reforms to the RIA system in 2006 implemented significant improvements addressing the issues of coverage, compliance assessment and improving consultation. However, there are a few remaining areas where improvements could be made. Certification of each RIA by the proposing Minster would add greater authority to the RIA process. The OBPR could potentially receive notice, in an electronic form of the preliminary assessment undertaken for all regulatory proposals to better track its application to regulations not proceeding to Cabinet, but without becoming overburdened. RIA training could usefully be extended to Ministerial offices to assist in guiding policy development. The OBPR should extend its reporting on RIS to include information on compliance with the obligation to quantify the costs and benefits of regulatory proposals. Consultation on RIA could be improved if a two stage approach were taken that required the RIS to be published in a draft format as a consultation document on regulatory proposals. Also where RIA is prepared for subordinate regulation the publication of RIA could be mandatory for a prescribed time period prior to the regulation being made would be consistent with the requirements of other jurisdictions in Australia.

Building regulatory agencies

In most OECD countries, economic structural reforms have stimulated the set up of independent regulatory agencies and the remodelling of existing regulations. The powers held by these agencies distinguish them from mere "administrative agencies" set up for managing part of the state administrations. Their powers allows authorities to issue opinions, set rules, monitor and inspect, enforce regulations, grant licences and permits, set prices and settle disputes. Institutional arrangements, including the legal framework and the provisions for governance, as well as a given administrative and political practice are a necessary condition for the independence of regulators. Independence needs to be balanced with accountability. Accountability for regulatory authorities, which are at arms' length from the political decision makers is often obtained through a set of procedural means, including annual reports, transparency in decision-making, self and external evaluation.

Regulatory authorities in OECD countries often differ from 'administrative agencies', as they are entrusted with significant powers which can be delegated to them by law, but also through other regulations. These institutions are often established in key economic sectors, with a role to foster competition and also provide for technical or prudential oversight. The goal is also to minimise the potential for conflicts of interests and stimulate long term investment in key infrastructure sectors as well as strengthen confidence and reduce institutional risk. The design and management of such regulatory agencies present significant challenges.[41] Key issues in this respect include considerations on how to establish institutions that are:

- Competent, accountable and independent;
- At arm's length from short-term political interference;
- Capable of resisting capture by interest groups, but still responsive to general political priorities;
- Able to exercise delegated powers, including for example the power of granting licences or imposing sanctions in specific cases;
- Have decision-making procedures that take into account the particularities of the area being regulated, while at the same time maintaining transparency and accessibility for all stakeholders; and,
- Ensure transparency and accessibility for all stakeholders.

In 2002, the Australian government commissioned a review of the corporate governance of Commonwealth statutory authorities and office holders to identify issues with governance arrangements and to provide options to improve the performance and accountability of statutory authorities and office holders.[42] A governance policy document was released in 2005 which outlines principles for the most appropriate structure and governance arrangements for Australian Government bodies. It guides the consideration of fundamental issues for the establishment of government bodies including the case for establishing a new body, financial frameworks, purpose and rationale, internal governance arrangements, including clarifying the role of boards, Ministers and departments. This applies to a wider list of administrative agencies as well as regulators. The government publishes a comprehensive list of *Australian Government Bodies and Governance Relationships* which provides details of all statutory and non-statutory bodies, companies, incorporated associations and trusts that the Australian Government controls or has an interest in at a formal level, including through holding shares or an ability to appoint directors.[43]

The Australian government has a policy preference to curb the unnecessary proliferation of Government bodies. Where there are persuasive reasons to form a body then minimum levels of governance and accountability requirements apply. Most Commonwealth agencies, including Commonwealth Government regulators, are subject to a statutory governance framework in the form of the *Financial Management and Accountability Act* 1997 (FMA Act) or the *Commonwealth Authorities and Companies Act* 1997 (CAC Act).[44]

Most government bodies operate under the FMA Act. The Act provides a framework for the proper management of public money and public property. Under the Act an agency may encompass a number of statutory office holders comprising a commission which makes collective regulatory decisions with relevant levels of statutory independence. A separate corporate identity may be granted where there is a need for a regulatory body to have the power to sue and be sued in its own corporate name.

If a governing board is essential for a body's effective governance, then the body may operate under the CAC Act. This Act applies to bodies that are both legally and financially separate from the Commonwealth. The extent of Government control over such a body will depend upon its enabling legislation. The CAC Act sets out the general financial management, accountability and audit obligations of certain statutory authorities and sets additional requirements for Commonwealth companies. These include the requirements for an annual report to be presented to the portfolio minister, who is required to table the report in the Australian Parliament, audit obligations, standards of conduct for the authority's directors and officers, and requirements for ensuring that ministers are kept informed of the body's activities.

Regulatory bodies do not usually require a governing board and are therefore generally governed by the FMA Act. There are 104 agencies operating under the FMA Act including 19 Departments of State, 3 Parliamentary Departments and 82 prescribed Agencies, and there are 88 bodies subject to the CAC Act. Details on these agencies are published by the Department of Finance and Deregulation including references to the enabling legislation for each of these bodies, the body's specific functions, powers and governance structure (including relevant independence requirements and powers).

Individual ministers may use Statements of Expectations (SOEs) and Statements of Intent (SOIs) with bodies within their portfolios. SOEs can be used to clarify the expectations of portfolio bodies where the minister has a role in providing direction. The portfolio body would then respond by outlining how it proposes to meet the expectations of government in an SOI, including the identification of key performance indicators agreed with the relevant minister. When considering the use of SOEs and SOIs, ministers are required to have regard to the nature and independence of the particular body concerned.

For example, the Treasurer may issue directions to the prudential and securities regulators through his SOE on policies and priorities, which are subject to suitable transparency requirements that provide appropriate accountability in the use of this power. It is important to note that the SOE is framed in terms that do not conflict with APRA's and ASIC's powers and functions as specified under its enabling legislation or other relevant industry legislation, nor do the SOE impinge upon any areas of legislated independence (*i.e.* the power to make decisions on individual cases).

Assessment

The regulatory quality management practices of the Australian government have wide application to regulators and the instruments that they use. They apply to independent regulators and the regulatory instruments that regulators use in the same way that it applies to government departments. The independence of regulators is preserved though their enabling legislation, but at the same time the statement of expectations issued by ministers can give transparent guidance regarding government policy

without coming into conflict with the statutory objectives of the agency. The consistent financial management and reporting frameworks established by the CAC Act and the FMA Act provide accountability to the parliament, and ensure probity and certainty of budget practices.

Box 20. The Governance of Australian Financial Regulators

The institutional structure of Australian financial regulation was reformed in 1998 following the Wallis Report. It adopts the 'twin peaks' model, in that responsibility for prudential and conduct of business regulation is split between two federal agencies (see Annex A). The Australian Prudential Regulation Authority (APRA) is responsible for the prudential regulation of deposit taking institutions, insurance companies and superannuation (pension) funds. The Australian Securities and Investments Commission (ASIC) is responsible for conduct of business issues with respect to deposit taking institutions, pension funds, insurance business and all securities business. The Reserve Bank of Australia (RBA) is responsible for monetary policy, maintaining financial system stability and promoting the safety and efficiency of the payments system. A deposit protection scheme was introduced in October 2008. Dispute resolution for retail customers and small businesses is performed by external dispute resolution schemes registered with ASIC, the largest of which is a new, integrated financial ombudsman created in July 2008, the Financial Ombudsman Services. There is a separate body Austrac, which is the regulator administering Australia's anti money laundering and counter terrorism financing regulation.

APRA and ASIC have powers to make rules which have legal effect independently of the executive. For example, APRA can determine prudential standards which have legal effect for all deposit taking institutions, general insurers, and life insurers as well as subsidiaries and non-operating holding companies of those entities; the powers are exercisable without the approval of a Minister.

In Australia, as part of the response to the Review of the Corporate Governance of Statutory Authorities and Office Holders (Uhrig, 2003) the Australian Government agreed that Ministers would issue Statements of Expectation to independent statutory agencies, and has done so with respect to both ASIC and APRA. The statement issued to ASIC, requires it amongst other things, to conform to the Government's principles on best practice in regulation, to adopt an outcomes-based approach to regulation, to adopt policies which minimize the burden on business, improve commercial certainty as to the administration of the legislation and to ensure that the regulatory framework does not unduly constrain competition and innovation. It clearly states that the Minister will ensure that ASIC has operational independence, but that it has to be mindful of the Government's economic policy objectives, and emphasizes that responsibility for policy formation with respect to corporations and financial services lies with the Minister (Australian Treasurer, 2007).

A notable difference with other OECD countries is that in Australia the Minister has power to give both APRA and ASIC written directions about policies they should pursue, or priorities they should follow in performing or exercising its functions and powers under corporations legislation (s.12(1) ASIC Act) and the Australian Prudential Regulation Act 1998 s.12, but should not give directions about a particular case nor about its staffing practices or policies or on issues relating to conflicts of interest (s.12(1) ASIC Act) (s.12(3) APRA Act). Government policy is to only use this in rare and exceptional circumstances, however: it was last used with respect to ASIC's predecessor in 1992.

