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Chapter 3

Multi-level Regulatory Governance – Commonwealth-State Relationships

This chapter is a summary of the background report Multi-level Regulatory Capacity in Australia *available at* www.oecd.org/regreform. *It discusses the design of the Australian program of national reform intended to improve productivity and create a seamless national economy. Particular focus is given to the co-ordinating arrangements of COAG, and the importance of effective working arrangements between the Commonwealth and the States, including the use of financial incentives to facilitate and reward reform efforts. The adoption of arrangements for effective regulatory management systems by the States is also examined.*

Introduction

The Federal ("Commonwealth"[1]), State and Territory governments of Australia are engaged in a significant programme of co-ordinated national reform to improve the productivity of the national economy. The Commonwealth, States and Territories have agreed on a reform agenda focusing on competition, regulatory reform and human capital. This has involved significant changes to the management of Federal and State and Territory financial relations to give the States and Territories ("States") more autonomy and accountability for the delivery of services to citizens in key service delivery areas under a new intergovernmental agreement for funding arrangements, including financial incentives to facilitate or reward reforms.[2]

The Council of Australian Governments (COAG) is the main forum for the development and implementation of inter jurisdictional policy, comprising the Australian Prime Minister as its chair, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association (ALGA). It was established in May 1992 out of a shared agenda aimed at advancing microeconomic reform and reducing the economic costs of duplication and overlap which subsequently led to the historic National Competition Principles agreement, signed by COAG in 1995 (Hollander, 2006).

Regulation reform is at the core of the current COAG reform agenda,[3] and of efforts to improve national productivity. The reform programme involves actions to improve the quality of the stock and flow of regulation within the governments of the States and the Commonwealth, and to promote regulatory harmonisation and the removal of regulatory overlap and duplication at a national level. The reforms also aim to preserve regulatory competitiveness and innovation among the States where this is beneficial to the national economy. The progress of the reforms and the continuing quality of service delivery by jurisdictions are monitored by the COAG Reform Council (CRC), an independent body that produces ongoing reports on the outcomes of the initiative. The Commonwealth has agreed to provide "reward" payments to the States based on the advice of the CRC on the delivery of reforms in specified areas.

Since 2007 the implementation of the COAG reform agenda has been boosted by new Commonwealth leadership and new working arrangements at COAG, including the use of working groups of senior State officials chaired by a Commonwealth Minister, to identify areas for reform and develop implementation plans. At the sub-national level, the COAG reform agenda has stimulated States to strengthen regulatory policies, institutions and tools to facilitate effective implementation of reform.

Throughout 2009 COAG has maintained the momentum of the reform agenda, acknowledging the important role of further microeconomic and regulatory reform to enhance Australia's productivity and competitiveness, raise potential growth rates and living standards, and better enable Australia to deal with difficult international economic effects of the global economic and financial crisis. The full outcomes of the COAG reforms will not be known until 2013, but significant progress is being made on nationally-uniform

occupational health and safety laws to reduce employers' costs; a national licensing system for specified occupations to improve flexibility and reduce licence costs; and, a single Commonwealth managed consumer credit system, reducing regulation and enhancing consumer protection.

The Australian Federation and COAG co-ordination

Prior to the introduction of COAG in 1992, Financial Premiers' Conferences served as the peak intergovernmental forum through which the Commonwealth, the States and the Territories discussed issues of national concern, but these were mainly driven by the Commonwealth with limited opportunity for the States to have input. In contrast, COAG meetings have been characterised by a high degree of collaborative efforts by State, Territory and Commonwealth political leadership as well as agency officials, who participate in COAG decision making through heads of government meetings, Ministerial Councils and working groups.

Under the auspices of COAG, 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. New Zealand participates in those meetings that are of relevance to New Zealand affairs. Agreements forged by Ministerial Councils often translate into laws and regulations designed to implement reform commitments.

Forty-five Ministerial Councils existed prior to the establishment of COAG. Yet, communication between Ministerial Councils and heads of government was perceived as being ineffective. In 1993 COAG undertook a reform of Ministerial Councils, focusing on rationalising and streamlining Ministerial Councils to facilitate a more integrated approach in their work and a more strategic view of the policy issues dealt. Further reforms of Ministerial Councils included: clear guidelines for the establishment of Ministerial Councils; representation of local government when local government interests are at stake; annual reporting of Ministerial Councils to COAG on key issues and outcomes; regular review by Ministerial Councils of their own functions, and; good practice regulatory principles. These principles include a requirement for regulatory impact analysis and the consideration of alternatives to regulation by Ministerial Councils (see Box 3.1 for a timeline of COAG action toward strengthening the work of Ministerial Councils).

In October 2006, the States established a Council for the Australian Federation (CAF), comprising all the State Premiers and Territory Chief Ministers. The CAF aims to facilitate COAG based agreements with the Commonwealth by working towards a common position among the States, as well as common learning and sharing of experience across States (CAF, 2006). The CAF provides a forum for dialogue between States and Territories and contributes to the COAG reform agenda through sponsoring policy analysis, collecting best practice policies, and contributing to the policy agenda.

The COAG national reform agenda

The momentum for the COAG reform agenda grew from the need to address the challenges of an aging population, and competition from developing countries by improving workforce participation and economic productivity. Initially developed in 2006 as the

Box 3.1. **Timeline of COAG actions toward rationalising and strengthening the work of Ministerial Councils**

December 1992: Agreement on the need to review the number, scope and distribution of Ministerial Councils, as well as their working protocols.

June 1993: Agreement on the need to rationalise Ministerial Councils to improve quality of policy development.

April 1995: Adoption of "Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies". (Includes guidance on RIA and best practice regulation.)

November 2000: Launch of the first review of Ministerial Councils.

June 2001: Agreement on streamlining of Ministerial Councils; adoption of "Guidelines for the Creation of New Ministerial Councils".

June 2004: Agreement on changes to a "Broad Protocol and General Principles for the Operation of Ministerial Councils"; regular reporting and information flow by Ministerial Councils on key issues and outcomes; regular review by Ministerial Councils of their own functions.

February 2005: Commitment to good practice regulatory principles, including the extension of these principles to Ministerial Councils.

October 2007: Adoption of the "Best Practice Regulation Guide for Ministerial Councils and Standard-Setting Bodies", replacing the Principles and Guidelines adopted in 1995 and amended in November 1997 and June 2004.

March 2008: Review of "Guidelines for the Creation of New Ministerial Councils".

July 2009: Agreement on the second review of Ministerial Councils.

Source: www.coag.gov.au.

National Reform Agenda, it comprised three streams focussing on competition, regulatory reform and human capital (PC, 2006a). The competition stream involved reforms in the areas of energy, transport, infrastructure and planning and climate change. The regulatory reform stream comprised two distinct sets of initiatives. The first was designed to promote best practice regulation making and review across the Commonwealth and the States. The second focused on reducing the regulatory burden in "hot spots" where overlapping and inconsistent regulatory regimes were identified as impeding economic activity. The human capital stream covered three areas – health education and training and work incentives.

The election of a new Commonwealth Government in November 2007 brought new momentum to the reform agenda, supporting a more co-ordinated approach to national issues and a more co-operative style of interaction across the federation. COAG capitalised on the political economy opportunity afforded by the fact that the same political party now held office at the Commonwealth and in all the State Governments. Leadership from the newly elected Commonwealth Government was instrumental in establishing more effective working arrangements at COAG. In its meeting of 20 December 2007, COAG identified seven areas for its 2008 work agenda: health and ageing; productivity agenda, including education, skills, training and early childhood; climate change and water; infrastructure; business regulation and competition; housing; and Indigenous reform. A working group was established for each area overseen by a Commonwealth Minister, with deputies nominated by the States at a senior departmental level to focus on developing reform proposals and service

delivery objectives, outcomes and outputs underpinned by new federal fiscal arrangements. The working groups' key strengths included: a clear and focused agenda; strong political leadership; high-level Commonwealth and State officials with direct knowledge and experience of specific issues and reform areas and; well funded and strong secretariats.

