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Chapter 2

Regulatory Governance

This chapter is a summary of the background report government Capacity to Assure High Quality Regulation in Australia *available at* www.oecd.org/regreform. *It focuses on the regulatory management and reform arrangements that are in place at the federal level of government in Australia, drawing on the good practices embedded in the* 2005 OECD Guiding Principles for Regulatory Quality and Performance. *The chapter includes an assessment of: the effectiveness of institutional arrangements and tools for promoting regulatory quality; the design of regulatory reform policy; the use of* ex ante *and* ex post *impact assessment; systematic transparency and public consultation measures, and; measures to reduce regulatory burdens including the integration of ICT. Australia has well embedded regulatory management arrangements in these areas and a history of successful reform. Future challenges include ensuring that Ministers and their departments embrace a culture of "continuous improvement" in rule making and enforcement.*

The administrative and legal environment for regulatory reform in Australia

Australia is a democratic federation of six States and two Territories that inherited its legal and parliamentary processes from British traditions. The Australian Federal Government is also referred to as the Commonwealth government of Australia and 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 (The "States") 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 of 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. 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. Successive governments have introduced robust institutional measures of oversight and quality control usually in response to periodic reviews of regulatory performance. 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 existing regulatory management practices and what is delivered in practice, and improvements have been made particularly to the standards of analysis for new regulatory proposals.

In Australia at the present time, however, 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. A number of regulatory management issues that appear intractable in other OECD countries are being managed well in Australia. Many of the pre-conditions for successful regulatory reform have already been put in place. There is a strong culture of professional commitment among staff in the public administration, a highly skilled and professional public

administration with experience of working with regulatory reform in government and a strong and well embedded institutional framework.

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.

Recent and current regulatory reform initiatives

Australia has a relatively long experience in the application of regulatory management systems to improve regulatory quality supported by institutional arrangements. 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; 2007). 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 Commonwealth Government commissioned the *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%*".[1] Hampered by the absence at that time of any effective methodology to measure the cumulative compliance burden, the taskforce recommendations focused on better processes, and an increased political profile for regulatory management.

The National Competition Policy Legislative Review Programme

The National Competition Policy (NCP) legislative review programme stands out as the one of the most important regulatory reform initiatives in Australia's history (see Box 1.7). The programme delivered important economic benefits to Australia and it has been promoted by the OECD to its members as a model approach. Under the NCP programme each jurisdiction examined their entire stock of laws for potential restrictions on competition and together identified and scheduled for review around 1 800 pieces of legislation. (For an overview of the competition reforms, see Box 4.1 in Chapter 4).

Important institutional features of the NCP have subsequently been adapted as the basis for the current COAG national reform agenda. These include the use of incentive payments from the Commonwealth to the States and the role of the COAG Reform Council to oversee and advise the Commonwealth on the progress of reforms.

The advocacy role of the Australian Productivity Commission

The Australian Productivity Commission (PC) is a unique example of a policy advocacy body among OECD governments in terms of its independence, staffing size, economic expertise, stability and the breadth of policy issues it considers. It has a role in researching and advocating the benefits of regulation reform, as well as monitoring and advising on regulation and undertaking benchmarking in specific sectors. The PC has been an

important part of the institutional architecture for regulatory reform in Australia and it provides a model with many features that could usefully be emulated outside Australia in other OECD countries (see Box 1.9).

The Banks Review – Rethinking Regulation

There is a record of mature economic debate among stakeholders in Australia which recognises the contribution of systemic regulatory reform to sustained economic development and has contributed to mainstreaming regulatory management principles and promoting their development. In 2006 the government commissioned 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, p. i). This was motivated in part by a 2005 Business Council of Australia (BCA) report which criticised the effectiveness of existing arrangements for the management of regulatory quality, and suggested a trend to increasing regulation potentially undermining Australia's competitive advantage. The BCA had proposed an action plan with three steps: to improve regulatory management processes through better RIA and institutional arrangements; clean up the stock of regulation, and; address overlapping and inconsistent regulation among the layers of government (Business Council of Australia, 2005).

