



AUSTRALIAN BANKERS' ASSOCIATION INC.

Diane Tate
Director

Level 3, 56 Pitt Street
Sydney NSW 2000
Telephone: (02) 8298 0410
Facsimile: (02) 8298 0402

2 January 2007

Mr Chris Sayers
Assistant Commissioner
Regulation Benchmarking Study, Productivity Commission
Locked Bag 2, Collins Street East
MELBOURNE VIC 8003
regulationbenchmarking@pc.gov.au

Dear Mr Sayers,

Performance Benchmarking of Australian Business Regulation

The Australian Bankers' Association (ABA) welcomes the opportunity to provide comment on the Productivity Commission's discussion draft paper *Performance Benchmarking of Australian Business Regulation*.

The Finance Industry Council of Australia (FICA) and the ABA have made previous submissions supporting the Commission's inquiry to develop a range of feasible quantitative and qualitative indicators and reporting framework options for ongoing assessment and comparison of the burden of regulation; and to provide information on the availability of data and approximate costs of data collection, collation, indicator estimation and assessment to the Council of Australian Governments (COAG).

FICA welcomed the opportunity to attend the industry consultation on 11 December 2006, and is generally pleased with the direction of the inquiry. The Commission is to be congratulated for preparing a comprehensive paper on benchmarking regulation and identifying benchmarking opportunities. We are particularly pleased that the report seeks to minimise the burden on business, especially in relation to the collection of data.

1. Benchmarking regulatory burden

The ABA has highlighted in the past that some regulation making in the banking and finance sector has been limited in a number of areas:

- *Design and formulation:* insufficient clarity of the objective and intent of regulation; insufficient assessment of the possible regulatory 'problem', identification of options and consideration of the possible impact of regulation on businesses and consumers; problems with the regulatory instrument (whether that be legislation, regulations, policies, standards, etc); tension between principles-based and prescriptive regulation; lack of national uniformity; and lack of cooperation between regulators.

- *Process and implementation*: inadequate consultation on the proposed regulation; unrealistic timeframes; lack of transparency; limitations with regulatory instruments; and flaws in administration of regulation.

The ABA believes that “good regulation” requires coordination and cooperation between legislators, government, regulators and industry. In this context it is important to get the balance right between the cost and benefit of regulation; clarity/certainty and flexibility of regulation; and that subsequent interpretation and enforcement correctly reflects original intent. If the balance is wrong it can lead to costly outcomes for businesses and less customer-friendly outcomes for consumers.

Recommendation 7.1 of the Regulation Taskforce's report *Rethinking Regulation* suggests that the Australian Government should endorse the six principles of good regulatory process. The ABA strongly supports this recommendation and is pleased that the Commission further endorses such an approach in the draft paper.

Benchmarking regulatory burden and compliance cost of existing regulation is essential to ensure that poor regulation can be addressed. However, benchmarking existing regulation will not reduce the creation of inefficient and inappropriate future regulation. Therefore, identifying a framework for benchmarking regulatory design and process is crucial to ensuring systemic improvements to regulation making can be implemented.

The ABA believes that a framework for benchmarking regulation should include:

- Benchmarking the *design* of regulation against best practice principles (including ensuring adequate and effective consultation in the design);
 - Establishing a clear need or market failure that needs to be addressed (identifying and assessing the regulatory ‘problem’) and articulating clear objective and intent;
 - Tracking compliance costs over time (by jurisdiction if relevant) and relating compliance costs to regulatory benefits (ensuring assessment of regulatory options, possible regulatory impacts and their relative costs and benefits takes place during the formation of regulation);
 - Comparing potential unnecessary regulatory burden and compliance cost over time.
- Benchmarking of the *process* of regulatory development and review against best practice principles (including ensuring adequate and effective consultation throughout implementation as well as ensuring harmonisation is a fundamental consideration in the process);
 - Measuring direct administrative and operating costs (including licensing, staff training, customer communications, IT systems, legal advice, consultancy services) and indirect compliance costs (e.g. management time and resources spent on compliance rather than pursuing business opportunities, changes in product availability and distribution);
 - Tracking the performance of regulatory authorities against the objective and intent (including administration and enforcement);
 - Comparing unnecessary complexity, uncertainty and inconsistency of regulations for businesses that operate across jurisdictions.