COAG also agreed to begin changing the nature of Commonwealth-State funding arrangements with a greater focus on outputs and outcomes, underpinned by a commitment from the Commonwealth Government to provide incentive payments to drive reforms.[4] In 2008, COAG agreed to an expansion of the reform agenda to boost productivity, increase workforce participation and mobility and deliver better services to the community.[5] Bringing a new emphasis on "co-operative federalism" the Commonwealth government sought to remove impediments to co-ordinated reform inherent in the system of intergovernmental financial transfers. Historically the States have transferred most of their taxing powers to the Commonwealth. As a result the States now receive most of their funding through the Commonwealth from the redistribution of all revenue collected through the Goods and Services Tax (GST)[6] and the payment of Specific Purpose Payments (SPPs) made to fund specific areas. Over time there had been a proliferation of SPPs which were used by the Commonwealth to set aspects of state policy. In the 2006-07 financial year more than 90 distinct SPPs were used giving the Commonwealth significant control over state policies and programmes, reducing state budget flexibility and setting up overlapping responsibilities with inherent incentives for cost and blame shifting between jurisdictions (Twomey *et al.*, 2007).

In November 2008, COAG agreed to a new Intergovernmental Agreement on Federal Financial Relations (IGA) to "reduce Commonwealth prescriptions on service delivery by the States, providing them with increased flexibility in the way they deliver services to the Australian people".[7] The IGA provides the basis of an agreement by the Commonwealth and States to expand the productive capacity of the economy through collaboration on policy development and service delivery and the implementation of social and economic reforms of national importance. It involves a major rationalisation of the number of payments made by the Commonwealth to the States and the withdrawal by the Commonwealth from involvement in the delivery of services by the States without a reduction in total Commonwealth funding for these activities.

The new financial arrangements commenced on 1 January 2009. Instead of receiving over 90 separate payments which could only be spent in a specified area, the payments have been rationalised to five broad areas – health, affordable housing, early childhood and schools, vocational education and training, and disability services.[8] Under the IGA the SPPs are distributed among the States on an equal per capita basis phased in over five years.[9] For each payment area a mutually agreed *National Agreement* clarifies the roles and responsibilities that will guide the Commonwealth and States in the delivery of services across the relevant sectors and covers the objectives, outcomes, outputs and performance indicators for each SPP. The performance of all governments in achieving mutually-agreed outcomes and benchmarks specified in each SPP will be monitored by the independent CRC and publicly reported on an annual basis. The CRC will also undertake a comparative analysis of the performance of governments in meeting the objectives of the National Agreements.

The independence the CRC is established by a COAG decision. It is a non-statutory body composed of a chairperson, a deputy chairperson, four councillors and an executive

Box 3.2. **Legislative co-operation in the Australian Federation**

In Australia rule making powers are distributed between the Commonwealth, six States and two Territories: New South Wales, (NSW) Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory (ACT) and Northern Territory, but there are robust frameworks for legislative co-operation where a multi-jurisdictional approach is needed.*

The Australian Constitution established the Commonwealth of Australia,in 1901 and allocates certain powers to the Commonwealth. Each of the States are sovereign and have their own constitution under which a State Parliament may make laws on any subject of relevance to that particular State, with the exception that the States cannot impose duties of customs or excise or raise defence forces. The ACT and Northern Territory are largely self governing through a conferral of power by the Commonwealth Parliament.

Section 51 (xxxvii) of the Australian Constitution provides expressly for legislative co-operation in the Australian Federation by providing, in effect, that States may "refer" additional law making power to the Commonwealth Parliament. Constitutional referrals generally take one of two forms: **Text based referrals** give the Commonwealth the necessary power to enact the text of a particular Bill, as well as a separate reference power to amend only that Act (once enacted) in the future. **Subject based referrals** give the Commonwealth power to legislate in a particular area without any specification of how to deal with the subject referred.

Other legal frameworks for national legislation are: "**Mirror" schemes which** involve one State enacting a law which is then enacted in the same or similar terms in another jurisdiction and; **Complementary approaches** which involve one jurisdiction, either the Commonwealth or a State, enacting a law which is then applied by each of the other participating jurisdictions as a law of that jurisdiction.

* Norfolk Island Territory, with a population of only 2200 people, has also been given some local rule making powers by the national Government.

Source: Australian Government.

councillor each appointed for a three-year term. A permanent secretariat, headed by the executive councillor and jointly funded by the Commonwealth and the States, supports the work of the CRC.

Incentive mechanisms: National Partnership Payments

The new financial arrangements give the States far greater control on how to administer the funds within their own jurisdiction. All payments are centrally processed by the Australian Treasury and paid directly to each State treasury, giving them greater flexibility on how to negotiate regulatory reform within their own jurisdiction. This flexibility, as well as competition between the States, is intended to lead to innovation and improvements in the methods of service delivery within the States, resulting in increased productivity.

The IGA provides for a system of National Partnership (NP) payments to be used where the Commonwealth intends to fund specific outcomes. There are three forms of NP payments: *project* payments to support specific projects; *facilitation* payments to initiate reform in a specific area and lift standards of service delivery, and; *reward* payments based on the achievement of agreed performance benchmarks. The IGA provides clear guidance on the design, administration and reporting arrangements of National Partnership Agreements and the role of the CRC in determining that reform targets have been achieved.[10]

The COAG Reform Agenda and the Seamless National Economy

The regulatory reform stream of the COAG reform agenda has been an evolving agenda which has been given momentum from the new model of co-operative federalism. As early as the February 2006 COAG meeting[11] the Commonwealth and States agreed to improve their regulatory management processes, while also continuing the previous COAG co-operation on National Competition Policy (NCP) and microeconomic reform. At COAG in April 2007 fundamental principles of the regulatory reform component of the national reform agenda were identified, which included a commitment to good regulatory principles and the continued application of the NCP guiding legislative principle to remove restrictions on competition from regulation unless it can be shown that the national interest cannot be served in any other way.

A core aim of the regulatory reform agenda has been to reduce instances of cross jurisdictional regulatory overlap and regulatory inconsistency, where this places a burden on business and the community, but at the same time preserve the potential for innovation and dynamism in competitive regulatory approaches. Through COAG, governments agreed to revise their RIA procedures to consider for new regulatory initiatives whether an existing regulatory model outside their jurisdiction would efficiently address the policy issue in question and whether a nationally uniform, harmonised or jurisdiction-specific model would be best for the community. This involves a consideration of: the potential for regulatory competition, innovation and dynamism; the relative costs of the alternative models in use, including regulatory burdens and any transition costs; whether the regulatory issue is state-specific or national, and whether there are substantial differences that may require jurisdiction-specific responses (COAG, 2007b).

Over the past five years the number of businesses operating across State boundaries in Australia has increased markedly. At the end of the last data collection in the 2007 financial year more than 31 700 businesses were operating in more than one State or Territory. Of these more than 4 300 businesses were operating in every state and territory, and, by implication, under nine different regulatory regimes. Since 2003 the number of business operating in every state and territory has increased by more than 70% from just over 2 500 (ABS, 2007) (see Table 3.1). This demonstrated the need for regulatory reform to remove barriers to the operation of a national economy.

In December 2007 COAG created the Business Regulation and Competition Working Group (BRCWG) as part of the new working arrangements to spearhead national regulatory reform. The BRCWG is co-chaired by the Commonwealth Minister for Finance and Deregulation and the Minister Assisting the Finance Minister on Deregulation with high level representation by officials from State treasuries and central agencies. The Deregulation Policy Division in the Commonwealth Department of Finance and Deregulation acts as secretariat to the BRCWG. The BRCWG considered 35 possible reform areas according to an analytical framework that looked at the potential national benefits to workforce mobility, productivity and economic growth. Each reform area was categorised according to the level and type of regulatory change which is desirable; mutual recognition, harmonisation or a national regulatory system. In March 2008 COAG agreed to an implementation plan prepared by the BRCWG which included an expanded business regulation and competition agenda to cover 27 deregulation priorities including the acceleration of some "hotspots" that had been previously identified by COAG as priorities for reform (for a condensed list see Box 3.3).