Source: OECD GOV/PGC/REG(2009)9

DYNAMIC CHANGE: KEEPING REGULATIONS UP-TO-DATE

The large stock of regulation and administrative formalities that accumulates over the years can become inefficient due to social, economic, or technological change. If not reviewed and reformed, this can lead to a highly burdensome regulatory system. The 1997 OECD *Report on Regulatory Reform* recommends that governments review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively. The 2005 OECD *Guiding Principles for Regulatory Quality and Performance* recommends that the assessment of impacts and the review of regulations include ex-post evaluation.

OECD governments have implemented a variety of institutional mechanisms to address the burden of existing regulation. These include systematic *ex post* analysis of regulation, the use of sun setting clauses in legislation and regulation, targeted burden reduction strategies and the incorporation of information and communications technology (ICT) in government business practices to streamline regulatory procedures and reduce costs to business.

Revisions of existing regulations and keeping regulations up to date

Australia has a number of relevant strategies to review and update the stock of regulation. As noted the regulatory management arrangements at the federal level include a commitment to the periodic review of legislation and regulation. Legislative instruments are automatically scheduled to sunset ten years after being made and 2013 will be the first year that Commonwealth legislative instruments will cease under the sun setting provisions. The government advises that periodic review clauses are frequently used in Acts of Parliament and it has a policy commitment to review regulation not otherwise scheduled for review every five years, commencing in 2012. Although the policy does not specify the scope of the review arrangements, it is likely to be based on the RIS requirements that are applied generally. The program for the NCP review of legislation was comprehensive and over several years updated most of the regulatory stock that contained restrictions on competition.

The role of the PC is important in identifying that the stock of regulation is kept up to date. The PC regularly receives terms of reference to conduct inquiries and review areas of government policy, and each terms of reference invariably involves an examination of the regulatory conditions that prevail. As a matter of practice where the PC identifies a mismatch between the policy objectives of regulation and the actual effect of regulation, or opportunities for improvement, it will make recommendations to the government for reform. As noted the breadth of policy areas that the PC has examined are very broad and their recommendations are usually accepted.

As a supplement to the PC's role of undertaking policy reviews by reference from the Treasurer, in February 2007 the PC was given the additional specific task of conducting systematic annual reviews of the regulatory burden applying to certain sectors from the stock of Commonwealth regulation. This program of review of regulatory burdens will operate on an ongoing five year cycle. The review process is designed to ensure that all Australian Government regulations affecting the sectors are efficient and effective, and to recommend improvements that lead to net benefits to business and the community, without compromising underlying policy goals. Following each review the government considers and responds to the recommendations of the PC reports, and reforms the regulatory arrangements as appropriate. The following areas have been scheduled for review under this program each year:

- 2007: primary industries sector (completed December 2007)
- 2008: manufacturing sector and distributive trades (completed September 2008)
- 2009: social and economic infrastructure services
- 2010: business and consumer services
- 2011: economy-wide generic regulation and regulation not addressed earlier in the cycle

Assessment

The aim of *ex post* evaluation is to reveal those issues with regulation that are hindering the efficient achievement of policy objectives and bring regulatory arrangements up to date. However, because it deals with matters that are not crying out for attention it can be difficult to obtain the necessary resources and political will for reviews, as emerging new policy priorities will always dominate the agenda. This makes it particularly important to have a systemic framework to ensure that reviews of regulations occur on a scheduled basis. The Australian system has many desirable features in this regard. The forward announcement of a system of rolling reviews of industry sectors signals the government's intention to evaluate these areas, and the use of the PC as a standing body to undertake the task ensures that the necessary resources have been made available and that it will be done rigorously and independently. This is the case at least for those sectors that have been included in the forward plan. The sun setting arrangements and the five yearly reviews of regulation which will commence in 2012 are the primary means to keep the stock of Commonwealth regulation up to date. However, some of the detail on how these reviews will be conducted still need to be determined. Sun-setting does not seem problematic as new regulation will be covered under the RIS processes, but sun-setting only applies to a subset of regulation. The major strategy for updating the stock of regulation is the five yearly reviews commencing in 2012 so careful planning in advance of that date will be necessary if they are to be effective.

Reducing administrative burdens

For most areas of public policy, regulation necessarily imposes some level of administrative formality. However the administrative burden can easily become a nuisance to business and citizens, and impede the efficiency of interactions with government. Left unchecked, the cumulative effect of red tape can impede innovation and create unnecessary barriers to trade, investment and economic efficiency. There is a rising concern about these negative consequences and the reduction of government red tape has become one of the primary goals of regulatory reform across most OECD countries.

Measurements of Administrative Burdens

Following the 1996 review of the Small Business Deregulation taskforce which set out to reduce the compliance and paperwork burden on business by 50%, the Australian government has not made the measurement and reduction of the burden of paper work a high priority focus of its regulation reform program. The fact that the 1996 review was not able to identify a robust measure of the total regulatory burden probably discouraged the subsequent use of targets for these exercises. It is notable that the outcome of that review was a strengthening of the *ex ante* processes for minimising the burden of new regulation, and this is where most of the strengths of the Australian system are concentrated. The administrative burden imposed by Commonwealth regulation is assessed *ex ante* in the RIS process and in the analytical steps that are required to be followed in the use of the BCC which, unlike the SCM, guides the analyst to consider the total compliance costs for all business for any regulatory proposal.

Australia has recently adopted its own unique program for the *ex post* measurement of the administrative burden across jurisdictions. Because it relates to regulatory management practices across jurisdictions, this will be discussed in more depth in the forthcoming chapter on multilevel issues. It is however worthwhile to describe the benchmarking initiative here because it is relevant to an assessment of the impact of regulations confined to the Commonwealth.

In 2006 COAG agreed that all governments would aim to adopt a common framework for benchmarking, measuring and reporting the regulatory burden on business. The PC was asked to undertake a two stage study on performance benchmarking. The first stage established the feasibility of benchmarking the regulatory burdens across jurisdictions. The PC found that benchmarking was feasible

but recommended a limited and targeted program over the first three years, that would allow 'learning by doing.' The first year would focus on benchmarking the quantity and quality of regulation, as well as compliance costs for business registration because it is a single, relatively easy, area of regulation. Progressively more regulation would be benchmarked following the development of better data over subsequent years. The PC identified the following staged program of benchmarking: year 1 – business registrations; quality and quantity/form of regulation; year 2 – occupational health and safety (OHS); stamp duty and payroll tax administration; and year 3 – environmental approvals; financial services; food safety; and land development assessment (PC, 2007).

Following the feasibility study the government asked the PC to proceed to report on the quality and the quantity of Australian business regulation, (PC, 2008a) and the administrative compliance costs of business registrations (PC, 2008b). These reports were completed in 2008 and cover all Australian jurisdictions and local government. The quality and quantity measures are intended to help compare the performance of the regulatory regimes in the different jurisdictions and assist governments to identify areas for improvement. The former report provides a 'snap shot' of the current regulatory environment across the Australian jurisdictions. To assess quality it focuses on the broad measures of the stock and flow of regulation and regulatory activities. Measures of good regulatory processes are used as a proxy for the quality of regulation, rather than any measures of specific regulations.

The report on the administrative compliance costs of business regulations concluded that the total costs of complying with registration requirements is generally low, but widely variable across jurisdictions, both for generic business registrations and industry specific registrations. The time costs of registrations were low across all jurisdictions and fees and charges (which are relatively easy to measure) are the most significant costs to business[45] (PC, 2008b, p. xvii). Because business registrations were not a significant burden the PC found that it is a big challenge to engage business interest in the study and to collect credible data. It identified that benchmarking works best when it focused on regulatory burdens that matter to industry and suggested a greater role for regulators in collecting data that would be of common interest for benchmarking and for evaluating the regulators own activities.

The government is continuing with the benchmarking exercises and has subsequently requested the PC to benchmark the regulatory burden of occupational health and safety regulation and food safety regulation.[46] These projects are currently underway and it is expected that subsequent reviews of other areas of regulation will follow. In this way a wide database of regulatory costs for various sectors will be constructed over time. It is notable that these benchmarking exercises provide data for the comparison of jurisdictions and do not include any specific recommendations for reform. They are intended to inform other reviews of regulation. They also place considerable emphasis on the processes and activities of regulators, such as the provision of online information services for the comparison of the performance of regulators across jurisdictions and not just the monetary costs imposed.

The benchmarking exercise presents data on the number of regulations in force. A count of the number of regulations does not reflect the actual regulatory burden; business are concerned about the type of obligations imposed rather than the existence of a regulation, although keeping up to date with the growing stock of rules is a burden of itself. However, a snapshot view demonstrates that the volume of regulation is considerable and that it grew over the year of the review (see Table 3). The PC also found that Commonwealth business regulators had over a thousand different types of business licences permits and registrations and that there were approximately 57 million business licences, permits and registrations were in operation on 30 June 2007 (PC, 2008a, p. 64-66).

Table 3. Measuring the stock and flow of Commonwealth regulation

	Stock	Flow
Regulation	As at June 2007	Enacted between 1 July 2006 and 30 June 2007
Acts	1 279	198
Pages	98 486	8 198
Statutory Rules	18 000	4 487
Pages	90 000	31 439
Total Pages	188 486	39 637

Source: Adapted from PC (2008b), pp. 33-34.