Benchmarking regulation to identify potentially unnecessary regulatory burden and compliance cost is necessary to ensure that regulation is effective and efficient. *Performance benchmarking* should measure and compare the regulatory burden and compliance cost across jurisdictions and over time. *Standards benchmarking* should measure regulation against best practice or policy targets. It is the ABA's view that *process benchmarking* is also an important measure of regulatory performance.

The ABA considers that it is possible to consider a range of indicators to capture the design, implementation and enforcement of regulation, thereby measuring the efficiency of the regulatory process and the costs of regulation on business. Compliance costs can be measured in terms of the cumulative burden over time as well as the specific components of compliance cost, whether these are direct or indirect indicators.

It is important for a benchmarking framework to contain systematic indicators that can measure and compare the regulatory burden and compliance cost of *becoming, being and doing business*. However, there may be instances where activity-specific or industry-specific indicators would also usefully be developed. In this case, we suggest that further consideration needs to be given to identifying reporting indicators relevant to measuring the cost of, for example, banking and financial services regulation. The ABA suggests that this could take place directly with Treasury and the financial services regulators.

We note that the Office of Best Practice Regulation (OBPR) *Best Practice Regulation Handbook* and the Business Cost Calculator (BCC) are potentially useful tools to use in the context of regulatory impact assessment, and generally should enable governments and regulators to conduct better cost-benefit analysis of potential business regulation. The OBPR is to be congratulated for further enhancing their guidance to governments and regulators on regulatory impact assessment.

However, it is the ABA's view that to conduct a thorough regulatory impact assessment for the banking and finance sector, the categories of compliance tasks identified within the BCC tool would potentially need to be supplemented, for example, with categories that also capture data on implementation costs, systems costs and indirect compliance costs. These categories have tended to be significant components of the overall regulatory burden for banks and other financial service providers.

The ABA believes that:

- *Performance benchmarking* and *standards benchmarking* are both important to ensure efficient and effective regulation making. A range of indicators can be used to identify the extent of unnecessary burdens relating to similar regulation across jurisdictions. This can also measure the cumulative effect of regulation over time against best practice.
- *Process benchmarking* is also important to ensure that governments and regulators are accountable for how regulation is designed and then implemented. Often unnecessary regulatory burden and compliance cost is associated with the administration of the law. In addition, to assist in efficient allocation of resources, we consider that benchmarking regulation across jurisdictions should also involve regulation where objectives may conflict (not just where regulatory objectives are aligned).
- Benchmarking regulation should cover direct compliance costs (including operating and administrative costs associated with complying with meeting regulatory requirements) and indirect costs.

- Reporting indicators should be quantitative and qualitative. Reporting indicators should be unambiguous and have broad application and support so that data collected is comparable.
- Collection of data should not impose unnecessary costs on business. Information should be obtainable and reportable at a reasonable cost.
- Data management protocols should be developed for collection, collation and assessment of data.
- Reporting of performance benchmarking results should be conveyed effectively to stakeholders so that all parties benefit from the benchmarking exercise. Governments and regulators should also make available information about how they intend to respond to the results, so that tangible outcomes from the exercise can be delivered to businesses, consumers and the broader economy.

2. Benchmarking the quantity and quality of regulation

The ABA acknowledges that a sound and safe banking and finance sector supported by a robust regulatory system is crucial to the success of market economies. Indeed the objectives of financial services law are to promote market efficiency and consumer protection. However, it needs to be recognised that the success of market economies is built on their ability to respond flexibly to changing circumstances.

Rigid regulations can harm innovation and competition. Regulation includes not just primary and delegated legislation, but also quasi-regulation, such as codes of conduct and advisory or relief instruments, as well as policy statements, guidance notes and practice guides. Regulation should be effective, efficient and above all necessary. It is important for regulators to consider effectiveness, efficiency and what may be the best means of addressing an identified problem. Therefore, regulation should only intervene where there is a clear need and when it done in ways that are proven to be effective and capable of delivering results while minimising cost and other market distortions.