Table 3.1. **Number of single and multistate businesses in Australia (2003-07)**

Financial year end	2003	2004	2005	2006	2007
All businesses	1 870 068	1 911 546	1 939 974	1 964 943	2 011 914
Single state	1 840 362	1 881 435	1 909 617	1 934 301	1 980 213
Multistate	29 706	30 111	30 357	30 642	31 701
All states	2 514	3 006	3 228	3 627	4 329
% of all businesses					
Single state	98.41	98.42	98.44	98.44	98.42
Multistate	1.59	1.58	1.56	1.56	1.58
All states	0.13	0.16	0.17	0.18	0.22
% change on previous year	2004	2005	2006	2007	% change 2003-07
All businesses	2.22	1.49	1.29	2.39	7.59
Single state	2.23	1.50	1.29	2.37	7.60
Multistate	1.36	0.82	0.94	3.46	6.72
All states	19.57	7.39	12.36	19.35	72.20

Source: ABS 2007.

Box 3.3. **Overview of the reform priorities of the NPA to deliver a Seamless National Economy**

The implementation plan of the National Partnership Agreement (NPA) to deliver a Seamless National Economy includes the delivery of 27 national reform priorities across the period 2008-09 – 2012-13, listed below. Areas of reform, known as COAG hot spots, are starred (*).

Part 1 – 27 Deregulation Priorities

Occupational Health and Safety (OH&S)*; Environmental Assessment and Approvals Processes*; Payroll Tax Harmonisation; Licences of Trades-people; Health Workforce Agreement; National System of Trade Measurement*; Rail Safety Regulation*; Consumer Policy Framework; Product Safety*; National Regulation of Trustee Corporations; National Regulation of Mortgage Broking; National Regulation of Margin Lending; National Regulation of Non-Deposit Lending Institutions; Development Assessment*; National Construction Code (NCC)*; Regulation of Chemicals and Plastics*; Registering Business Names*; Personal Property Securities (PPS)*; Standard Business Reporting (SBR); Food Regulation; National Mine Safety Framework (NMSF); A National Electronic Conveyancing System; Oil and Gas Regulation; Maritime Safety Regulation; Wine Labelling; Directors' Liability, and; A National System for Remaining Areas of Consumer Credit not covered above.

Part 2 – Competition Reform

Review of Australia's anti-dumping and countervailing system; Review of parallel import restrictions on books; Previously agreed energy reforms; Infrastructure access regulation; Previously agreed infrastructure reforms; Rationalisation of occupational licences; National transport policy and Previously agreed transport reforms

Part 3 – Regulatory Reform

The development and enhancement of existing processes for regulation making and review.

Source: Australian Government.

In November 2008 the 27 priority areas, and a further eight competition reforms were reflected in the preparation of a National Partnership (NP) agreement to *Deliver a Seamless National Economy* that was ratified by the States and the Prime Minister in February 2009. The BRCWG was given continued responsibility for ensuring the success of the Seamless National Economy reforms according to an agreed implementation plan. Among the top priorities was a commitment to harmonise occupational health and safety laws. Reflecting the success of the reform processes, COAG has added a number of issues to the BRCWG work plan during 2009, beyond the scope of the original NP Agreement. These are the reform of the legal profession and the not-for-profit sector, and an examination of competition issues associated with planning and zoning processes. The high level representation on the BCRWG has meant that it is well positioned to co-ordinate reform within jurisdictions.

Securing agreement by the States to reform and achieving implementation has been assisted by NP payments which provide an incentive to advance implementation and redistribute the expected financial benefits of reform. Under the NP Agreement for a Seamless National Economy, the Commonwealth government has agreed to provide the States with funding of up to AUD 550 million over five years from 2008-09, subject to satisfactory progress in advancing the 27 specified reforms against the agreed implementation plan. The payment model involves an initial "facilitation" payment of AUD 100 million and a reward component contingent upon an assessment that the key milestones have been achieved. The funding is shared among the States on an equal per capita basis. The reward payments are available in two tranches: no payments are made in 2009-10 and 2010-11 and then AUD 200 million is available in financial year 2011-12 and AUD 250 million in 2012-13 (Table 3.2).

The reward payments to each jurisdiction are contingent on "an assessment by the Commonwealth of the overall level of progress" based on the advice of the CRC that the jurisdiction has successfully achieved the reform milestones for the 27 deregulation priorities in the NP Agreement. Early indications are that the programme is on course and that it has considerable momentum. After the first year, the annual progress report card produced by the secretariat of the BRCWG for July 2009 reported that all of the 27 deregulation priorities are on track, except two where reform is reported as "slowing" (these are the reform of chemicals and plastics regulation, and directors liability).[12]

Table 3.2. **Seamless National Economy funding for the States based on per capita distribution**

	2008-09 AUD m	2009-10 AUD m	2010-11 AUD m	2011-12 AUD m	2012-13 AUD m	Total AUD m
NSW	32.552	0.0	0.0	64.212	79.910	176.673
Vic	24.774	0.0	0.0	49.554	61.943	136.272
Qld	20.104	0.0	0.0	41.010	51.582	112.697
WA	10.133	0.0	0.0	20.683	26.021	56.838
SA	7.477	0.0	0.0	14.725	18.316	40.518
Tas	2.322	0.0	0.0	4.533	5.621	12.476
ACT	1.610	0.0	0.0	3.220	4.026	8.856
NT	1.028	0.0	0.0	2.062	2.580	5.671
Total	100.0	0.0	0.0	200.0	250.0	550.0

Source: National Partnership to Deliver a Seamless National Economy *www.federalfinancialrelations.gov.au/content/national_partnership_agreements/default.aspx.*

Strengthening regulatory quality of COAG decisions

COAG has developed eight principles of best practice regulation (see Box 3.4) which guide the preparation of the regulatory impact statements (RIS) by Ministerial Councils. RIS are required to be done in two stages, first for release as a consultation paper for a regulatory proposal and at the final stage of a decision involving a regulatory option (COAG, 2007a). The Office of Best Practice Regulation (OBPR), provides independent advice on the adequacy of the RIS prepared for both consultation stage and for decision by Ministerial Councils. The OBPR also monitors and reports on the adequacy of these documents and the compliance by the Ministerial Council with the principles and guidelines but does not have any power to veto the decisions of Ministerial Councils if the analysis in the RIS is not adequate[13] (COAG, 2007a, p. 14).

Box 3.4. **COAG principles of best practice regulation**

In October 2007, COAG agreed that all governments would ensure that regulatory processes in their jurisdiction are consistent with the following principles:

- establishing a case for action before addressing a problem;
- a range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed;
- adopting the option that generates the greatest net benefit for the community;
- in accordance with the Competition Principles Agreement, competition should not restrict competition unless it can be demonstrated that:
  1. The benefits of the restrictions to the community as a whole outweigh the costs; and
  2. The objectives of the regulation can only be achieved by restricting competition.
- providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear;
- ensuring that regulation remains relevant and effective over time;
- consulting effectively with affected key stakeholders at all stages of the regulatory cycle; and
- government action should be effective and proportional to the issue being addressed.

Source: COAG (2007a).