An important feature of this burden measurement activity is that it is not directly related to exercises to reduce the burden of regulation. Its purpose is to provide data for comparison and other reviews. This contrasts with some other OECD countries that have used the burden measurement exercise to set a baseline for achieving a reduction in the regulatory burden. For example, using the Standard Cost Model (SCM), the Netherlands, Denmark and the United Kingdom have calculated the aggregate administrative burden of regulations by agency across the economy and used the result to set burden reduction targets for regulatory agencies. The SCM calculation does not consider other compliance costs of regulation such as initial and ongoing capital costs and indirect efficiency costs. However, the focus on administrative burdens has been attractive to OECD countries precisely because it is a narrow class of regulatory burden, relatively easily measured by reference to proxies such as a *normally efficient company*, and reductions in this type of burden do not require an evaluation of the policy objectives of a regulation. Also, it provides a mechanism that can be used to create an incentive for compliance by agencies without determining in advance where the reductions in regulatory burdens are going to come from. Finally, the success of the programs can be measured and communicated to business to build support for reform (OECD, 2007).

In the UK, the NAO has initiated a review to report to Parliament on the achievements of the Administrative Burden Reduction Programme and the extent to which it is achieving its intended objectives and delivers meaningful improvements for business. It conducts an annual survey to track business perceptions of the impact of burden reduction initiatives and reviews agency performance. The NAO has found that setting targets has "provided a new focus and impetus to Government efforts to reduce the administrative burdens of regulation (but) there is a risk that businesses will not notice a meaningful impact from the initiatives to reduce burdens" (NAO, 2007, p. 7). In general the NAO found that departments are using the program to deliver wider improvements in the regulatory environment, had established process for consulting with business to identify what types of measures are likely to deliver a real difference and had been proactive in putting in place frameworks monitor and deliver against targets and deadlines. The NAO provided useful guidance for agencies when developing their reduction strategies (see Box 21).

The preliminary conclusion of the NAO was that the benefit to business of the 25% reduction target is uncertain and departments should not be driven exclusively by the need to meet this target. It supported the case, however, that a target based administrative burden reduction program can be compatible with the pursuit of other reform strategies. In the second year of operation the NAO found that business perceptions of government approach to regulation had improved. The NAO has emphasised the need to develop and maintain a consistent method for calculating the monetary value of burden savings, to record the costs to government of the programme to ensure value for money and to measure the costs of new regulation to achieve a net target (NAO, 2008, p.8).

Box 21. NAO advice for departments in delivering reductions in regulatory burdens

Identify Measures

- Make greater use of the measurement exercise databases of regulations to identify areas where reductions will have greatest impact;
- Develop a more sophisticated understanding of business to identify the type of measures that will improve the regulatory environment;
- Do not focus exclusively on administrative burdens – consider other simplification or de-regulatory measures, and do not neglect aspects of regulation that are 'irritating' to business;
- Consider how to deliver some 'quick wins'. Learn lessons from other departments and internationally; and
- Be bold and ambitious – conduct more holistic reviews of the impact of regulation.

Prioritise

- Consider the trajectory of proposed reductions and focus attention on the priority areas. Do not spread resources or focus too thinly; and,
- Apply recognised project management techniques.

Deliver

- Treat initiatives as discrete projects – assign responsibilities; identify required resources; set milestones;
- Establish appropriate mechanisms to monitor progress and hold policy teams to account for delivery; and,
- Raise awareness of better regulation principles among policy officials. Promote the benefits of better regulation to develop buy-in, motivate officials and embed into the culture of departments. Senior management must show an active involvement.

Measure/evaluate

- Co-ordinate with other departments and the BRE to develop a consistent approach to measuring cost reductions;
- The target is a net reduction. Calculate and include the increased administrative costs associated with the introduction of new regulations. The revised Impact Assessment process provides a means to measure costs; and
- Consider the other measures required to evaluate the impact of initiatives on the regulatory burden and wider business environment. Develop a broad suite of measures.

Communicate

- Develop communication strategies to inform business of changes to information obligations and the achievements of the Programme.

Source: NAO 2007:Appendix Two.

Assessment

A number of OECD governments have developed innovative strategies for reducing administrative burden and other OECD countries are learning from their peers. In particular there is some convergence around the use of specific methodologies such as the Standard Cost Model (SCM) in Europe. Given the federal government's ambition of ensuring that there is no net increase in regulatory burden and its goal of promoting culture change it is somewhat surprising that it has not also adopted a targeted approach to reduce the administrative burden of federal regulation. Australia has resisted the trend, but if the experience of other OECD countries is a guide, the large volume of Commonwealth business regulatory requirements suggests that scope exists for regulatory simplification. This strategy of setting targets for burden reduction has proved effective in OECD countries at focusing the reform efforts of regulatory agencies.

It is however, not without its costs. The measurement of burdens can be an expensive exercise and there is the potential to divert resources that could be applied to more productive regulatory reform efforts. It also remains a problem that businesses continue to report that they do not necessarily notice the impacts of the reductions in burdens that have been achieved. Nevertheless, there is now several years experience among OECD countries with the use of the SCM as a measurement tool and the application of burden reduction programs. This provides the opportunity to examine how it can be adapted to suit the Australian conditions in terms of setting targets and time frames. In fact the Australian State of Victoria already has a program in place to reduce the administrative burden of State regulation by 25% over five years to 2011[47] (PC, 2008, p. 111).

Box 22. Monitoring and measuring administrative burdens

The **United States** developed a highly developed, comprehensive and centrally enforced programme for analysing and clearing individual government information collection requirements. The Paper Work Reduction Act (PRA) is intended to minimise the amount of paperwork the public is required to complete for federal agencies. The Act requires federal agencies to request approval from the Office of Management and Budget (OMB) before collecting information from the public. The OMB has the responsibility to evaluate the agency's information collection request by weighing the practical utility of the information to the agency against the burden it imposes on the public. Agencies must publish their proposed information collection request in the Federal Register for a 60-day public comment period, and then submit the request to OMB for review. In seeking OMB's approval, the agency needs to demonstrate that the agency will make practical use of the information collected. The agency must also certify that the proposed information collection "reduces to the extent practicable and appropriate the burden" on respondents, including for example, small business, local government, and other small entities. Since 1980 OMB has set varying quantitative targets for the reduction of information collection burdens.

The **Netherlands** pioneered the development of a measurement system for administrative burdens. The first system MISTRAL,[1] became the Standard Cost Model (SCM), and has been adopted by a growing number of countries in recent years.[2] The roots of today's programme can be traced back to 1994, with the establishment of the MDW (Marktwerking, Deregulering en Wetgevingskwaliteit) programme which targeted the better functioning of markets, deregulation and legislative quality. A main aim of the MDW programme was the reduction of administrative burdens to streamline regulations in order to return to "what is strictly necessary". The report of the Slechte Committee in 1999 confirmed the direction, proposing that progress was best made and politicisation avoided by giving the administrative burden reduction programme a relatively narrow focus. The establishment of ACTAL, as an independent external watchdog for the programme in 2001 was an institutional milestone.

Following the 2003 election the government set the objective of reducing burdens by 25% by the end of its term, relative to a baseline measurement of EUR 16.4 billion (3.6% of GDP). Administrative burdens were defined as "the costs to business of complying with the information obligations resulting from Government imposed regulations." Overall, ministries met their targets. An OECD/World Bank reported that the Dutch model has been an inspiration to other countries, and the considerable investment made by successive Dutch governments since the 1990s has largely paid off. The success factors have been a combination of: measurement (the use of the SCM method for the measurement and mapping of burdens); setting a time bound quantitative target (divided among ministries); a strong inter ministerial co-ordinating unit at the centre of government (the RRG and its predecessor, IPAL); independent monitoring via the watchdog, ACTAL; a link to the budget cycle to give incentives to agencies; and not least, political support, helped by the narrow focus of the programme on administrative burdens which tended to avoid controversy.

The **United Kingdom** Government has set up a Simplification Programme to reduce burdens on business, based

on the Standard Cost Model (SCM) methodology developed by the Netherlands. This was used to establish a May 2005 baseline of GBP 13.4 billion of annual administrative burdens on the private and third (voluntary and community) sectors. The Government announced in autumn 2006 an overall net reduction target of 25% by 2010, to be achieved across most central Government departments and some agencies (35% for the Cabinet office). As a net target it takes into account new additions to regulatory burden. There are separate targets for Her Majesty's Revenues and Customs (HMRC), which has a tax simplification programme, the Foreign and Commonwealth Office, and the Financial Services Authority, who conducted their own exercises. Reduction targets vary across departments but are, with a couple of exceptions, at least 25%.[3]

Administrative costs are defined as the annual recurring costs of administrative activities that businesses (and the third sector) are required to perform in order to comply with central government obligations. The SCM methodology was used to calculate the administrative costs of regulation. Administrative burdens were then calculated by making a Business As Usual (BAU) adjustment (BAU is activities that businesses would do anyway). Regulations are broken down into manageable components in order to calculate the baseline.

Measurement was a very significant exercise. It cost GBP 17 million excluding Government internal costs, and involved over 8500 interviews, and over 200 expert panels and focus groups, who helped determine what business would do in the absence of regulation. These engaged individual businesses, charities and voluntary sector organisations. For BAU, the estimate was via an independent panel (representatives from the Better Regulation Commission, Confederation of British Industry (CBI), Forum of Private Business, Federation of Small Businesses, Small Business Council, British Property Federation, House Builders Federation, Royal Institute of Chartered Engineers, National Farmers Union and others. All central government regulations were mapped. The responsible department and the origin of the regulation was then identified, the obligations defined, and the costs measured.

