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Benchmarking Business Regulation
Productivity Commission
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Business
Council of
Australia



Dear Sir/Madam

BUSINESS COUNCIL OF AUSTRALIA SUBMISSION

The Business Council of Australia (BCA) welcomes the opportunity to make a submission to the Productivity Commission's issues paper *'Performance Benchmarking of Australian Business Regulation'* September 2006 (Issues Paper).

The BCA is an association of Chief Executives of 100 of Australia's leading corporations. BCA Member companies employ nearly one million Australians, generate \$340 billion in the economy and produce 30 per cent of Australia's exports. They also contribute a significant proportion of the \$56 billion in company taxes that the Commonwealth Government is forecast to receive next financial year. The BCA has a deep interest in policies that promote sustained growth and prosperity in the economy through strengthening Australia's economic competitiveness.

In May 2005, the BCA released the *Business Regulation Action Plan*¹ (Action Plan) outlining a series of recommendations on how to reduce the unnecessary costs of poor regulation. Those recommendations were aimed at not only fixing the current stock of poor regulation, but also at systemic improvements to the regulation making system to ensure that further poor regulation is not imposed on business.

Following the release of the Action Plan, the Government commissioned the Banks Taskforce² to assess regulatory compliance costs to business. The BCA welcomed both the Banks Taskforce's and the Government's³ recognition that it is the systemic regulation processes that are contributing to the unnecessary costs of red-tape for business. It was recognised that fixing the regulation making system can stem the tide of growing regulation, can reduce the complexity and overlap of regulation and reduce compliance costs for business. It is the products of poor regulation making processes that place an undue cost on business and should be fixed.

¹Business Council of Australia, *Business Regulation Action Plan for Future Prosperity*, May 2005 (available www.bca.com.au).

²See Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and Treasurer, Commonwealth of Australia, Canberra, January 2006.

³See Australian Government, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business – Australian Government's Response*, August 2006.

The BCA welcomes a study which will determine performance and reporting benchmarking indicators for Governments, and believes that the regulation making systems are very important for such an analysis. Whilst benchmarking to assess the compliance burden and costs of particular existing regulations may be useful, it will not reduce the creation and development of inappropriate and inefficient regulations into the future. It is the growing tide of poor regulation that poses a significant cost burden to business and should be prevented if possible. Accordingly, in order to *“identify best practice for similar regulation across jurisdictions to assist in the design of improved regulatory arrangements”*⁴ consideration of benchmarking the systemic aspects of our regulatory system is crucial.

The terms of reference of the Issues Paper appear to ask two main questions:

1. What are feasible quantitative and qualitative performance and reporting framework options? and
2. What is the availability of data and approximate costs of data collection, collation, indicator estimation and assessment?

We address those questions below. This submission should be read in addition to our recommendations in regards to regulation, such as those in the Action Plan and the BCA Submission to the Banks Task Force⁵ (Submission). This submission will not address benchmarking in particular industry sectors but rather discusses the benchmarking of the systemic aspects of our regulatory system.

Feasible quantitative and qualitative performance and reporting framework options

The costs of regulation to Australia’s economy are huge. There have been estimates of such costs in the tens of billions of dollars. Regulation however plays an important role in keeping law and order and providing adequate rules for the community and business. However, if regulation is poorly drafted, inefficient and fails to achieve the outcomes that are intended, then unnecessary compliance burdens are imposed on business and the economy as a whole. The BCA audit of regulation (see Action Plan) showed that regulation has been growing at more than three times the rate of the Australian economy. When regulation is growing at such a fast pace, then inevitably inefficient regulations will be produced as a result.

Whilst it may be difficult to measure the total cost of “bad” regulation to our economy, it is clear that if the regulation making systems are inadequate, then there will be a significant amount of “bad” red-tape in our regulatory system. In the fight against the growing red-tape burden on business and the economy therefore, the focus must be on fixing our regulation system (both the regulation making and implementation processes).

In general, the Action Plan and the Submission outlined a number of recommendations on how to improve the regulation making processes at a Commonwealth level and fix the system of business regulation. These

⁴Issues Paper, p. 8.