The OBPR (and the former ORR) have reported that the Ministerial Councils' compliance with COAG's impact analysis requirements has been uneven over time, but appears to be improving. The OBPR has repeatedly highlighted the need to improve awareness of the scope of the RIS requirements and the required level of analysis, as well as the need to strengthen capacity of Ministerial Councils' officials to conduct regulatory impact analysis (PC, 2004a, p. 83; OBPR, 2007, p. 87). Key issues appear to be the rate of turnover of staff in the secretariats supporting Ministerial Councils, the long time frames over which policy options develop and a lack of knowledge of the requirement of the best practice principles. The quality of Ministerial Councils' RIS can have important efficiency consequences for the quality of regulatory outcomes as most States and Territories do not require a subsequent RIS to be prepared for a local regulation if a RIS conducted by the relevant Ministerial Council has been assessed as adequate at the decision-making stage by OBPR.[14]

Communications and capacity challenges

A systemic reform of the scale of COAG's reform agenda clearly presents a significant communication challenge for the Commonwealth government. The changes to "business as usual" have to be understood by the people working in the governments of the Commonwealth and States, by business and by members of the community, particularly as the future focus of reform is on outcomes and is designed to allow for flexibility in policy and service delivery. This will place greater demands on the States to improve their policy service capabilities and to demonstrate success in service delivery. The success of the new federal financial relations framework will rely upon the involvement of communities holding the State governments to account for their performance. Realising the benefits of accountability and the incentives for performance in the project will depend upon good communication with all stakeholders and careful political management by the Commonwealth. In this respect it is notable that the government is trying to emphasise the national impacts of early reform achievements as widely as possible.

With such an ambitious reform programme, capacity bottlenecks can hamper progress toward implementing regulatory reform, for example, by creating inconsistencies across the States and ultimately undermine the effectiveness of the co-ordinated COAG reform agenda. The facilitation payments of AUD 100 million are intended to address this within the States. The CRC also appears to be alert to challenges for key implementation tools, highlighting the need for legislative drafting skills where there are high resource demands in the short term. In the longer term, the changed role of the Commonwealth, with a more national focus on regulation and the increased responsibility of the States for service delivery will increase the need for sharing experiences among jurisdictions and models of good regulatory practice, including the challenge of assessing a coherent picture of emerging regulatory risks which in a national framework can arise in different parts of the country. Some institutional capacity for this already exists in the Australia New Zealand School of Government which has been operating since 2003 with the participation of the Commonwealth and State governments and New Zealand, and builds on cross-jurisdictional co-operation and a culture of mutual learning and sharing of experiences.

The Australian Productivity Commission (PC) plays an important role in the achievement of the objectives of COAG's reform agenda. It is a respected source of advice on the potential areas where reform will deliver economic benefits. It is charged with providing an assessment to COAG of the economic impacts and benefits of the reform agenda and it supports the CRC in the collection of performance data to monitor and measure progress in respect of the National Partnership Agreement implementation. A number of the areas for reform in the COAG reform agenda were identified in reports of the PC. The PC is also undertaking a series of studies on *Performance Benchmarking of Australian Business Regulation* across the Commonwealth and the States, including reviews of the regulation of a range of industry sectors (among them OH&S and food safety regulation) as a source of comparative information and to be able to subsequently assess the benefits post-reform.

Co-ordinating arrangements within the States

An important part of this assessment is looking at the co-ordination capacity within the States. There is evidence that the States have consistently moved toward strengthening their strategic approach to reform across government agencies. States have put in place

diverse inter-ministerial co-ordination mechanisms to facilitate implementation of the COAG reform agenda, including arrangements to monitor implementation and have pursued an alignment of State priorities with the COAG reform agenda. Usually, it is the central agency with primary responsibility for regulatory reform that co-ordinates implementation of the national regulatory reform agenda within the States. New South Wales, Queensland and South Australia have each appointed Ministers with specific responsibility for championing better regulation and public management within the Cabinet. Across jurisdictions, treasury departments have taken a lead role in facilitating implementation of federal financial and regulatory reform. The financial transfer arrangements in the IGA have contributed to strengthening this role as, under current arrangements, treasury departments manage the financial flows. This adds to the authority of State central treasuries to direct reform and to manage the dialogue and co-ordination with the line agencies that carry out the bulk of implementation. Under the previous arrangements funds were transferred directly from Commonwealth agency to State agency, which limited the scope for central management of reform within the States.

States' reform priorities

The available evidence suggests that there is a strong alignment of the States' reform priorities and the COAG agenda. A review of the States' strategic planning instruments indicates that their policy priorities are largely in line with the priority areas of COAG's reform agenda, although the States emphasise different specific reform priorities, perhaps reflecting different stages of reform within the sub jurisdictions. For example, Victoria, South Australia and New South Wales have been particularly active in advancing the red tape reduction agenda. South Australia emphasises regulatory reform for renewable energies, as well as zoning and planning reforms. Tasmania's identified priorities include transport infrastructure and free movement of labour. This attention to different aspects of reform in turn has facilitated the emergence of State champions of reform with an interest in driving national reform in particular areas. For example, Queensland has joined New South Wales, South Australia, Victoria and the Commonwealth, to participate in a BRCWG Regulatory Reform Sub-Group to assist the BRCWG in the development and enhancement of existing processes for regulatory making and review.

Managing relations with stakeholders to facilitate implementation

In most cases States manage relations with stakeholders through well established and regular consultation mechanisms. Most of the States have prepared guidance for government agencies on engaging stakeholders. The Australian Capital Territory and Victoria present annual plans of envisaged legislative proposals to Parliament. New South Wales and Victoria have a programme of public reviews of existing legislation to identify policy priorities and areas for future reform. Queensland is implementing a phased programme of reviews by all agencies of their existing stock of regulation to reduce the regulatory burden, in consultation with key stakeholders. Western Australia is taking a similar approach through an *ad hoc* group, the Red Tape Reduction Group, which is consulting widely with industry groups and local governments on opportunities to cut regulatory burden. Tasmania has established a Business Tax and Regulation Reference Group, comprising business representatives, to identify opportunities for regulatory reform.

Performance reporting to CRC

Reporting to CRC on the performance of the States toward achieving milestones and objectives identified in National Partnership Agreements is an essential feature of the 2008 Intergovernmental Agreement on Federal Financial Relations. In addition to releasing National Partnership payments, performance reporting is also expected to serve as a repository of best practices, capture institutional and policy innovation and facilitate cross-jurisdictional learning and sharing of experience. States are aware of risks of performance reporting including the additional resources required, the tight timetable for reporting results and the potential for duplication of existing reporting arrangements. States are exploiting the opportunities for utilising existing performance reporting mechanisms to meet the CRC requirements. A critical aspect of the performance reporting framework is the continued reliance on the annual *Report on Government Services*. This report has been produced since 1995 through a steering committee with representation by the States and the Commonwealth and chaired by the Chairman of the PC, which also provides the secretariat for the steering committee.

Strengthening regulatory quality at the State level

The six States and two Territories that comprise the Australian Federation are relatively diverse in terms of population and the nature of the main areas of economic activity. Accordingly, the extent to which they regulate may vary significantly. Furthermore, in the absence of co-ordinating frameworks, jurisdictions have an incentive to take an approach to regulation that focuses on that single jurisdiction's welfare. As such, they may fail to capture economies of scale or "spill over" effects when they assess the costs and benefits of regulation.

The establishment of better systems for regulatory management is a key strategy for promoting regulatory quality in multi-level governance systems. The reality of different jurisdictions is that it does not allow for a single system of regulation, and regulatory harmonisation or mutual recognition is not always achievable, or necessarily efficient. Having in place effective regulatory management arrangements across jurisdictions that consistently meet best practice standards are thus essential to achieve regulatory quality in a country as a whole and to embed practices that promote the development of high-quality regulation for the body of law operating in that jurisdiction.

The 2005 *OECD Guiding Principles for Regulatory Quality and Performance* are as applicable at the sub-national levels of government as they are for national administrations. Specifically, regulatory quality reform should be facilitated through the adoption of the following features of systems of regulatory management at all levels of government:

- *Regulatory policies/strategies* that promote high-quality regulation, facilitate co-ordination and exchange of information across levels of government and across jurisdictions, recognise national objectives but take into account the diversity of jurisdictions' socio-economic and political characteristics.
- *Regulatory institutions* that are consistent across jurisdictions to ensure efficiency and effectiveness of regulation;
- *Regulatory tools* that are systematically used across all levels of government and are embedded in existing decision-making processes to ensure full ownership by each jurisdiction.