1. MeetInSTRument Administratieve Lastendruk.

2. For a list of the 27 jurisdictions that have adopted the use of the Standard Cost Model for the measurement of administrative burdens (including the government of the State of Victoria in Australia) see the Standard Cost Model network at *www.administrative-burdens.com*.

3. For example BERR 25%; Cabinet Office 32%; Department for Environment, Food and Rural Affairs 29%; Department for Innovation, Universities and Skills 32%; Government Equalities Office 56%; HM Treasury 72%.

Source: OECD (1999a), *Regulatory Reform in the Netherlands*, Paris; OECD (1999b), *Regulatory Review of the United States,* Paris; OECD (2007), *Cutting Red Tape*, *Administrative Simplification in the Netherlands*, Paris

Integrating ICT into the regulatory process.

There is a trend in most OECD countries to integrate ICT mechanisms into the regulatory process to facilitate transactions within and between government bodies and between government bodies and business and citizens. The use of ICT and changes to business processes is one of the most important enablers of administrative simplification.[48]

The federal government has made the use of ICT to improve service delivery and reduce administrative burdens a priority and has developed several complementary initiatives:

- A comprehensive e-government strategy entitled *Responsive Government: A New Service Agenda* was released in 2006 updating previous initiatives. The strategy recognizes the decentralized operation of ICT services in government and aims to bring a co-ordinated and citizen-driven focus to the government's e-government initiatives to reform and improve government processes.[49]

- A major review of the Australian Government's use of ICT was undertaken in 2008.[50] Its recommendations, currently being implemented, are designed to improve the Australian Government's use of ICT for public administration and service delivery. They are intended to deliver a strategic vision for ICT in support of government policies and programs and a new model for the effective and efficient use of ICT within the Australian Government.

- The government established a Business Process Transformation Committee (BPTC) in 2007 to co-ordinate the redesign and reform of agency business processes. The BPTC is a group of senior executive officers from service delivery and central agencies, responsible for transforming the way agencies do business through ICT to improve service delivery. The priority focus of the BPTC is the reform and use of standard, business processes across APS agencies, to improve the quality, consistency and efficiency of service delivery to citizens. As an example of common standardised business processes, the *Australian Government Online Service Point Program* has been set up to improve access to information, messages and services on government websites through the online portal: *www.australia.gov.au*.

- A framework which sets out principles, standards and methodologies for interoperability between agencies has been established. The framework promotes whole of government collaboration to improve the design of policies and services and obtain efficiencies from streamlined interactions both within and across agencies.[51]

- A process of government employee authentication has been developed to re-use information and to reduce internal administrative costs across government agencies.[52]

- The Management Advisory Committee (MAC) is a forum of Departmental Secretaries and agency heads established under the *Public Service Act 1999*, and Chaired by the Head of the Department of the Prime Minister and Cabinet to advise the government on matters relating to the management of the Australian Public Service. Among other things, the MAC is responsible for promoting strategic approaches to service delivery and collaboration across government.[53]

- At COAG level the *Online and Communications Ministerial Council* encourages the shared use of systems and promotes interoperability and better practice across all levels of government to maximize efficiencies and reduce costs.

- The government is testing a number of online consultation mechanisms to develop a consistent, cost effective and efficient approach for Australians to communicate with government. The aim is to develop a whole of government policy to bring consistency in agency practice. The trials are testing issues around registration and participation, the use of blogs and different methods of moderation to online consultation.[54] An aim of the improved online consultation is to support the regulatory reform agenda, by allowing the community to comment on regulatory costs.

Assessment

The above strategies are not a complete account of activities being undertaken by the federal government in this fast moving area. The initiatives described indicate that the federal government is actively promoting the efficient use of ICT and its integration in the improvement of business processes. One of the drivers for this is to reduce the burden of regulation on business and citizens. But this is not the principle reason. Its origins and aims are much more located in an overall ambition to improve the responsiveness, efficiency and citizen focus of the Australian Public Service using the tools that are provided by ICT. The fact that reductions in administrative burdens has not been promoted as the primary driver of ICT related reforms probably reflects the relatively lower priority that has been given to this as an approach to regulatory reform, compared to some European countries that have made this a key plank of their reform efforts.

Box 23. Examples of Australian reforms to streamline reporting requirements for business and reduce compliance costs

Standard Business Reporting (SBR) will reduce the reporting burden by making it faster, cheaper and easier for business to report their financial information to Australian state and territory governments. SBR will remove unnecessary and duplicated information from government forms; utilize business software to automatically pre-fill government forms; adopt a common reporting language based on international standards and best practice; make financial reporting to government a by-product of natural business processes; provide an electronic interface to enable business to report to government agencies directly from their accounting software, which will provide validation and confirm receipt of reports; and provide business with a single secure online sign-on to the agencies involved. It is expected to save Australian business AUD 795 million per year when fully operational in 2010.

Reducing the burden of tax compliance – The Australian Tax Office (ATO) introduced an easier, cheaper, more personalised program in 2003 in order to reduce administrative burdens for its clients. Following consultation with business and tax agents the ATO provides clearer forms and more forms electronically, including the option of receiving and lodging tax forms online, and the use of smart forms. The Australian Government is currently considering recommendations of a review by of the Board of Taxation of the legal framework for the administration of the GST, on ways to streamline and improve the operation of the GST and reduce compliance costs.

A central clearing house for statistical reporting - The Australian Bureau of Statistics (ABS) is Australia's central statistical authority, responsible for providing statistical services to all Australian governments. The ABS operates a Statistical Clearing House, which reviews and clears business surveys conducted by Australian Government agencies to eliminate duplication and ensure that surveys conducted follow sound statistical methodologies and practices.

A 'one-stop-shop' portal for individuals and business:

The website *www.australia.gov.au* is an online entry point where the public can access Australian Government information, messages and services. The website will be updated in 2009, to allow users to personalise their view and browsing options through an optional online account. A single sign-on function will allow people to simplify the process of accessing agency services and undertaking online transactions and not have to remember multiple websites, usernames and passwords.

The website *www.business.gov.au* is an online tool and information resource that encompasses information from all three levels of government and reduces business compliance costs. It includes delivery of a range of free products and services for business, including syndication of content to third party websites and the use of Smart Forms to make it easier for business to transact online. Business.gov.au hosts a consultative forum for business and government representatives twice a year to provide an update on its activities, and to encourage the use of information technology to reduce business compliance costs.

A seamless, single online registration system. The Australian Business Number (ABN) and Business Names Registration Project will enable businesses to apply for their business name and ABN online at the same time leading to significant savings in time and registration fees for businesses operating in more than one state. The system will also provide an interface for improved interactions between business and government, placing information needed by business operators in one place. The specific objectives of the project include:

- improving service delivery by making national business registration available online 24/7;
- increasing business knowledge and certainty by providing all licences, registrations, permits and business assistance tools across the three tiers of government in one place;
- improving awareness about the rights conferred by business names in comparison to trademarks, reducing the time and cost in fulfilling regulatory obligations through streamlined application processes and electronic form filling;
- improving interactions between business and governments throughout the business lifecycle through a dedicated workspace, enabling businesses to fill, lodge, pay and track transactions as well as subscribe for tailored notifications relevant to their business; and
- increasing the common utilisation of the ABN for other registrations to enable pre-filling of forms, telling government once about changes to details, as well as increasing consumer confidence through improved identification of businesses.

The use of the internet by regulators to provide and receive information from business was one of the areas surveyed by the PC in its Performance Benchmarking of Australian Business Regulation (PC, 2008a, pp. 69-73). This study found that there is considerable room for improvement in the use of the internet by Commonwealth regulators. More than 60% of regulators provide information and application forms on line, but fewer than 20% receive application forms on line or allow business details or licenses to be updated or renewed on line. The results of this benchmarking exercise provide a good basis for analyzing opportunities for improvements to this area through the increased use of ICT in the approvals process.

CONCLUSIONS AND RECOMMENDATIONS FOR ACTION

General assessment of strengths and weaknesses

Australia has a long history of implementing regulatory reform and introducing improvements to its regulatory management arrangements. Successive Australian governments have progressively strengthened the regulatory management arrangements in Australia and it already has in place many of the tools, institutions and policies that the OECD recommends for improving regulatory quality.

The current Australian government has promoted its regulatory policy agenda under the heading of 'Deregulation', under a firm political commitment to the reform task, and with a target of no net increase in the regulatory burden. The explicit policy aim is to reduce impediments to Australia's long-term productivity growth by reducing the regulatory burden on Australian businesses, non-profit organisations and consumers. Deregulation as it is used by the Australian Government is not a mantra that dictates that regulation is not to be used. It is a banner intended to promote support for reforms that lead to better designed regulation and the removal of regulation where it is not in the public interest and alternative non regulatory means can achieve the policy goals more effectively. The challenge for Australia is to bring about a change in the culture of regulation; to move from a history of periodic reviews and incremental reforms to an embedded program of continuous improvement in regulation.