⁵Business Council of Australia, *Submission to the Taskforce on Reducing the Regulatory Burden*, December 2005 (available www.bca.com.au).

recommendations are equally applicable at a State level and include, amongst others⁶:

- creating a Ministerial Task Force, similar to those operating in the UK and the Netherlands, to act as a 'gatekeeper' to prevent proposals for new business regulation being considered by Government unless the benefits of the proposed regulation clearly outweigh the costs;
- establishing a Business Regulation Advisory Council to advise the Government on priorities for regulation reform, including Commonwealth, State and Local regulation that should be removed or substantially improved;
- creating a champion for better business regulation within Government through enhancing the role and powers of the Office of Regulation Review to challenge the need for new regulation affecting business and to oversee the cost-benefit analyses of regulatory proposals;
- introducing a two-stage impact assessment process, with all regulations likely to affect business subject to a preliminary assessment, and all regulations likely to have significant impacts on business subject to full assessment;
- enshrining in legislation the requirement that all regulatory proposals likely to have a significant impact on business must undergo a detailed regulatory impact assessment to ensure the benefits of the regulation clearly outweigh the costs;
- requiring the Minister proposing new business regulation to certify personally that the benefits of the regulation will outweigh the costs;
- requiring the release of draft regulatory impact statements for public comment and allowing sufficient time for consultation to make that consultation meaningful; and
- developing a standardised, sophisticated methodology for identifying and measuring the likely costs to business of proposed regulations.

Any regulation making system, must meet the underlying intent of the proposals to ensure that the regulation making process becomes transparent, that there is adequate consultation with those likely to be affected before decisions to regulate are made and that officials developing regulation are accountable for their decisions and the quality of the regulations they develop.

Identifying the key indicators of an adequate systemic regulation making and implementation process can be gained from other studies and benchmarking which have already been undertaken. Obviously further work and consultation will be needed to identify these indicators. This submission is not intended to provide specific recommendations, but examples of the types of issues that should be considered. The BCA and the Banks Task Force have identified many systemic issues in our regulatory system which should be benchmarked. The BCA believes that not only should compliance costs of particular pieces of legislation or sectoral

⁶This is a summary of the BCA's recommendations. A more detailed discussion is to be found in Business Council of Australia, *Business Regulation Action Plan for Future Prosperity*, May 2005 and Business Council of Australia, *Submission to the Taskforce on Reducing the Regulatory Burden on Business*, December 2005, both available from www.bca.com.au.

regulations be monitored, but that other aspects such as the achievement of policy objectives, compliance with regulation making processes, policy and regulation design and performance of regulators should also be benchmarked.

For example, in June 2006, the BCA released a scorecard to measure the regulatory progress of the Commonwealth Government's response to the Banks' Taskforce recommendations⁷ (Scorecard). The Scorecard was able to identify the key areas of systemic regulatory reform that should be undertaken, and to measure the Commonwealth Government's progress against those key areas.

The Productivity Commission has in the past compared the coverage and nature of the Regulation Impact Statement (RIS) process across jurisdictions. For example, the Productivity Commission provided a table on RIS processes across jurisdictions and found that only the Australian Government and Victoria had an independent assessment body and public compliance reporting.⁸ Whilst the Productivity Commission assessment was limited to RIS processes, it shows that systemic regulation making processes can be identified and assessed.

It is therefore possible to identify and benchmark the important systemic indicators of our regulatory system.

What is the availability of data and approximate costs of data collection, collation, indicator estimation and assessment?

Not only is it possible to identify the key indicators of a "good" regulatory system, but there is also an ability to measure performance against those key indicators. The Productivity Commission highlights in its Issues Paper that the OECD Red Tape Scoreboard project "*focussed on the qualitative assessment of regulatory tools and policies, rather than the comparison of business costs*".⁹ The BCA believes it is important that benchmarking should not only include an assessment of the costs of individual pieces of red-tape, but should focus on the systemic aspects of the regulation system because it is those aspects that can result in the largest costs to business if they are not operating effectively.