The political commitment at the COAG level to improving regulatory management has furthered action toward establishing stronger regulatory policies/strategies, institutions and tools across Australia. COAG has provided a forum for lowering transaction costs of reform and sharing good practice experiences. The COAG process has also helped build momentum for the establishment of strategies, institutions and tools for strengthening regulatory management at the State level. A key step was the commitment by the States to consistently strengthen regulatory quality which has been given renewed support by the government elected in 2007 (see Box 3.5). There is evidence that jurisdictions have been converging around common regulatory quality management mechanisms promoted by COAG, where previously some States had only limited arrangements in place.

Box 3.5. **COAG commitments to better regulatory management mechanisms**

In the COAG meeting of 10 February 2006, Commonwealth, State and Territory governments agreed to strengthen "gate keeping" as part of the decision-making process; improving the quality of regulation impact analysis; better measurement of compliance costs; and broadening the scope of regulatory impact analysis. Moreover, Commonwealth and State governments agreed to:

- Adopt a common framework for benchmarking, measuring and reporting on regulatory burden across all levels of government;
- Set quantifiable targets for the reduction of red tape (for those jurisdictions that choose to do so).

Source: COAG (2006a).

The benchmarking of the performance of regulation across jurisdictions has assisted in identifying opportunities and challenges of regulatory reform in Australia. It has been an important strategy to direct efforts and resources towards areas of reform that were lagging and identify emerging best practices. Through the COAG process, the States have committed to a rigorous process of benchmarking conducted by the Productivity Commission. In November 2008, the PC completed the first stage of the benchmarking exercise, focusing on identifying a benchmarking methodology, baseline information and initial estimates of business compliance costs (PC, 2008a, 2008b). The methodology adopted by the Productivity Commission relies on the adoption of regulatory management practices as a proxy for the quality of regulation. The benchmarking exercise has the potential to become an independent monitoring tool, fully owned by all Australian jurisdictions and embedded in the COAG mechanism, providing feedback on regulatory reform implementation and incentives to address bottlenecks and challenges. The advocacy from the Business Council of Australia which has produced a "Scorecard of State Red Tape Reform" benchmarking the performance of the States has also been an impetus for reform of regulatory management mechanisms.

COAG commitment to strengthening gate keeping has facilitated the use of this institutional model for promoting regulatory quality. All States have established a body responsible for screening compliance with regulatory impact assessments. Significantly, some States that already had gate keeping mechanisms in place have re-evaluated them and strengthened their role in providing high-quality analysis to elected officials. In Victoria, the oversight reach of the VCEC was extended to include the review of measurements of

the administrative burden of regulation (Victorian Government, 2006). Western Australia has established a Regulatory Gate keeping Unit (RGU) within the Department of Treasury and Finance to better monitor and report compliance with the preparation of Regulatory Impact Analysis (RIA) across government agencies. In 2008, the Queensland Office for Regulatory Efficiency was moved to Queensland Treasury to ensure regulatory reform, including regulatory oversight, is centrally driven.

Table 3.3. **Gate-keeping and regulatory oversight in the States**

New South Wales	• A Better Regulation Office (BRO) within the Department of Premier and Cabinet provides advice on new and amending regulation and the adequacy of Better Regulation Statements (BRS). • Upon BRO advice, the Minister for Regulatory Reform can refuse to certify a BRS if it does not comply with better regulation principles. The Minister can also advise the Premier that the matter should not proceed
Victoria	• The Victorian Competition and Efficiency Commission (VCEC) has administrative independence under an executive order. • The VCEC provides an independent assessment of RIS and BIA. • The VCEC can require that a department undertakes further work if the RIS is deemed inadequate. • The VCEC assessment of the RIS informs a compliance certificate that a Minister attaches to the proposed subordinate legislation. • Further scrutiny is provided by the Scrutiny of Acts and Regulation Committee, which can disallow approved regulation if it finds it in non compliance with RIS requirements
Queensland	• A Queensland Office of Regulatory Efficiency (QORE) within the Treasury assesses the quality of RIS. • QORE takes an advisory role. It is responsibility of individual agencies to ensure compliance with RIS requirements. • The Department of the Premier and Cabinet also provides regulatory advice and oversight, specifically with the development of primary legislation, and works closely with Treasury to drive the national reform agenda. • The Treasury is also responsible for ensuring the Public Benefit Test market competition requirements under the NCA are met.
Western Australia	• The Department of Treasury and Finance has primary gate keeping responsibilities. • A Regulatory Gate Keeping Unit (RGU), established in 2009, assist government agencies with the RIA process and monitor and report on compliance. • If RGU deems a RIS inadequate, the submission may not process to the decision maker.
South Australia	• The Department of Trade and Economic Development (DTED) reviews and assesses the adequacy of all BISs and provide advice on the preparation of Business Impact Statements (BISs) and the use of Business Cost Calculator (BCC). • DTED's assessment of BISs and BCC is included with all policy proposals.
Tasmania	• An Economic Review Unit (ERU) within the Department of Treasury and Finance reviews all primary and subordinate legislation. • The ERU certifies compliance with RIS requirements. ERU certification is required for legislation to proceed.
Australian Capital Territory	• A Regulation Policy Unit (RPU) within the Department of Treasury oversees quality of Regulatory Impact Statements (RIS), and sets RIS standards. • Regulatory proposals that are found in non compliance might proceed but RPU's advice is attached.
Northern Territory	• A Regulation Impact Unit (RIU) within the Northern Territory Treasury assesses the adequacy of RIS. • RIU takes an administrative role. It is the responsibility of individual agencies to ensure compliance with RIS requirements.

Source: State responses to OECD questionnaire on multi-level regulatory governance, 2009.

Most States established RIA for subordinate legislation in the late 1980s and 1990s, during the wave of regulatory reforms undertaken through the NCP. Yet, in the absence of an established mechanism to facilitate systematic cross-jurisdictional co-ordination and exchange of information, there had been little convergence across jurisdictions on RIA methodologies and focus. RIA was mainly required for subordinate legislation or statutory rules. A new wave of reform facilitated by the COAG process has helped address these challenges. States have moved toward systematically including tools to assess business cost assessments of relevant regulation and to extend the scope of RIA to primary legislation. The Australian Capital Territory, New South Wales, Victoria, Queensland and Western Australia have provided guidance to consider national and cross-jurisdictional effects when assessing

Table 3.4. **Regulatory Impact Analysis in the States**

New South Wales	• Under the 1989 Subordinate Legislation Act, a RIS is required for all principle statutory rules. • The 2008 Guide to Better Regulation requires that all significant new and amending regulation be accompanied by a Better Regulation Statement setting out compliance with better regulation principles • RIS are required to take into consideration extra-jurisdictional effects of regulation.
Victoria	• Under the Subordinate Legislation Act 1994, a RIS is mandatory for proposed statutory rules that impose an appreciable economic or social burden. • Preparation of BIAs is required for any legislation that might have significant effects for business or competition. Where any regulatory instrument results in a material change in administrative burden imposed on business, the Standard Cost Model is required to be used. • RIS and BIA are required to take into consideration extra-jurisdictional effects of regulation.
Queensland	• Under the 1992 Statutory Instruments Act, proposed subordinate legislation that is likely to impose appreciable costs on the community is subject to the preparation of a RIS. • Since 1995, all new and amending primary and subordinate legislation restricting competition is subject to a public benefit test. • RIA is being enhanced following a 2007 renewed commitment to regulatory reform.
Western Australia	• A RIA process applying to primary legislation is operational since July 2009. The process is expected to be extended to subordinate legislation and quasi-regulation. • A Preliminary Impact Assessment will apply to all proposals. If the PIA shows significant negative impact, a detailed analysis is to be undertaken through a RIS. • RIS are required to take into consideration extra-jurisdictional effects of regulation.
South Australia	• All Cabinet submissions require an assessment of regulatory impacts. • Since July 2006, all proposals with a significant impact on business must include a Business Impact Statement and a Business Cost Calculator Report, assessing the cost of compliance on business.
Tasmania	• The Legislation Review Program requires a RIS for all new legislation for which competitive restrictions or negative impacts are identified. • The 1993 Subordinate Legislation Act requires a RIS for all new and amending legislation imposing a significant burden, cost or disadvantage on any sector of the community. • Impacts and costs of new and amended regulation on other jurisdictions or national markets are usually taken into consideration.
Australian Capital Territory	• Under the 2001 Legislation Act, a RIS identifying costs and benefits is required for all new regulation. • The ACT Government Cabinet Handbook, updated in November 2008, prescribes that for all new and amended legislation or government direction, a RIS must be completed. • RIS are required to take into consideration extra-jurisdictional effects of regulation.
Northern Territory	• A Preliminary Regulation Impact Assessment (PRIA) applies to all legislative proposals. If the PRIA shows significant negative impact, a detailed analysis is to be undertaken through a RIS.