Ambitious aspirations are necessary to implement change across a range of institutional settings. Bringing about cultural change to government administration is a long term challenge requiring commitment on many fronts. Reversing the flow of the proliferation of regulations seems to go against the natural inclination of government administration. Governments are usually much more effective at increasing the stock of regulation than reducing it.

A bold strategic agenda appears to be appropriate for Australia, which has established a strong foundation for embarking on regulatory improvement. Australia has formalised procedures for making regulation within government and ensuring the legal quality of the rules that are made. Its regulatory institutions and governance arrangements are also established according to formalised procedures that are enshrined in law and in informal governance arrangements that are clear and respected by elected governments. It has a strong culture of professional commitment in the administration, a broad acceptance of the need for reform to achieve better regulatory outcomes and a well trained and skilled administration with experience in the use of regulatory quality tools like RIA.

The Australian system for regulatory management is particularly strong in RIA and its institutional arrangements. The frameworks for *ex ante* evaluation of regulatory proposals through an assessment of business costs, RIA and the use of 'green papers,' are well developed and supported by comprehensive guidance and training. The gatekeeper functions for RIA are rigorous and provide clear incentives to agencies to commence an evaluation of the implications of regulatory proposals early in the policy development process. The machinery of government changes to the Department of Finance and Deregulation bring the OBPR closer to the Cabinet processes, enabling firmer oversight of the technical quality of the RIA, and establishing a policy function in the DPD that is resourced to assess and improve regulatory proposals from agencies and concentrate on bringing about the culture change that the government seeks.

In terms of *ex post* reviews, the Productivity Commission (PC) is an effective policy institution that provides guidance to the government on policy options and also challenges the merits of current regulatory arrangements and government practices. The tradition of using the PC in this way is strengthened with further references to the PC to review the regulatory burden on specific sectors and benchmark regulatory arrangements.

These represent solid foundations where there are opportunities to make improvements to the Australian system, even if many of these appear to be at the margin of current activities. Compared to some OECD countries however, consultation processes may leave scope for some improvement. Opportunities may exist for greater involvement of the public and stakeholder groups in the development of regulatory proposals, and the scrutiny of the analysis that underpins the preparation of RIA. Despite the very detailed RIA processes, there continues to be an issue with ensuring the early integration of the tools and processes for the evaluation of the need for regulation and of the identification of non regulatory alternatives in the policy development processes. This indicates a need for greater Ministerial accountability in the use of RIA. *Ex post* reviews of the stock of regulation could also benefit from more systematic approaches through structured review processes.

Strategies may need to be adjusted if culture change is to be promoted and implemented across government. Further efforts are required to encourage the promotion of innovation in regulatory practices by regulators to achieve regulatory objectives in ways that that are more efficient and reduce costs to business, and to streamline regulatory approvals processes, lower ongoing compliance cost and impose lower barriers to entry for innovative products and services. Related to this, there is scope for improvement in the way regulators use risk assessment and risk management tools in the design of regulation and the development of regulatory compliance and enforcement strategies.

The role of the body with responsibility for deregulation policy is still evolving as the Government puts its different policy strategies into operation. This development period offers opportunities for identifying how to best use existing resources to put policy aims into practice. A key challenge is to identify strategies for interacting with sectoral regulatory bodies and agencies to stimulate a change in regulatory culture. Technical constraints may prevent the one-in one-out rule and regulatory budgets from being fully effective. Nevertheless, tools and approaches are needed to manage the flow and stock of regulation. Additional mechanisms will have to be designed to promote and monitor regulatory reform activities within agencies.

The key challenge, in Australia as well as across OECD countries, is to maintain the momentum of the reform agenda in the wake of the financial crisis. The recovery from the economic effects of the crisis will require economies to be flexible and innovative, and it will be increasingly important that they are not overburdened by unnecessary regulatory impediments that prevent businesses from responding to market opportunities when they emerge. Producing further evidence of the benefits of regulatory policy is a key challenge as part of the recovery programmes in Australia and beyond. These policies require broad support from citizens and business to sustain momentum for reform in the face of often concerted opposition. To do this effectively, the policy message has to be well delivered and understood.

Australia is in a privileged position compared to the majority of OECD countries. It has already started to mobilise its forces to ensure significant advances. While it can learn from some OECD countries, it will also surely serve as an example and a model to which many countries can refer. Yet, in this context, it can also benefit from a broader reference to best practice where OECD countries have experienced and developed alternative tools and approaches. This leaves room for a number of recommendations which are submitted for the consideration of the Australia authorities to aid and encourage their efforts.

Policy options for consideration

This section identifies measures based on international consensus on good regulatory practice and on concrete experience in OECD countries that are likely to improve the arrangements for managing regulatory quality in Australia. They are derived from the recommendations and policy framework of the 1997 OECD *Report to Ministers on Regulatory Reform*, the 2005 *OECD Guiding Principles for Regulatory Quality and Performance,* and experiences of OECD countries.

Expand the framework for the accountability of Ministers, and regulatory authorities for the delivery of the regulatory reform agenda.

The 2005 OECD *Guiding Principles for Regulatory Quality and Performance* emphasise the need to encourage better regulation at all levels of government and establish programmes of regulatory reform with clear objectives and frameworks for implementation. This requires clear frameworks for accountability to ensure that commitments will be translated into concrete policy actions.

The Australian Government's objective of instigating culture change, promoting innovation and identifying widespread reductions in regulatory burdens will require Ministers to be more accountable and transparent as to how they will achieve the government's deregulation policy goals.

Clearer accountability for these goals will be required, possibly with a commitment at Ministerial level. An effective way to improve the deregulatory focus and accountability across government could be through requiring proposing Ministers to agree to the RIS which is passed to the Office of Best Practice Regulation for assessment. Further, when Ministers issue a Statement of Expectations to regulatory agencies within their portfolio concerning policy priorities for the agency, they could usefully request advice on how agencies will deliver on aspects of the Government's deregulation agenda, including in relation to continuous regulatory improvement. Regulatory agencies would report progress, in their corresponding Statements of Intent and in Annual Reports.

Combined with the promotion of the deregulation agenda outside government, this should create a kind of virtuous cycle to promote and assess the level of demonstrable change that occurs within government.

Continued advocacy and communication of the benefits of regulatory reform

The OECD principles state that governments should "articulate reform goals, strategies and benefits clearly to the public". Australia has a coherent policy on regulatory reform, built on the endorsement of the principles of good regulatory process, the NCP guiding legislative principle, a "whole of government" policy on consultation, and a broad requirement for RIS and *ex post* review of regulations. The policy has been endorsed through Ministerial statements and speeches. There would, however, be benefit in the government developing and drawing on a set of issues and arguments, using language and examples relevant and accessible to the broader community to build understanding and support the benefits of regulatory reform and the Government's deregulation agenda.

Communicating the benefits of reform to business and citizens is vital. Australia already benefits from the excellent analytical work of the PC, and its diffusion to a wide audience, which could be complemented by a continuing policy narrative on the benefits of regulatory reform together with examples. This policy narrative should help to promote greater engagement by the business sector and more ownership of the regulatory policy goals within government. Building a broader constituency within government to support regulatory reform will strengthen the resilience of the regulatory policy agenda over time and beyond the current crisis. Potential roles for other parts of government include external scrutiny of agencies, as a

source of advice of new reform opportunities and the consideration of complaints directly from business and citizens. For example, the UK NAO also uses external experts on its review teams to look at the performance of regulators and the conduct of RIS.

Expand guidance on stakeholder engagement

The OECD principles promote consultation with affected or potentially interested parties at the earliest possible stage of developing and reviewing regulations.

The assessment of the Australian Government's consultation practice is generally positive, with efforts to promote the use of the internet and blogosphere to solicit public comments. However, there is a challenge to maintaining a sustained commitment to effective consultation as an input to policy development. Building on the strengths of the current arrangements, there is scope to provide more extensive guidance to departments and agencies on the use of consultation practices drawing on examples from other OECD countries. The Best Practice Regulation Handbook's consultation guidelines could be updated to encourage agencies to take into account these guidelines when developing their own agency's consultation practices, and to publish information to stakeholders concerning these practices.

The government wide policy on consultation could be better targeted if improved information on the extent of the use of consultation practices were available. The current APSC survey methodology provides a potentially useful source of information on the effectiveness of the government wide policy on consultation. The survey methodology could readily be extended to collect more detailed information on the actual use of practices by agencies. It could also provide insights into views of officials of effective practices for improving consultation on RIA.

Develop a more systematic and transparent approach to reducing the burden of regulation

The OECD principles recommend that countries minimise the aggregate regulatory burden on those affected as an explicit objective to lessen administrative costs for citizens and businesses, and as part of a policy stimulating efficiency. Countries are also invited to measure the aggregate burdens, while also taking account of the benefits of regulation. As a result, many OECD countries have embarked on programmes to reduce administrative burdens, with significant efforts towards measurement in a large set of European countries.

Australia has a long history with regulatory reform, and has had a functioning RIA system for several decades. This may have lessened the interest as well as the energy for burden reduction as the focus has been on developing well designed regulations. There may also be some scepticism concerning the value of targets as a goal, noting potential shortcomings in terms of the short term focus, and potential to concentrate on areas that are not necessarily the most relevance to business.