In our submission to the NSW Independent Pricing and Regulatory Tribunal's regulation review for example¹⁰ we noted that the time given by Government for consultation on regulatory or policy proposals varies across jurisdictions. Broadly, the BCA believes that consultation periods should be long enough to allow adequate time to comment on regulatory proposals. For example, the Victorian Government has recommended a minimum consultation period of 60 days for RISs covering significant or complex issues, compared with a consultation period of 30 days in some other jurisdictions and currently 21 days in NSW. However, the BCA advocated in its Action Plan that a minimum 12 week period for consultation be introduced at a Commonwealth level, and would recommend a similar consultation period be introduced across jurisdictions. The BCA considers that Governments should consider consistency in consultation periods and processes across

⁷Business Council of Australia, *Regulatory reform: A Scorecard to measure Australia's progress*, June 2006 (available www.bca.com.au).

⁸Productivity Commission, *Review of National Competition Policy Reforms*, Commonwealth Government, Report No.33, Canberra, 28 February 2005, Table 9.1, p. 256.

⁹Issues Paper, p. 7, Box 1.

¹⁰Business Council of Australia, 22 August 2006, Submission to the draft report of NSW Independent Pricing and Regulatory Tribunal, *Investigation into the burden of regulation and improving regulatory efficiency*, July 2006.

jurisdictions (provided that the consistent consultation periods and processes are adequate).

Therefore, the appropriate consultation periods (or range of time) could become a performance indicator which could be benchmarked. The benchmarking processes could assess whether consultation was undertaken in all appropriate circumstances, whether the timeframes were adequate and whether adequate feedback was given to those who responded to the consultation.

A further indication that consultation is measurable was shown in Gary Banks' comments in a speech in May this year:¹¹

"Regulation without consultation is like a shot in the dark. Yet a recent government survey found that only one-quarter of regulatory agencies consult outside government when developing regulations.....This smacks of 'government knows best' and has been a major cause of some of the most costly regulatory decisions. (A contemporary example, hopefully caught in the bud, is the drafting of anti-money laundering legislation.)"

The Productivity Commission in its *Annual Report* series already assesses compliance with the RIS process. For example, it has been found that compliance with the requirement that adequate impact statements be tabled in parliament with explanatory material for bills, delegated legislation or treaties was found to be adequate in 89 per cent of cases in 2004-05 compared with 95 per cent compliance rate in 2003-04.¹²

The examples above demonstrate that it is possible to obtain quantitative data for benchmarking indicators relating to systemic aspects of our regulatory system. A qualitative assessment can also be given to some indicators (such indicators could include independent oversight, transparency and consultation procedures).

The BCA welcomes the Office of Small Business costing tool which will enable Governments to make a more adequate cost-benefit analysis of policy proposals. The information collected and provided by this tool could be one method of collecting the data to benchmark the regulation making processes.

The BCA welcomes the recognition by the Productivity Commission that *"Costs could be potentially incurred by those collecting data as well as those providing it."*¹³ Any benchmarking process that is developed therefore should ensure that it does not impose another significant layer of complexity or compliance burden onto business. The BCA notes that the Productivity Commission should also seek information from those groups that are best placed to locate and collect such data (such as specific sectoral groups).

¹¹G. Banks, Chairman Regulation Taskforce and Productivity Commission, *Reducing the Regulatory Burden: the way forward*, Inaugural Public Lecture, Monash Centre for Regulatory Studies, University Law Chambers, Melbourne, 17 May 2006, p. 12

¹²Productivity Commission, *Regulation and its Review 2004-05*, Annual Report Series, Productivity Commission Canberra, 2005, p.15.

¹³Issues Paper, p. 6.

Conclusion

The BCA welcomes the opportunity to comment in relation to the Issues Paper and in general welcomes the concept of benchmarking Government performance and costs to business of the Australian regulatory system.

There are some important systemic requirements of the regulatory system that must be efficient and adequate if the cost burden to business of regulation is to be reduced. The BCA has emphasised these requirements in its Action Plan as well as its Scorecard, and the BCA believes much could be gained from benchmarking those requirements and providing continued scrutiny of Government performance against those indicators.

The BCA looks forward to continuing to provide input into the benchmarking process and looks forward to the next stage of the Productivity Commission's review.

If you have any further questions or require any additional information, please contact me or Leanne Edwards, Senior Policy Analyst on (03) 8664 2614.

Yours sincerely

Steven Münchenberg

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