Source: State responses to OECD questionnaire on multi-level regulatory governance, 2009.

costs and benefits of regulation. Tasmania also considers costs imposed by new or amended regulation on other jurisdictions or national markets. Also, cross-jurisdictional co-ordination appears to have accelerated the pace of reform. States originally introduced RIA across a long period between 1985 (Victoria) and 2001 (Australian Capital Territory). The timeline of the new wave of RIA reforms has been shorter, spanning from mid-2006 to mid-2009.

Since 2006, four States, New South Wales, Queensland, South Australia and Victoria, have set quantitative targets to cut red tape. The two early reformers, South Australia and Victoria, introduced initiatives to reduce regulatory burdens in mid-2006, adopting different approaches and methodologies. South Australia took a broad approach aimed at cutting both administrative costs to government and compliance costs to business. It has relied on the Business Cost Calculator used by the Commonwealth Government. Victoria adopted a narrower approach, focusing on administrative costs as measured by the Standard Cost Model. The two approaches have offered other States a set of options from which they could draw lessons and identify the approach that best fit their needs. Queensland and New South Wales adopted red tape reduction targets in 2008 and 2009, respectively. Both States have chosen an approach that address both administrative and compliance burdens. The Queensland focus is not limited to business but includes benefits and savings to business, community and government.

All jurisdictions are converging around provisions for consultations with stakeholders on new regulation and require or recommend consultation for at least 28 days on RIA. There is a progressive move toward using the RIA or RIS as a basis for consulting with stakeholders. Notably, Western Australia requires the public release of consultation RIS. NSW requires the publication of a Better Regulation Statement for significant regulatory proposals setting out how the regulation complies with regulatory good practice. Victoria has extensive processes for public consultation on RIS requiring prior consultation with the sector of the public on which an appreciable economic or social burden may be imposed by a proposed statutory rule, and also the release of the RIS for public comment for 28 days after independent advice from VCEC on the adequacy of the RIS has been obtained.

States are using different mechanisms for reviewing and updating regulation. Systematic sunset clauses for subordinate legislation were introduced in Victoria in 1985 and by New South Wales in 1995. Terms of sunset clauses vary, with Victoria and Tasmania having a ten year term and New South Wales having a five year term. Queensland introduced sunsetting provisions in 1992. In 2008, the government committed to the Queensland *Regulatory Simplification Plan 2009-13*, under which agencies deliver three year regulatory simplification plans aimed at reducing their existing stock of regulation. Western Australia has introduced a systematic review mechanism through the RIA process, but sunset clauses are not systematically applied. Most States have introduced regular reporting mechanisms to assess progress toward regulatory reform.

All States provide online access to legislation and, as a practice, regulators use the Internet to make information easily available to stakeholders. However, one area for development appears to be the use of the Internet by business regulators to facilitate and reduce the administrative costs of licensing and compliance transactions. Benchmarking reports published by the PC suggests that use of electronic tools to facilitate speedy and less burdensome compliance processes remains relatively limited among regulatory agencies. Most business regulators in all States do not allow for filing of licence applications via the Internet. In part, this might be the consequence of requirements that cannot be easily performed online, but the use of on-line services also remains limited for compliance steps which might require a less stringent oversight. For example, on average across the States fewer than 10% of business regulators provide access to online renewal of licences or payment of fees (PC, 2008a).

COAG and the BRCWG are working to reduce information requirements for business and facilitate online processing of reporting requirements. For example, in March 2008, COAG launched a Standard Business Reporting initiative aimed at reducing the burden of reporting financial information to government and providing a single secure way to interact electronically with government agencies. Implementation is expected to roll out in the course of 2010 (COAG/BRCWG, 2008).

Australia's States are very advanced from an OECD perspective for the consistent effort towards embedding good practice regulatory management in decision-making processes. Commitment to national reform by States has helped strengthen regulatory management across jurisdictions by lowering barriers to reform and keeping up momentum. This commitment has been critical for improving regulatory quality in Australia, which in turn has the potential to improve long-term growth prospects across jurisdictions.

The choice of regulatory policies and strategies has facilitated commitment to regulatory reform. Benchmarking business regulation across jurisdictions has facilitated comparisons across the States, thus triggering healthy competition for better performance and accelerating the pace of reform. Late comers have built on emerging good practices and introduced innovative approaches to regulatory management. Benchmarking business regulation has also drawn attention on areas of reform that might need concerted action and greater focus. The availability of online services at the level of State regulators shows scope for significant improvement, even compared with other OECD jurisdictions. As COAG is taking action to address some of these issues, the role of performance monitoring is important. Moreover, important areas of regulatory quality have not been covered in the initial benchmarking conducted by PC. These areas include, for example, quality of the RIS and RIA analysis and their impact in reducing actual regulatory burdens.

Regular and systematic benchmarking has proved to be effective. However, after the initial assessment conducted by the PC, COAG does not appear to have agreed on a timeline for regular benchmarking as of yet. Benchmarking has also the potential to further develop at the sub-national level, as Victoria tends to be more advanced than other States for systematically collecting key performance information on their State regulators.

General assessment of the challenges and opportunities for multi-level regulatory governance

The reforms invigorated by the current Commonwealth government ensure it is very well placed to tackle some of the core regulatory challenges faced by the Australian Federation. These reforms build on a track record of successful regulatory reform across successive administrations. An initial wave of reform, launched in the 1980s, opened up the Australian market to international exposure. In the early 1990s, a second wave of reform, the National Competition Policy, enhanced competition and the development of a national market.

The most recent wave of reform had its genesis in December 2007, when all Australian governments, through the Council of Australian Governments (COAG), agreed to a new model of co-operation underpinned by more effective working arrangements between the Commonwealth and the States. COAG agreed seven priority areas for its 2008 work agenda. Importantly, these priorities included business regulation and competition and the establishment of the COAG Business Regulation and Competition Working Group (BRCWG). During 2008, the BRCWG developed an agenda focussed on delivering a seamless national economy, culminating in COAG agreeing in November 2008 to a AUD 550 million National Partnership Agreement to deliver a Seamless National Economy, funded by the Commonwealth. This is an ambitious programme aimed at enhancing regulatory quality and embedding strong regulatory management in institutional arrangements and decision-making processes across levels of government. It is designed to reverse the declining productivity trend and increase workforce participation.

This represents a very promising venture, which deserves praise and has been well received by the private sector and commentators. Australia stands out among OECD member countries for innovative and cutting edge initiatives aimed at facilitating regulatory reform across levels of government. Established co-ordination arrangements are in place to facilitate multi-level intergovernmental dialogue and co-operation. A new framework guiding federal financial relations provides an opportunity to enhance the effectiveness of financial transfers by allowing more responsibility to States to deliver

services, while promoting a culture of accountability and transparency through regular monitoring of performance. Payment arrangements facilitate the commencement of reform activity by the States and are astutely designed to provide maximum incentives for implementation. The delegation of responsibilities, including oversight of reform progress and receipt of National Partnership payments, to core ministries, including the State treasuries, also represents a powerful policy lever.

A comprehensive reform package has been put in place to facilitate the active participation of all jurisdictions. This led to formulating a charter for reform that is transparent and allows for planning and sequencing of reform activities. Moreover, a process has been set up to strengthen regulatory quality at the sub-national level, with the States showing greater convergence on policies, institutions and tools to improve regulatory management. Recent progress has been in part driven by a commitment to a rigorous benchmarking process that has helped identify challenges and opportunities for improvement.