However, the argument could be made that Australia could benefit from developing a more systematic and transparent approach to reducing the burden of regulation. In this context, the challenge remains to identify a mechanism that can reduce the stock and manage the flow of regulation. A structured approach to reviewing the stock of regulation is required that clearly places portfolio responsibility with Ministers and agencies, and applies ongoing incentives to manage the growth in the regulatory burden. This could build on existing ministerial partnerships for specific burden reduction initiatives. It should also be complemented by explicit references to the need for burden reduction in the "statement of expectation letters" addressed by Ministers to agency heads, as set out in the first recommendation.

While limitations to the use of target based approaches exist, there is now considerable experience among OECD countries on the design and implementation of these programs which could be used to develop a tailored approach to the identification of burden reduction in Australia. This could apply in a limited way, for example to only those sectors where it would be most likely to deliver benefits, and to combine burden reduction incentives with the use of ICT to improve government processes. Australia has the opportunity to examine comparative information collected by the OECD on international experience as well as the performance of examples in the Australian states that have adopted such strategies to develop its own adaptive program including the use of measurement tools, targets and time frames to reduce burdens.

International experience suggests that the following issues should be taken into account when considering an administrative burden reduction program. The costs of establishing an accurate measurement of the baseline administrative burden can be considerable, both for government and for the private sector which is the key source of information on administrative burden. However, information about the overall costs of regulation is important to regulators, parliament and citizens for focussing and monitoring efforts, and can also be collected in cost-effective ways, taking advantage of the existing economic and statistical apparatus. An economically robust approach for burden reduction should also account for the cost of any additional burden imposed within government. If targets are to be considered, they should be net of the burden of new regulation. Governments need to ensure that they maintain an appropriate balance in the use of resources for other substantive reform initiatives when a special focus is given to the measurement and reduction of administrative costs. Clear guidance would be required on the types of reforms that should be pursued and methods for achieving burden reduction. OECD countries have also found it useful to have private sector representation on an oversight body to monitor progress with burden reduction programmes, and to identify optimal areas for burden reduction.

There appears to be considerable potential in the use of regulatory budgets to control the aggregate regulatory burden. However, as there is relatively limited practical experience with this means of burden reduction, a cautious approach is warranted. There would be merit in undertaking widespread consultation on the design of regulatory budgeting in Australia taking account of the views of business, citizens and departments. Examination of the policy process would expose some of the technical challenges, stimulate new ideas and help to build a commitment to the process if the government does choose to proceed with regulatory budgeting.

The government's relatively new policy on reducing red tape inside government is sound in principle, but should be supported by a review schedule and regular reports on compliance and of the result of the reviews by agencies. It is likely that some experimentation in processes among agencies will occur which could usefully inform changes to the policy over time.

Strengthen the contribution of RIA to policy development and extend the monitoring and reporting on the quality of RIA processes

The OECD principles promote the use of performance based assessment of the effectiveness of regulatory tools and institutions. The OBPR already publishes useful information about the quality of the RIA processes, but provides no information about the success of the RIS process in generating better policy outcomes. This could include incidences where regulatory proposals that were under consideration were amended and improved through the requirement to analyse the impacts as well as the identification of new regulatory proposals that benefitted the community. The OBPR should transparently report on compliance by agencies with the obligation to quantify the costs and benefits of regulatory proposals. These performance reports will be important as the enhanced requirements of the RIA system have only been in place since 2007.

Assessed against OECD principles, the Australian RIS process is very good, but there are potential improvements at the margin that could strengthen the process further. Improved contribution of the RIA process to policy development could be promoted by establishing greater accountability at Ministerial level for the use of RIA. As mentioned above, requiring proposing Ministers to agree to the RIS which is provided to the Office of Best Practice Regulation for assessment would not only increase accountability but it would also add greater authority to the RIA process. Further, Australia could assess the opportunity for the Australian National Audit Office to periodically review the quality of RISs. The OBPR could potentially receive electronic notice of the preliminary assessment undertaken for all regulatory proposals to better track its application to regulations not proceeding to Cabinet, without becoming overburdened. RIA training could usefully be extended to Ministerial offices to assist in guiding policy development.

Consultation on RIA could be more effective if a two stage approach were taken that required the RIS to be published in a draft format as a consultation document on regulatory proposals. Where RIA is prepared for subordinate regulation, the publication of RIA could be mandatory for a prescribed time period prior to the regulation being made to allow public input to the quality of the analysis in the RIS. This would be consistent with the requirements of Australian State jurisdictions.

In Australia regulatory policy is set out in policy documents and informal guidance. The government has given a commitment to follow the existing arrangements which appear to achieve a high level of compliance in practice. However, the Cabinet Handbook was last updated in 2004, so it would be timely for it to be amended to more explicitly reflect the detail of the changes to the regulatory oversight processes from 2006. In the future a move towards more formal requirements would promote transparency, stronger safeguard and more accountability. The establishment of statutory standards for regulatory quality is a means of providing political support for regulatory policy and promoting continued compliance. For example, other jurisdictions within Australia have a statutory requirement that RIA must be prepared for subordinate legislation and made public prior to the regulation being made.

Use scheduled reviews of regulation to promote continuous improvements to regulation.

The OECD principles call on countries to review regulations against the principles of good regulation, from the point of view of those affected rather than of the regulator, and to update regulation through automatic review procedures and sun-setting.

In Australia, sun setting arrangements and scheduled five yearly reviews of regulation are the primary means to keep the stock of federal regulation up to date. The government should systematically specify the general terms of reference that would apply to the five year periodic review of legislation and publish a schedule to require departments and stakeholders to begin preparing for the post-implementation reviews, including organizing and collecting the data in advance that will be necessary to review outcomes. The OBPR should use the opportunity before the rolling five yearly reviews commence to undertake its own evaluation of the legislation/regulation to be reviewed. The OBPR should also provide guidance to the agencies responsible for the reviews on how extensive the review of particular regulation based on its significance. The principle of proportionate analysis already exists in the guidance in the Best Practice Regulation Handbook, but specific guidance on other matters such as an assessment of the need for independence of the reviewer and the consideration of related policy issues should be determined by the OBPR in consultation with the agencies concerned. Further guidance, could be reflected in a future update to the Commonwealth Government's Best Practice Regulation Handbook.

To gain better effect from the Ministerial partnerships model, it would be worthwhile to publicise the kind of support and services that the Department of Finance and Deregulation is able to provide. Potentially this could include expertise in regulatory analysis, stakeholder management, and Cabinet support for subsequent policy initiatives.

Expand the use of risk-based strategies in the development of regulation and compliance strategies building on existing practices by agencies

The OECD principles promote the use of risk assessment and risk management options in RIA. The *Best Practice Regulation Handbook* provides good solid guidance on the assessment of risk when considering a regulatory proposal. There is scope to extend this to the design and implementation of compliance and enforcement strategies. Selected OECD countries have produced guidelines which could provide a model starting point for expanding the guidelines on risk assessment and management. However, experience suggests that the guidance should be developed in close consultation with regulators to accommodate existing departmental arrangements where they already reflect a culture and practice of effective risk assessment, management and communication.

The Australian government aims to promote innovation and continuous improvement as part of the deregulatory policy agenda. This will require regulators to take account of the features of firms as well as the circumstances of the market when designing regulation. A case by case approach is necessary, but the government should share lessons among regulators about good performance and innovation in regulatory products, and consider how to provide incentives for the identification of innovative solutions so that flexibility and outcome oriented approaches are systematically favoured in regulatory design. This could build on the transfer of good existing practices from a number of sectoral agencies in charge of prudential and safety regulation.

Strengthen the quantitative underpinnings for evidence based decision making

The OECD Principles acknowledge that "Good Regulation should… ii) have a sound legal and empirical basis". RIA requires a sound empirical and statistical base, with appropriate data for assessing economic and welfare effects of the intended regulations.

As part of the activities to improve the capacity of agencies to assess the costs and benefits of regulatory proposals, the OBPR could raise the awareness of the availability of data derived through the course of the administrative activities of government agencies. This could include making a case for maintaining and distributing this information to other government agencies to improve the information about the impacts of regulation. This could include a study to identify if there are any legal or administrative barriers to sharing data between levels of government and research institutions.

NOTES

1. In Australia competition policy and regulatory management have been closely intertwined. The competition policy reviews will also be discussed as part of the chapter on competition policy.

2. Regulatory quality is defined by a framework in which regulations and regulatory regimes are efficient in terms of cost, effective in terms of having a clear regulatory and policy purpose, transparent and accountable. OECD (2004a), *Building Capacity for Regulatory Quality: Stocktaking Paper*, GOV/PGC(2004)11, Paris, April.