Benchmarking regulatory design and process is as important as identifying the costs of regulation. It is important that the administration and enforcement of the law reflects the objective and intent of the law, and that this be measured through quantitative and qualitative indicators.

The ABA believes that:

- Benchmarking regulation should take into account the cumulative effect of regulation over time, including the amount/total stock of regulation affecting a reference business (including number of pages of legislation/regulation, number of licenses, etc); the form/type of regulation (including primary, delegated, quasi); the initial and ongoing cost of regulation; and whether the regulation is achieving its objective and intent. We also believe that it would be useful to benchmark regulation that has been removed or replaced with an alternative form, so that a measure of the shift of regulatory burden can be established.

- Benchmarking the *design* of regulation should take into account the clarity of purpose of the regulation (including articulation of the objective and intent; identification of the regulatory 'problem'); balance between certainty and flexibility of regulation (including principles-based versus prescriptive regulation); and the 'matrix' of regulation (including primary and delegated regulation, i.e. does the manner in which regulation is made, or the number of regulatory instruments, unnecessarily complicate the law and generate unnecessary regulatory burden).
- Benchmarking the *process* of regulation should take into account the balance between cost and benefit (including whether a regulatory impact statement (RIS) was completed and BCC used during the development of the regulation and whether these tools informed the regulation making); consultation processes (including consultations undertaken with stakeholders, timing, etc); and administration and enforcement (including number of regulatory forms, timeframes for reporting, availability of online facilities, risk-based enforcement, regulatory levies paid by businesses, etc).
- Benchmarking the performance of regulatory authorities should take into account administration and enforcement at both Federal and State levels. For example, laws governing the way in which the banking and finance sector can conduct business is administered at the Federal level (including RBA, APRA, ASIC, ATO, ACCC, AUSTRAC and Federal Privacy Commissioner) and the State level. Various Ministerial Councils are responsible for decisions which make changes to various business regulations and should also be subject to performance benchmarking.

3. Benchmarking program and implementation

The ABA believes that benchmarking regulatory burden and compliance cost potentially offers considerable net benefits for government, regulators and businesses. However, the costs of undertaking a benchmarking exercise would be significant.

Therefore, it is pleasing that to minimise the burden on business, the draft paper sets out that data collection would be undertaken by the Commission in consultation with legal experts and government agencies, and with input from affected businesses, as required. The reference business approach to collection of data should provide a representative indication of the costs without creating an undue reporting burden on businesses.

However, while we acknowledge that many of the reporting indicators may require input from government and regulators only, in many instances, collection of data will require input from individual banks, which in itself will generate a cost. We note that to gather useful and meaningful information for benchmarking regulatory performance, a number of quantitative and qualitative reporting indicators would require activity or industry-specific data.

It will be important to identify a benchmarking program that:

1. Involves representatives from across governments, regulators and businesses;
2. Clarifies the purpose of the benchmarking exercise and identifies relevant reporting indicators and caveats; and
3. Establishes data collection protocols (including designing reporting templates to ensure that the collection of data is streamlined, which will assist with collecting and reporting information as well as comparing and analysing information).

The ABA believes that:

- Benchmarking regulatory performance will be more effective if integrated into regulation and policy making processes. It will be important to benchmark regulatory design and process so that improvements can be made for future regulation.
- Benchmarking performance of existing regulation should initially focus on priority areas of regulation. Benchmarking regulation should take place across all levels of government; however, the relevance of particular levels of government will depend on the regulation itself. We also believe that benchmarking should include other countries, in particular those countries where Australia has close economic relations (such as New Zealand and the United States), and where Australian businesses are also subject to extra-territorial regulation. This can also identify 'good practice' so that over time regulation can be measured against best practice.
- A cost-effective approach to benchmarking would involve a rolling program of periodic review of priority areas of business regulation. The regulatory 'hot spots' identified by COAG offer a reasonable basis for initial review. However, to ensure unnecessary regulatory burden is reduced, it will be important to consider other areas where cross-jurisdictional regulation may be imposing unnecessary regulatory burden, for example, due to lack of harmonisation of regulation.

Yours sincerely



Diane Tate