The Banks review found that there was too much regulation imposing an unnecessary cost on business remarking upon a rising phenomenon of risk aversion in society and an over reliance by governments on the development of regulatory solutions that had led to a "regulate first ask questions later culture". Furthermore regulatory silos meant that the broader effects of regulation were rarely taken into account. This concurred with the views of the BCA that the requirements for good regulatory process had not been effectively discharged and that unless the underlying reasons for regulatory failures were addressed the regulatory problems would simply re-emerge.

The recommendations of the Banks Review set in place a new phase of reform initiatives with an emphasis on improving the institutions and processes that promote good regulation. The government endorsed six principles of good regulatory process and these were reflected in an improved version of its official Best Practice Regulation Handbook. Important process changes adopted on the recommendation of the Banks Review were a requirement for a higher level of analysis in RIS and improved gate keeping arrangements that would prevent a regulatory proposal from proceeding to Cabinet if an adequate RIS has not been prepared. The existing Office of Regulation Reform was 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 institutional arrangements and 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. The election platform reflected a view that despite the long history of regulatory reform initiatives, they had not been sufficient to deliver a material reduction in the regulatory burden on

Box 2.1. **Principles of good regulatory process**

The government adopted the following six principles in good regulatory practice recommended by the Taskforce on Reducing the Regulatory Burden on Business (Banks Review):

- 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), p. v; Australian government 2007.

business. The new government took office in November 2007, and immediately created a new Cabinet portfolio position of Minister for Finance and Deregulation as a champion inside the Cabinet to help ensure that Ministerial colleagues comply with regulatory quality processes in preparation for and during the Cabinet process. The responsibility for deregulation was assigned to the portfolio of the Finance Minister so that the two functions could impose a complimentary discipline on departments from the centre of government: finance being responsible for budget policy advice and process, and; the deregulation portfolio being responsible for regulatory efficiency. 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 Deregulation Policy Division was also established in the department.

The new Minister for Deregulation the Honourable Lindsay Tanner, outlined the ambition of the government's deregulation agenda to achieve culture change among regulators, 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 new elements that the government emphasised about its deregulation agenda were: 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).

Protection from political influence and the authority 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

Box 2.2. **Key policy initiatives of the Federal Labour Party to improve business regulation April 2007**

The federal Labour 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.

(OECD, 2002, p. 90). When the OBPR was located in the PC, it operated under the general statutory independence that applies to the functions of the Commission. The OBPR lost this statutory independence when relocated within the Department of Finance and Deregulation, but of its independent capacity to undertake a technical assessment of the adequacy of the analysis in RIS was endorsed in statements by the Minister for Finance and Deregulation to the Australian Parliament. (Tanner, 2008b, p. 1 890) Furthermore, it gained a closer relationship to the processes of Cabinet and the development of policy proposals. The Deregulation Policy Division took on the new function of evaluating the policy merits of regulatory proposals reflecting the government's focus on deregulation. Overall the institutional capacity for managing regulatory policy has been significantly strengthened as well as the development of a number of new regulatory management initiatives.

Specific deregulation initiatives include a requirement on Ministers to quantify the regulatory burden of new regulatory activities in Cabinet proposals. 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 were 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. The Department of Finance and Deregulation identified 200 pieces of redundant regulation through a stock take in 2008. Almost 60 regulations had been removed by mid 2009, and a *Removal of Regulation Omnibus Bill* was in preparation for consideration by Parliament later in 2009.

The Minister for Finance and Deregulation has initiated *Better Regulation Ministerial Partnerships* to identify and develop improved regulatory outcomes across portfolio responsibilities. Partnerships have been commenced with the Minister for Financial Services, Superannuation and Corporate 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.

In 2009, the government commenced a review of all pre-2008 Commonwealth subordinate legislation registered on the Federal Register of Legislative Instruments with a particular focus on reforming business regulation. The aim of the review is to document regulations that impose net costs on business and identify scope to improve regulatory efficiency. The Department of Finance and Deregulation also plans to use this stocktake to enhance cultural change in the way that portfolios manage their regulatory stock.

The Minister for Finance and Deregulation will make bi-annual reports to Cabinet on progress with the better regulation agenda. The first of these reports was delivered in April 2009. The government has agreed to undertake further better regulation initiatives including the enhanced use of consultation green papers to better identify the regulatory impacts from significant regulatory proposals, more formal arrangements for the conduct of Ministerial partnerships, updates to the guidance on preparing RIS, and a requirement that agencies lodge a preliminary assessment of all regulatory proposals with the Department of Finance and Deregulation.