3. OECD (2002a), *Regulatory Policies in OECD Countries. From Interventionism to Regulatory Governance*, Paris.

4. In 1984, the State of Victoria within Australia had already established a law within its jurisdiction requiring a Regulatory Impact Assessment of subordinate legislation that imposed an appreciable burden on any sector of the public (OECD, 1997, p. 23) "The Subordinate Legislation (Review and Revocation) Act 1984 (Vic) commenced operation in July 1985, introducing major changes to the Subordinate Legislation Act 1962 (Vic) and thereby the Victorian regulatory system. Some of these changes included automatic sun setting of regulations at the end of ten years; staged repeal requiring regulations made prior to 1984 to be reviewed and remade and the preparation of regulatory impact statements with an opportunity for members of the public to comment on the regulations prior to them being made." (Scrutiny of Acts and Regulations Committee 2002:15)

5. Notably the Victorian Subordinate Legislation Act 1984, and the equivalent South Australian and NSW Acts.

6. Terms of Reference. *Time For Business*, Report of the Small Business Deregulation Task Force, November 1996 Commonwealth of Australia *www.daf.gov.au/reports_documents/pdf/time_for_business.pdf (pg vii)*.

7. More Time for Business Statement by The Prime Minister, The Honourable John Howard, MP 24 March 1997 Australian Government Publishing Service Canberra (pg 12) *www.innovation.gov.au/Section/SmallBusiness/Pages/MoreTimeforBusinessMarch1997.aspx*.

8. For an example see the presentation by Dr. Fred Hilmer on Making Competition Reform Happen at the 100th anniversary of the Competition Committee, Paris February 2008. Frederick Hilmer (Australia), vice Chancellor of the University of the New South Wales.

9. The institutional arrangements for competition policy assessment adopted in Australia are explored and adapted for application by other OECD members in OECD (2007) the *Competition Assessment Tool Kit, Version 1.0.*

10. For a comparative overview of the advocacy function in a set of selected OECD countries see OECD 2008 "The Role of Advocacy Bodies – Building Drivers and Engines for Reform: Integrating Business and Citizens in the Regulatory Quality Process." in *Implementing Regulatory Reform: Building the Case through Results.* Proceedings of the Meeting of the Group on Regulatory Policy OECD, Paris, December 2007.

11. Regulation is defined in the Office of Best Practice Regulation, Best Practice Regulation Handbook as "Any 'rule' endorsed by government where there is an expectation of compliance for example, primary legislation (Acts), subordinate legislation (legislative or non legislative instruments), treaties and quasi-regulations."

12. The Minister for Finance and Deregulation stated: *"As at the end of March this year, my department found only 40% of accepted recommendations (of the taskforce) had been completely implemented. Half were still in progress, and no progress had been made at all on the remaining 10%"* Speech by The Hon Lindsay Tanner MP Minister for Finance and Deregulation: *The Future of Regulation: Next steps in the Rudd Government's deregulation agenda*. Address to the Centre for Policy Development 10 September 2008, *www.financeminister.gov.au/speeches/2008/sp_20080910.html*

13. The role of the policy group in respect to the COAG working group will be discussed in the chapter on Commonwealth State arrangements. In Summary the Business Regulation and Competition Working Group (BRCWG) is one of seven working groups established by COAG. Each group is overseen by a Commonwealth Minister, with deputies at a senior departmental level nominated by the States and Territories. These groups also include senior officials from all jurisdictions. The objectives of the BRCWG are:

    - to accelerate and broaden the regulation reduction agenda to reduce the regulatory burden on business;

- to accelerate and deliver the agreed COAG regulatory hot spots agenda;
- to further improve processes for regulation making and review, including exploring a national approach to processes to ensure no net increase in the regulatory burden, and common start dates for legislation; and
- to deliver significant improvements in Australia's competition, productivity and international competitiveness. www.finance.gov.au/deregulation/coag.html.

14. HM Government (2008) Regulatory Budgets: A Consultation Document. *www.berr.gov.uk/files/file47129.pdf*

15. The United Kingdom had planned to commence with a shadow roll out of a regulatory budget for departments from April 2009, to test its effectiveness. In April 2009, it announced that it had changed its plans in response to the economic situation and decided "not to implement a system of regulatory budgets at this stage." See the written Ministerial Statement issued on 2 April 2009, by the Rt. Hon. Lord Mandelson, Secretary of State for Business Enterprise and Regulatory Reform.

16. The ANAO Better Practice Guide on Administering Regulation was contributed to by an expert reference group including the administrative Review Council, Australian Fisheries Management Authority, Australian Prudential Authority, Australian Quarantine and Inspection services, Civil Aviation Safety Authority, Office of Best Practice regulation and Therapeutic Goods Administration.

17. More information is available from the ASIC website: *www.asic.gov.au/asic/ASIC.NSF/byHeadline/Better%20regulation*

18. The Act is available at *www.opsi.gov.uk/acts/acts2008/pdf/ukpga_20080013_en.pdf*. Further information about the intended effect of the legislation can be found at the BRE website *www.berr.gov.uk/whatwedo/bre/inspection-enforcement/implementing-principles/sanctions-bills/page44047.html.*

19. The European Commission issued an official "communication" on the role of precaution in risk management (EC, 2000). The United Kingdom government has written an extensive policy report on how the capacity of government to respond to risks should be enhanced (UK Government, 2002).The external advisory committee to the Government of Canada on "smart regulation" dedicated a chapter to the special challenges of risk management (Canadian Government, 2004). The U.S. Government issued updated "principles of risk analysis" for use by all federal departments and agencies, after more detailed draft technical bulletin on risk assessment met opposition from the (US Government, 2007).

20. *www.dpmc.gov.au/guidelines/docs/cabinet_handbook.pdf*

21. The current standing committees of Cabinet are: Parliamentary Business (PBC), Strategic Priorities and Budget (SPBC), National Security (NSC), and (decisions of the following committees require endorsement of Cabinet) Expenditure Review (ERC), Social Policy (SPC), Economic Policy (EPC), Climate Change Water & Environment (CCWEC).

22. *www.pmc.gov.au/guidelines/docs/legislation_handbook.pdf*

23. The Australian Government has advised that in the future a similar arrangement will also apply to legislation published on the ComLaw website under the *Evidence Amendment Act* 2008.

24. *www.comlaw.gov.au*

25. The manuals are available for download from *www.opc.gov.au/plain/index.htm*

26. The principles have also been endorsed by COAG and incorporated as Appendix F in the COAG *Best Practice Regulation: A Guide for Ministerial Councils and Standard Setting Bodies* (COAG 2007).

27. Based on advice provided by the Deregulation Group, Department of Finance and Deregulation.

28. *www.australia2020.gov.au/about/index.cfm*

29. Further details on the consultation processes of these reviews are available through the following web links: The Australia's Future Tax System Review (the 'Henry Tax Review') *http://taxreview.treasury.gov.au/Content/Content.aspx?doc=html/home.htm* the Carbon Pollution Reduction Scheme Green Paper, *www.climatechange.gov.au/greenpaper/index.html* the Aviation Green Paper *www.infrastructure.gov.au/aviation/nap/index.aspx* and the Energy White Paper *www.ret.gov.au/energy/facts/white_paper/Pages/default.aspx*

30. Consistency in the rail gauge is no longer a problem however as the main interstate rail routes are now standard gauge, facilitating the interstate movement of goods. Different gauge railways continue to be used within the states, but these are submarkets where the costs of renewing the infrastructure would outweigh the benefits.

31. The original six 'hot spots' were rail safety, occupational health and safety, national trade measurement, chemicals and plastics, development assessment arrangements and building regulation.

32. A copy of *The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* is available at www.ag.gov.au/crimlaw

33. A list of the decisions that the Tribunal has jurisdiction to review is listed at: *www.aat.gov.au/LegislationAndJurisdiction/JurisdictionList.htm.*

34. There are certain decisions which are exempt from the operation of the Administrative Decisions (Judicial Review Act) 1977, set out in Schedule 1 to the Act. A copy of the ADJR Act, Judiciary Act and Constitution is available online at: www.comlaw.gov.au

35. *www.standards.org.au/*

36. Speech by The Hon Lindsay Tanner MP, Minister for Finance and Deregulation: *The Future of Regulation: Next steps in the Rudd Government's deregulation agenda*. Address to the Centre for Policy Development 10 September 2008. www.financeminister.gov.au/speeches/2008/sp_20080910.html

37. OECD (1997b), *Regulatory Impact Analysis: Best Practices for Regulatory Quality and Performance*, Paris.

38. OECD (2005), *Guiding Principles for Regulatory Quality and Performance*, Paris.

39. There were significant reforms implemented to the RIS processes in 2006-07.

40. OECD (1997a), *OECD Report on Regulatory Reform*, Vol. I, p. 221.

41. For more details see OECD (2005), *Designing Independent and Accountable Authorities for High-quality Regulation*, Proceedings of an expert meeting held in London on January 10-11, 2005, Paris.

42. The review was asked to develop a broad template of governance principles and arrangements that the Government could extend to statutory authorities and office holders, and potentially beyond, to a wider range of public sector bodies. www.finance.gov.au/financial-framework/governance/governance-

arrangements-for-australian-government-bodies.html. *See the policy document Governance Arrangements for Australian Government Bodies*.

43 The list is available at *www.finance.gov.au/financial-framework/governance/list-of-australian-government-bodies.html.*

44 See *Financial Management and Accountability Act 1997; Commonwealth Authorities and Companies Act 1997;*A comparison table which sets out the key differences between the Acts may be found at Appendix E of the *Governance Arrangements for Australian Government Bodies* document.