Australia's ambitious reform process also presents challenges. Any reform conducted in a multi-level regulatory governance context is complex, and can be affected by Commonwealth-State relations, reform strategies as well as regulatory management at state level. However, tools and strategies exist to overcome most of these challenges. Many of these have already been put to use in the current Australian reform effort, which bodes well for its future success and potential achievements.

Some of these strategies may also have implications that would need to be addressed in the longer term. For example, institutional arrangements that have been put in place to advance reform in the short term may overlap and duplicate existing structures, potentially adding some costs to the reform process. A shift in the financial relationship between the Commonwealth, on one side, and the States, on the other side, may require a change in the way of doing business and enhanced capacities on both sides. Benchmarking of business reporting also draws attention to areas of reform that might need greater attention, such as the availability of online services at the level of State regulators. As additional areas of reform are included and further efforts are required to strengthen national markets, commitment from all jurisdictions to advancing reform becomes essential. Thus maintaining commitment and momentum for reform becomes the key for obtaining success in the long term, as outlined below in the policy recommendations. This is key to ensuring that jurisdictions maintain their interest and direct the necessary human and financial resources to advance reform.

The COAG national reform agenda builds on previous microeconomic reform programmes that have strengthened the resilience of the Australian economy. However, the long-term goal of the Commonwealth government is to break out of a cycle of periodic reform programmes and to embed a commitment to good regulatory management in the culture of the public administration. Despite the clear strengths of the COAG reform programme, pragmatically it will be difficult to maintain the sharpness of the incentives and political leadership that has driven these reforms, particularly after the last incentive payments are made in 2013. Forecast future fiscal constraints, as outlined in the Commonwealth Government's *Intergenerational Report*, may reduce the capacity to the Commonwealth Government to fund reform in the States and political attention will also be drawn away to more immediate demands. The challenge for Australia is not so much in a refinement of tools for regulatory management, which are well developed by OECD

standards, but to promote continuous improvements in regulatory design and in embedding a commitment in the culture of State and Federal administrations to develop regulation that is efficient, effective and in the national interest.

Commonwealth-State relations

A common potential obstacle to reform in multi-level governance systems is the lack of effective levers of reform. For example, unbalanced fiscal relationships can reduce innovation and flexibility at the sub-national level and jurisdictions might lack incentives to initiate reform. In addition to financial incentives, important drivers appears to be institutional and co-ordination arrangements across levels of government to channel demand for reform and facilitate coalition building and the presence of champions of reform. To facilitate ongoing reform, it is important to ensure there are appropriate governance arrangements with sufficient authority to most effectively regulate or implement policies and programmes.

Australia stands out among OECD member countries in adopting innovative institutional approaches which appear promising and go beyond similar mechanisms in other countries. A key reform lever has been the establishment of COAG as a permanent forum for policy dialogue and co-ordination across levels of government. COAG has been and continues to be instrumental in lowering barriers to reform created by the multiplicity of jurisdictions, capturing innovations from different jurisdictions and providing a forum for the Commonwealth and the States to champion reform. It has been a platform for the redesign of pre-existing co-ordination arrangements, the Ministerial Councils, to facilitate dialogue and co-ordination and improve the effectiveness and efficiency of decision making.

At the end of 2007, to drive reform, COAG introduced new working arrangements centred on working groups that were instrumental in advancing COAG's reform agenda, particularly in relation to regulation reform. These innovative institutional arrangements have benefited from a clear agenda, strong leadership, in-depth technical knowledge and strong administrative support. These important elements should be taken into consideration as COAG continues fine-tuning co-ordination arrangements to implement further national reforms.

In November 2008 COAG reaffirmed its commitment to new co-operative working arrangements through a new Inter-governmental Agreement for an overarching framework for the Commonwealth's financial relations with the States. The IGA is aimed at improving the quality and effectiveness of government services by reducing Commonwealth prescriptions on service delivery by the States, providing them with increased flexibility in the way they deliver services to the Australian people as well as providing a clearer specification of roles and responsibilities of each level of government and an improved focus on accountability for better outcomes and service delivery. The new framework also provides tangible incentives to commit to reform and strengthen jurisdictions' ownership of implementation, through a system of project, facilitation and reward payments to help drive reform. It has also centralised the management of payments in treasuries both at the Commonwealth and State level, which represent powerful core agents of reform. Greater autonomy for the States, combined with an outcomes focussed performance reporting framework, is intended to produce not only greater accountability of the States to citizens, but also more effective implementation drawing on the better knowledge of local needs and implementation challenges that States have.

The reforms also feature a significant rationalisation of the number of payments to the States for Specific Purpose Payments, while increasing the overall quantum of funding. The new framework also includes a number of National Partnership payments to fund specific projects and to facilitate and reward States that deliver on nationally significant reforms based on National Partnership Agreements entered into by the Commonwealth and the States.

Reform strategies

Identifying a reform strategy is necessary to facilitate reform across levels of government and address the challenges of implementation. Sub-jurisdictions have different levels of interest and political commitment which can create delays in implementing national reform. Resistance to reform can be expected from stakeholders that stand to lose from reform. At the sub-national level entrenched interests may be stronger within the local socio-political environment. This is also an issue if jurisdictions expect uniform schemes to increase the cost of regulation. In a multi-level governance context, reforms are likely to be interdependent. Sequencing and pacing reform according to the jurisdictions' capacity, resources and commitment is important to facilitate implementation. The actions of one jurisdiction affect other jurisdictions. If a jurisdiction fails to take necessary actions, overall reform can be undermined.

Australia has taken action to address these challenges by launching a comprehensive path to reform. Developed in consultation with the States the reform agenda provides jurisdictions the opportunity to participate in national reform and further their own reform priorities. Identifying a reform package that attracts support from all jurisdictions builds on the strong involvement of government stakeholders that are able to facilitate implementation. A key step in the comprehensive reform package to create a Seamless National Economy has been the establishment of a Business Regulation and Competition Working Group (BRCWG). The BRCWG has brought together political commitment and technical knowledge, thus fostering upfront involvement of those agencies that are essential to facilitate implementation. With central agency membership, it appears to have been particularly effective.

Regulatory management at state level

State jurisdictions are often responsible for developing regulation and implementing policies and programmes. Effective implementation requires the adoption of best practice regulatory management arrangements within jurisdictions to underpin regulatory quality across the nation.

Australia stands out among OECD member countries for the consistent efforts of its States and Territories at embedding good practice regulatory management into decision-making processes. These efforts have been advanced by the commitment undertaken within COAG to strengthen regulatory management at the State level. Best practice regulation making standards also apply to Ministerial Councils, which under the COAG reform agenda are required to take decisions that translate into laws and regulations more rapidly. The Office of Best Practice Regulation, part of the Commonwealth Department of Finance and Deregulation, is responsible for monitoring compliance with COAG RIA requirements, and has found that compliance by some Ministerial Councils with this requirement is inconsistent.

Benchmarking business regulation by the independent Productivity Commission has facilitated comparisons across jurisdictions, and triggered healthy competition for better performance and accelerated the pace of reform. It has also drawn attention to areas of reform where more concerted action and greater focus could be beneficial. Benchmarking is most effective when conducted regularly and systematically. Also, benchmarking has not yet taken hold at the sub-national level, except in one State.

Policy options for consideration

The following policy options are intended to assist Australia to strengthen regulatory reform across levels of government and address some of the challenges identified in this review.

- ***Ensure national institutional arrangements can support ongoing regulatory reform***

Australia is taking advantage of uniquely designed institutions and processes to address its multi-level challenges. The structure of COAG, including through the use of working groups and well structured secretariats, provides a unique opportunity which needs to be maintained and consolidated. The working groups that were established in December 2007 have been instrumental in advancing the COAG reform agenda, and particularly the BRCWG, which builds on the strength of its constituency. Identifying champions of reform within State and Territory Governments could also reinforce current reform efforts, and could help strengthen leadership within Ministerial Councils.