The policy division also provides secretariat and policy support to the COAG Business Regulation and Competition Working Group (BRCWG) which is responsible for driving the delivery of the national deregulation priorities of COAG.[2] These are contained in a COAG *National Partnership Agreement to Deliver a Seamless National Economy* and include national regulatory reforms in 27 priority areas, eight areas of competition reform, and improvements to regulatory management in all jurisdictions.

Departments have been notified of their deregulatory obligations including the requirement to consider regulatory offsets when considering new regulatory proposals in a *Guidance Note on Advancing the Deregulation Agenda*. A key challenge for the future 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.

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 use of targets and the Standard Cost Model (SCM) were developed; as a way to provide leverage to facilitate the reduction of administrative burdens. Where other OECD governments have had a goal of no net increase in the burden of regulation these have been confined to administrative burdens, which is a relatively narrow class of costs imposed by regulation. The Department of Finance and Deregulation is testing the concept of regulatory budgeting with a pilot within its own department and in the Department of Innovation, Industry Science and Research. There is little practical experience of regulatory budgets as they have not been implemented by any OECD government. The requirement for regulatory offsets and the "one in one out" principle is not of its own likely to have a material effect on the growth of regulation.

The structure of the policy division 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 agencies who regulate. The Australian Government has not set the kind of burden reduction targets commonly used in Europe although it is a feature in some Australian States. Given the technical constraints on regulatory budgets, it will be a challenge to establish clear incentives for agencies to meet the government's overall policy commitment to no net increase in regulatory burden. It will require the allocation of clear responsibilities with Ministers and departments to ensure they identify and implement reforms that reduce the burden of regulation within their portfolios, and conscientiously examine any new regulatory initiatives to ascertain that it imposes the least regulatory burden necessary to achieve policy objectives.

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. In 2007, the Commonwealth Auditor-General also noted a need for the improvement in the performance and culture among regulators, including the systematic application of risk-based management procedures. It has produced practice material reflecting examples from well performing regulatory agencies.

While not widespread, there are clear cases where regulators have already taken the initiative to report on better regulation initiatives. For example, the Australian Securities and Investment Commission (ASIC), the national corporate regulator, 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.[3]

An example of the promotion of cultural change among regulators that may be worthy of emulation is the United Kingdom *Regulatory Enforcement and Sanctions Act 2008*[4] *which* imposes a general obligation on regulators *not to impose or maintain unnecessary regulatory burdens*. A regulator covered by the Act is required to publish an annual statement advising how they plan to avoid imposing additional unnecessary burdens, and how they have removed any unnecessary burdens. 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.

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. Increasingly OECD countries are working on improving the way that risk is managed by regulators to reduce the costs of regulation and increase its effectiveness.

The OBPR Best Practice Regulation Handbook gives clear guidance on the importance of a risk analysis to determining the need for regulation and designing a proportionate regulatory response. It notes that the achievement of zero risk is neither an appropriate nor technically feasible goal of government intervention, and that the aim of the RIS is to transparently identify the tradeoffs. However, there is scope for further discussion in the handbook 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.

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 (APSC) conducts annual surveys of public sector agencies and 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 Australian Government developed a policy to reduce red tape in government with the aim of dispelling myths which lead 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, similar to the RIS requirements. Agencies are expected to review administrative requirements 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.

The government's policy on reducing red tape is a significant step forward in extending systematic and rational analysis to internal processes. However, the policy could be improved through 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 and the origin of so-called myths.

Furthermore, it is not clear that the oversight responsibility for the implementation of the reviews has been established as originally envisaged, suggesting that a central agency should be given responsibility for monitoring and reporting on the application of the policy by departments.

Administrative capacities for making new regulations of high quality, transparency

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 Cabinet process is the product of well respected convention and practice and, though not supported by legislation, the Cabinet administrative arrangements are often stricter than in other countries. 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. Cabinet submissions on significant regulatory proposals are circulated for formal co-ordination comments over a minimum five day "consideration period". The submission must identify whether there is agreement among relevant departments and agencies for the proposal. A submission brought to Cabinet or its committees by a Minister must include a clear recommendation and accompanying justification for the recommendation including an assessment of the regulatory impacts. Where the impacts are considered significant, a RIS is required to include a quantified cost-benefit analysis. Details must also be included about the proposed implementation of the regulatory policy, its financial implications, and impacts on small business, regional Australia and families. 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.