45 Child care registration was the exception where the delays associated with police checks is an issue.

46 See *www.pc.gov.au/projects/study/regulationbenchmarking/stage2*.

47 In 2006 the Victorian government set a target of reducing administrative burden by 15% in three years and 25% over five years. It estimates the net reduction already achieved at AUD 162 million annually (PC 2008b:111)

48. OECD (2003c), *From Red Tape to Smart Tape: Administrative Simplification in OECD Countries*, Paris.

49. The strategy is available from *www.finance.gov.au/publications/2006-e-government-strategy/index.html*. The 2002 e-government strategy is titled *Better Services, Better Government*.

50. In 2008 a major review of the Australian Government's approach to ICT was undertaken by Sir Peter Gershon. Although the 2006-10 e-government Strategy (referred to above) has not been formally superseded, it is being 'overtaken', by implementation of the Gershon review recommendations to improve the Australian Government's use of ICT for public administration and service delivery and deliver: a new strategic vision for ICT in support of government policies and programs; and a new model for the effective and efficient use of ICT within the Australian Government (See Ministerial Media Release *www.financeminister.gov.au/media/2008/mr_372008.html.*

51. *www.finance.gov.au/e-government/service-improvement-and-delivery/interoperability-frameworks.html*

52. The *Identity Management for Australian Government Employees Framework* (IMAGE) is an integrated, approach for identity management of Australian Government employees and contractors. It provides a standardised set of identity management practices across the Australian Government. www.finance.gov.au/e-government/security-and-authentication/image-framework.html

53. The report Connecting Government can be found at *www.apsc.gov.au/mac/connectinggovernment4.htm* .

54. The online consultation trials were a recommendation of the June 2008 Consulting with Government Online report: *www.finance.gov.au/publications/consulting-with-government-online/index.html.*

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ANNEX A EXAMPLES OF AUSTRALIAN REGULATORY BODIES IN THE INFRASTRUCTURE, PRIVATE HEALTH INSURANCE AND FINANCIAL SECTORS[1]

National Transport Commission (NTC)

The NTC is an independent advisory body established under the National Transport Commission Act 2003, but funded by all jurisdictions (Commonwealth and state) to develop and co-ordinate regulatory reform for nationally consistent transport road, rail and inter-modal transport policies and laws. NTC recommendations are considered by the Australian Transport Council.

The Australian Competition and Consumer Commission (ACCC)

The ACCC performs economic regulatory functions in respect of transport infrastructure (rail, airports, waterfront and shipping), energy and communications under both general and specific provisions of the *Trade Practices Act* 1974 which it primarily administers. As an independent statutory authority, the ACCC may exercise a function or power only if specific legislation so provides. It exercises its functions in accordance with the provisions of the relevant legislation.

Australian Maritime Safety Authority – Shipping industry (AMSA)

The AMSA was established in 1991 with responsibility for maritime safety and marine environment protection. It is governed by the *Australian Maritime Safety Authority Act* 1990 which sets out AMSA's functions and powers, financial arrangements, the composition of its Board of Directors, the Chief Executive Officer's appointment and engagement of staff and consultants. Five members of the AMSA Board are independent non-executive directors.

Civil Aviation Safety Authority (CASA)

CASA is responsible for the regulation of the safety of civil air operations in Australia and the operation of Australian aircraft overseas. CASA has the power to issue orders concerning use of airspace, and also to issue Civil Aviation Orders on detailed regulatory matters, such as safety precautions, weight limitations and pilot licences. CASA was established on 6 July 1995 as an independent statutory authority by an amendment to the *Civil Aviation Act 1988*. In addition to the independence and accountability functions established under the CAC Act, the responsible Minister can provide direction to CASA concerning how its powers are exercised and to undertake certain reporting requirements. To ensure regulatory independence, directions from the Minister about the performance of CASA's regulatory function may be of a general nature only.

Australian Energy Regulator (AER)

The AER regulates the wholesale electricity market and is responsible for the economic regulation of the electricity transmission and distribution networks in the national electricity market. The AER is also responsible for the economic regulation of gas transmission and distribution networks and enforcing the national gas law and national gas rules in all jurisdictions except Western Australia. The AER is part of the ACCC.

1. Links to the websites of the regulators listed: *www.ntc.gov.au*; *www.casa.gov.au/*; *www.aer.gov.au www.phio.org.au*; *www.phiac.gov.au; www.gbrmpa.gov.au*.

Private Health Insurance Ombudsman (PHIO)

Consumer protection and product complaints are primarily the jurisdiction of PHIO, a prescribed agency under the FMA Act. PHIO provides an independent service to help consumers with health insurance problems and enquiries. The Ombudsman can deal with complaints from health funds, private hospitals or medical practitioners. Complaints must be about a private health insurance arrangement. PHIO also manages the website *www.privatehealth.gov.au* which provides information about private health insurance and where consumers can search for and compare selected features for all private health insurance products offered in Australia.

Private Health Insurance Administration Council (PHIAC)

PHIAC's central functions are to monitor and regulate the private health insurers which are non-governmental bodies, and to provide information to government and other stakeholders on private health insurance membership and utilisation, risk equalisation benefits and gap cover. The performance of its functions requires the collection of financial and statistical returns from each registered health insurer on both a quarterly and an annual basis. The analysis of this information supports the PHIAC's regulatory role. PHIAC supervises the private health insurance industry in concert with the regulation undertaken by the Department of Health and Ageing and the Private Health Insurance Ombudsman.

Great Barrier Reef Marine Park Authority (GBRMPA)

The GBRMPA is responsible for managing the Great Barrier Reef Marine Park and is the principal adviser to the Australian Government on policy matters related to Great Barrier Reef Marine Park. It was established under the *Great Barrier Reef Marine Park Act 1975*.It undertakes the following regulatory functions: developing and implementing zoning and management plans; and environmental impact assessment and permitting of use. The Australian Government is reforming the governance and representation arrangements of the GBRMPA following a review.

National Offshore Petroleum Safety Authority (NOPSA)

The National Offshore Petroleum Safety Authority (NOPSA), is a prescribed agency under the FMA Act, established on 1 January 2005 to deliver world class safety regulation for the Australian offshore petroleum industry, reduce regulatory burden and provide consistent and comprehensive services to achieve better safety outcomes. NOPSA has regulatory responsibility in Commonwealth waters and state and Northern Territory coastal and inland waters.

Financial system regulation

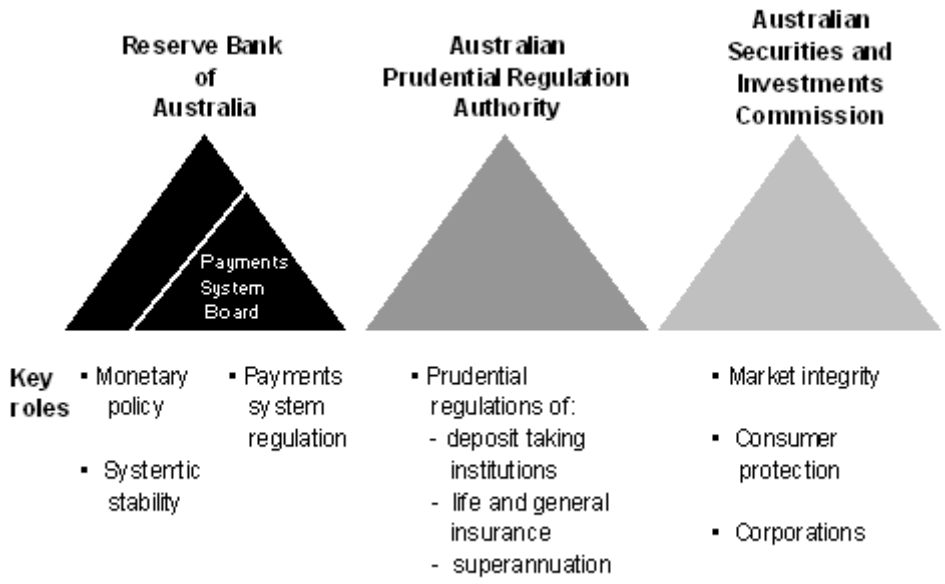
The current regulatory framework of the financial sector in Australia has been in operation since 1998. It is based on three separate agencies operating on functional lines (see Figure 1). These institutions have prime responsibility for maintaining the safety and soundness of financial institutions, ensuring market integrity and protecting consumers and promoting systemic stability through implementing and administering the regulatory regimes that apply to the financial sector. Specifically:

- The Australian Prudential Regulation Authority (APRA) is a prescribed agency under the FMA Act, responsible for prudential regulation and supervision of authorised deposit taking institutions, general and life insurance companies and superannuation funds.

- The Australian Securities and Investments Commission (ASIC), is a prescribed agency under the FMA Act, responsible for market conduct and investor protection.

- The Reserve Bank of Australia (RBA) is responsible for monetary policy, maintaining financial system stability and promoting the safety and efficiency of the payments system.

Figure 1. Key Financial Sector Regulators in Australia



Responsibility for the operational or day-to-day supervision of financial institutions and markets lies with these individual regulators, while accountability for the broad framework for the regulation of the financial sector rests with the Australian Government, through the Australian Treasury. The regulators are all members of the Council of Financial Regulators which provides a high-level forum for co-operation and collaboration among its members. The Council also has a role in advising the Government on the adequacy of Australia's financial system architecture in light of ongoing developments. The Council is non-statutory and has no regulatory functions separate from those of its members.