COAG could continue to use the BRCWG to drive implementation of reform and to identify and promote new areas of reform, or alternatively it could establish another body for this purpose. In either case, there is a need to ensure that there is an ongoing process for identifying and referring new areas of regulatory policy suitable for national reform according to an evaluation of the potential economic benefits. This could continue to reflect advice from the Productivity Commission.

Under the new federal financial relations framework, COAG requested the COAG Reform Council monitor and report to COAG on the aggregate pace of activity in progressing COAG's agreed reform agenda. At its March 2008 meeting, COAG agreed that, to assist the COAG Reform Council in its role of helping to enhance accountability and promote reform, and monitoring the progress of COAG's reform agenda, the Commission would report to COAG on the economic impacts and benefits of COAG's agreed reform agenda every two to three years.

Now that the reform efforts are underway, further tasks and assignments could be scoped for the relevant body to develop an ongoing agenda. While these need to be identified in joint co-operation between the Commonwealth and the States, a possibility could be to address some policy areas of the National Competition Policy that have yet to be completed, as underlined in the chapter on competition policy. These areas include for example the pharmacy and the taxi industries. They could also include the development of a timetable for a second round review of existing legislation against the NCP guiding legislative principle. The current reform momentum could provide a window of opportunity for advancing these reform areas.

- ***Maintain momentum for reform by establishing formal arrangements for ongoing consultation with business in relation to current and proposed regulatory reforms***

While the current reform agenda is well advanced, one of the challenges is the potential loss of momentum for reform in the future. The lessons of the NCP legislative

reforms were that financial incentives were not sufficient at that time to maintain momentum and prevent backsliding by jurisdictions without the commitment of key stakeholders. This can be prevented through a proactive strategy on several fronts.

The first is to maintain political commitment for reform, both at the Commonwealth and at State level. This is consistent with core OECD knowledge and principles for regulatory policy. Such an inter-jurisdictional initiative in a multi-level context needs to be sustained as it has the potential to deliver clear results and political wins. Maintaining national institutional arrangements to promote reform is important to this. Ongoing political commitment can also be enhanced by providing for more regular and structured interaction with the private sector and the national business community.

To facilitate regular communication with stakeholders on inter-jurisdictional regulatory reform, the BRCWG report card should be continued as it is a useful communication tool to stakeholders on progress being made by the Commonwealth and the States in implementing agreed actions under the National Partnership agreement.

The BRCWG, or a similar national entity, could also consider more formal and regular interaction with key business stakeholders to gauge their views and support for the current reform agenda and for other reforms of most concern to business.

- ***Strengthen regulatory management mechanisms at State level through ongoing benchmarking and co-operation***

Australian States have already made significant progress and are engaged in substantial reform efforts. Existing benchmarking programmes, including that currently being undertaken by the Productivity Commission, in response to a request by COAG, are useful. Continual benchmarking of business regulation could help deliver the benefits of innovation across jurisdictions and assess progress in addressing challenges. This could be institutionalised with a fixed timetable providing jurisdictions with clear timelines for action. This could, for example, facilitate an increased diffusion of online services for licence applications, which tend to currently lag behind in a number of jurisdictions. Institutionalising benchmarking could help improve data production and analysis at the level of each jurisdiction. Developing criteria to compare the arrangements in place within States can assist in determining which features of reform models are best suited to the States' public management arrangements and identify future reform priorities and further beneficial reforms to improve regulatory quality. Data production and analysis could in turn help identify implementation challenges at the State level and spearhead action.

A key strength of the COAG reform agenda and the new federal financial relations is its focus on outputs and outcomes and its aim to profit from the competitive dynamic of jurisdictions experimenting with alternative approaches. It will be important that performance monitoring and reporting by the COAG Reform Council – including learning from best practice – is translated into ongoing improvements in these outcomes.

Besides benchmarking, the sharing of information can also help to foster good regulatory practice. The example of other countries shows that using common fora for sharing best practice at state level can also facilitate more consistent programme implementation and contribute to strengthened capacity. For example, the disciplined application of a policy of cost recovery in setting regulatory charges can assist in facilitating national reform by minimising the impact on jurisdictions and licence holders when functions are transferred to other jurisdictions. A review of the application of cost recovery principles by regulators and sharing the approach for consistent cost recovery

guidelines could improve administrative efficiency and facilitate future reform initiatives. The COAG Reform Council's monitoring reports may be able to highlight examples of best practice.

Sharing common approaches to RIA at a local level is also likely to yield benefit. States have consistently moved to take into consideration the national impact of regulation when conducting RIA for local regulation. This is a bottom-up approach to building a seamless national economy that should be encouraged and enhanced. Moreover, to raise awareness of cross-jurisdictional issues, Commonwealth and State agencies responsible for regulation policy could bring together regulators and staff from different jurisdictions for joint training sessions on impact analysis of national regulatory issues.

To remain aware of developing systemic problems in areas of national responsibility, the creation of networks of regulators will be increasingly necessary to share regulatory knowledge across jurisdictions and across regulatory fields within jurisdictions. The ANZSOG model of networked intergovernmental learning and research may provide a model for enhancement and emulation in this regard.

- ***Strengthen the compliance and transparency of impact assessment of decisions taken by Ministerial Councils***

Australia has a well developed framework for assessing the costs and benefits of regulatory proposals by Ministerial Councils. However, oversight of this framework by the OBPR suggests that compliance and transparency by Ministerial Councils has been inconsistent. To improve performance and support robust policy development, OBPR should inform Ministerial Councils where a RIS is inadequate or a proposed decision would be non-compliant with the RIS requirements and explain why this is the case. There would also be benefit in clarifying the requirement that COAG RIS be made public, with a requirement that where the OBPR assesses the RIS as inadequate that this assessment and reasons for its inadequacy be published with the RIS.

Notes

1. 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.
2. This chapter is a synthesis of a longer background paper multi-level regulatory governance which was peer reviewed by the Working Party on Regulatory Management and Reform in Paris on 22 September 2009. The background paper was drafted by Gregory Bounds, Policy Analyst, OECD Regulatory Policy Division, and Filippo Cavassini, Master's Candidate, Harvard Kennedy School of Government. It is available at *www.oecd.org/regreform*.
3. Originally agreed to in 2006.
4. See COAG Communiqué December 2007.
5. See COAG Communiqué October 2008.
6. The way that the revenue is distributed is not based on where it was collected, but according to a formula determined by the Commonwealth Grants Commission which is intended to produce "horizontal fiscal equity" across all jurisdictions.
7. COAG Communiqué 29 November 2008
8. The funding agreement operates over five years and covers:
   - AUD 60.5 billion in a National Healthcare SPP;
   - AUD 18 billion in a National Schools SPP;
   - AUD 6.7 billion in a National Skills and Workforce Development SPP;

- AUD 5.3 billion in a National Disability Services SPP; and
- AUD 6.2 billion in a National Affordable Housing SPP.

9. With the exception of the schools SPP which is to be distributed according to full-time student enrolments in government schools.
10. IGA Schedule E, paragraph 22.
11. In February 2006, COAG agreed to address six priority cross-jurisdictional "hot spot" areas where overlapping and inconsistent regulatory regimes are impeding economic activity: rail safety regulation; occupational health and safety; national trade measurement; chemicals and plastics; development assessment arrangements; and building regulation. COAG Communiqué 10 February 2006.
12. Towards a Seamless National Economy Progress Report Card July 2008-July 2009 *www.finance.gov.au/deregulation/docs/2009_annual_report_card_July.pdf*.
13. Such provision exists for Commonwealth legislation that does not comply with Commonwealth best practice regulation requirements; see OBPR (2008), p. ix.
14. Such provision is clearly stated in the RIS guidelines of the Australian Capital Territory, New South Wales and Victoria; see Department of Treasury (2003), p. 18; Better Regulation Office (2008), p. 24; Department of Treasury and Finance (2007), pp. 4-9.

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