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. 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". The *Legislation Handbook* gives 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.

The final RIS is tabled in Parliament in the explanatory material of a Bill. This clearly aids the transparency of the regulatory process, but it can also lead to some confusion when the government's decision does not correspond with the design of the regulatory option that has been assessed by the original RIS. As the role of the RIS is to assist decision makers to evaluate the merits of alternative regulatory proposals, it seems perfectly appropriate that on occasion the government would make decisions that do not directly follow the conclusions of the RIS. However, it does suggest the need for improved

communication on the contribution of the RIS to the decision process, as well as an argument for a less conclusive format of the RIS in cases where the government is considering among different regulatory approaches.

Transparency in the implementation of regulation: communication

All Federal 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. Bills introduced to Parliament are published in hard copy and on the Parliament's website. The Commonwealth *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 which is later proved to be wrong are at no disadvantage.[5] Unless exempted legislative instruments are subject to a ten year sunsetting 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. 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.[6]

Plain language

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 Office of Legislative Drafting and Publishing (OLDP) drafts 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 need for clarity and comprehensibility in the law appears to be very well understood and incorporated in the Australian system. Since the 1980s the OPC has promoted the use of "plain English".

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. 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.[7] 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, p. 5) (see Box 2.3). Key aspects 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.

A business consultation website provides a facility for government agencies to link to current consultation activities (*www.consultation.business.gov.au*). Businesses and individuals are invited to register themselves and identify their areas of policy interest. Departments are also required to publish and maintain on their website an Annual

Box 2.3. **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.

Regulatory Plan (ARP) including 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. All Commonwealth Departments have complied with the requirement for an ARP however a 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. The *Legislative Instruments Act 2003* has a reference to the need for consultation with business on proposed rules. However, the Act leaves considerable discretion to the rule maker to decide whether consultation is required, and what form it should take.

Other consultation initiatives 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 1 000 Australians to "debate the best ideas from the community" on how to "shape a long-term strategy for the future of the nation".[8] 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 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.[9]

Further examples of consultation practices 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.

Reflecting a commitment on the part of the APSC to obtain better information on the effectiveness of government policies on consultation is an annual survey on the extent to which federal public service agencies conduct formal consultation on the development of policy and programmes. 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, it also suggests 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.

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

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. Australian regulators use a variety of compliance "tools" including significant sanctions such as pecuniary penalties and jail. Some regulators also have considerable discretion concerning remedies for which they may seek orders in relevant courts/tribunals which can include injunctions, remedial orders and the payment of damages and/or compensation.

The Commonwealth 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.[10] The Australian Government's general approach is to require regulatory agencies to provide a strong justification for the need to exercise coercive powers. New 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 Attorney-General's Department also 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 in cases where corporations are being penalised.

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. 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. Most Commonwealth decision making is also subject to judicial review. A person who is aggrieved by an administrative decision 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.

The Australian Federal Court does not have responsibility for reviewing regulations, but is 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. The High Court decides 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.

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 Australian *Best Practice Regulation Handbook* requires that the RIS for a regulatory proposal must include consideration of a range of regulatory and non-regulatory alternatives. It provides guidance and identifies the strengths and weaknesses of a range of alternative approaches, including examples of where they could be applied. 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. Regulators may refer to and mandate compliance with documents prepared by third parties such as national or international standards prepared through *Standards Australia*. There is also a preference for the use of consumer organisations to undertake an assessment of products and provide information to educate consumers to make informed choices.

The evidence of the use of co-regulation, self-regulation and education suggest that Australia does not overly use prescriptive regulation. However, 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. This suggests the need for the development by regulators of more client focused approaches, in addition to the development of alternative regulatory approaches.

Understanding regulatory effects: The use of Regulatory Impact Analysis

Australia was early among OECD countries to adopt RIA in 1985. Successive governments have progressively strengthened the requirements for RIA and its application to regulatory instruments. The following assessment against best practice is based on

OECD experience of the most important areas for government attention in the development and application of RIA and suggests that Australia is advanced among OECD countries in the design of its RIA system.

Maximise political commitment to RIA. 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. 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. Despite its strength, it does not guarantee that the requirements will always be followed faithfully. A further expression of political support, which already applies in some jurisdictions in Australia, would be an obligation on Ministers to "certify" that the RIA assesses the likely impacts of the proposed rule (see policy options).

Allocate responsibilities for RIA programme elements carefully. In Australia the careful allocation of RIA responsibilities is well integrated in the system for RIA which is intended to ensure "that ultimate responsibility for regulatory quality rests with individual ministers, departments and agencies, boards, statutory authorities and regulators". (Australia Government, 2007) 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. The RIA process is carefully "staged" to assist its effectiveness in improving the regulatory proposals prepared by agencies. Agencies are responsible for 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) 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. If the RIA process is not followed, the regulatory proposal is not meant to proceed to Cabinet, although the Prime Minister may grant an exemption in exceptional circumstances, and the proposals are then required to be subject to a post implementation review in one to two years.

Train the regulators. 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. 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.

Use a consistent but flexible analytical method. There is a commitment to promoting the use of cost-benefit analysis as the preferred analytical method in the RIA. 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. 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.

Target RIA efforts. The Commonwealth Government 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 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.

Develop and implement data collection strategies. 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 as well as 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 2.4).

Integrate RIA with the policy making process, beginning as early as possible. 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. 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. 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 estimating the benefits of regulation, and with 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 Commonwealth Government RIA processes do not formally require that the draft RIA be released prior to its consideration by the decision maker. However, the obligation to consult on the preparation of the RIA and to use the RIA analytical framework should test the assumptions and evidence that is the basis for the regulatory proposal. 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 when the regulation is announced. Cabinet confidentiality is

Box 2.4. **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: Australian government (2007), p. 26.

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.

Involve the public extensively. 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. The consultation model outlined in the *OBPR Handbook* and the requirement to demonstrate in the RIA the consultation that was undertaken appear best practice and there is clear evidence of good practice on significant policy issues. However, it may be that consultation practices vary across departments and are not as broadly applied as the guidelines require, which suggests that further consistency in processes could be promoted.

Apply RIA to existing as well as new regulations. Australia has a good record on the use of RIA for *ex post* review of legislation. The NCP legislative review programme 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 "sunsetting" ten years after the date they are made, and if remade would be subject to the RIA processes.

Acts of Parliament are not subject to a formal requirement for sunset or reviews, but a number of Acts include review provisions. 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 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 (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. 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 Minister 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, which would be consistent with the requirements of other jurisdictions in Australia.

Building regulatory agencies

The Australian Government has a policy preference to curb the unnecessary proliferation of government bodies, and has in place well developed Governance arrangements to ensure consistency of administration and the performance and accountability of statutory authorities where there are persuasive reasons to form a body. A governance policy document released in 2005 outlines principles for the most appropriate structure and governance arrangements for Australian Government bodies. 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).[11] The government also promotes transparency by publishing 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.

Individual ministers may use Statements of Expectations (SOEs) with bodies within their portfolios to clarify the expectations of portfolio bodies where the minister has a role in providing direction. The agency would then respond by outlining how it proposes to meet the expectations of government in a Statement of Intent (SOIs), including the identification of key performance indicators agreed with the relevant minister. The SOE are public to provide accountability in the use of the Minister's power and are required to be

framed in terms that do not compromise the legislated functions and independence of the statutory agency.

The regulatory quality management practices of the Australian government, including the requirement for the preparation of RIS, have wide application to regulators and the instruments that they use, in the same way that they apply to government departments. The independence of regulators is preserved through 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.

Improving the stock of existing regulations and reducing burdens

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 on a systematic basis. The programme for the NCP review of legislation was comprehensive and updated most of the regulatory stock that contained restrictions on competition over several years. 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 sunsetting provisions. The government has given a policy commitment to review regulation not otherwise scheduled for review every five years, commencing in 2012. However, the detail on how these reviews will be conducted still need to be determined and careful planning in advance of that date will be necessary if they are to be effective.

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. 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 programme of review of regulatory burdens operates 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 responds to the recommendations of the PC reports, and reforms the regulatory arrangements as appropriate.

Measuring and reducing 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 programme. 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. 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 adopted its own unique programme for the *ex post* measurement of the administrative burden across jurisdictions. 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 to establish the feasibility of benchmarking the regulatory burdens across jurisdictions and to report on the quality and the quantity of Australian business regulation (PC, 2008a) and the administrative compliance costs of business registrations (PC, 2008b). 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 first report provides a "snap shot" of the current regulatory environment across the Australian jurisdictions using broad measures of the stock and flow of regulation and regulatory activities, and good regulatory processes as a proxy for the quality of regulation, rather than any measures of specific regulations.

The second report on the administrative compliance costs of business regulations concluded that the total costs of complying with business 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 represent the most significant costs to business[12] (PC, 2008b, p. xvii). The government has subsequently requested the PC to benchmark the regulatory burden of occupational health and safety regulation and food safety regulation.[13] It is notable that these benchmarking exercises provide data for the comparison of jurisdictions and to inform other reviews of regulation; they do not include any specific recommendations for reform. 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.

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 federal government has made the use of ICT to improve service delivery and reduce administrative burdens a priority and has developed several complementary initiatives. The government is implementing a new model for the effective and efficient use of ICT within the Australian Government following a major review in 2008.[14] The government also established a Business Process Transformation Committee (BPTC) in 2007 to co-ordinate the redesign and reform of agency business processes through the use of ICT to improve service delivery. The *Australian Government Online Service Point Programme* is introducing common standardised business processes to improve access to information, messages and services on government websites.[15] The government is also testing a number of online consultation mechanisms to develop a consistent, cost effective and efficient approach for Australians to communicate with government. The trials are testing issues around registration and participation, the use of blogs and different methods of moderation to online consultation.[16] An aim of the improved online consultation is to support the regulatory reform agenda, by allowing the community to comment on regulatory costs.

These 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 (see Box 2.5). One of the drivers for this is to reduce the burden of regulation on business and citizens, but mostly it is part of an overall ambition to improve the responsiveness, efficiency and citizen focus of the Australian Public Service using the tools that are provided by ICT. However, benchmarking by the PC of the use of the Internet by regulators to provide and receive information from business found that there is considerable room for improvement among Commonwealth and State regulators. More than 60% of regulators provide information and application forms online, but fewer than 20% receive application forms online or allow business details or licences to be updated or renewed online (PC, 2008a, pp. 69-73).

Box 2.5. **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; utilise 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.

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. Planned updates will 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;

Box 2.5. **Examples of Australian reforms to streamline reporting requirements for business and reduce compliance costs** *(cont.)*

- 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.

Source: Australian government (2009).

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 programme 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 with 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 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 with 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 of the most relevance to business.

The argument could be made that Australia could benefit from developing a more systematic and transparent approach to reducing the burden of regulation. 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 programmes 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 programme 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 programme. 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 RIS. 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. 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, sunsetting 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 organising 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 should be 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 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. A small group of 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 the 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. 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* (p. vii).
2. The role of the Business Regulation and Competition Working Group (BRCWG) in respect to COAG working group is discussed in Chapter 3.
3. More information is available from the ASIC website: *www.asic.gov.au/asic/ASIC.NSF/byHeadline/Better%20regulation.*
4. 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.*
5. 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.
6. *www.comlaw.gov.au*
7. 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).
8. *www.australia2020.gov.au/about/index.cfm*
9. 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.*
10. *The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* is available at *www.ag.gov.au/crimlaw.*

11. 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.
12. Childcare registration was the exception where delays associated with police checks is an issue.
13. See *www.pc.gov.au/projects/study/regulationbenchmarking/stage2*.
14. See Ministerial Media Release *www.financeminister.gov.au/media/2008/mr_372008.html*.
15. *www.australia.gov.au*.
16. 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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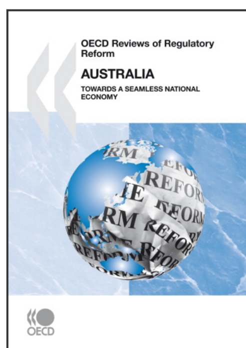

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