S U B M I S S I O N

TO THE

PRODUCTIVITY COMMISSION

STUDY OF

PERFORMANCE BENCHMARKING OF AUSTRALIAN

BUSINESS REGULATION

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EXECUTIVE SUMMARY

NARGA welcomes this first step in the examination and benchmarking of the regulatory burden borne by business. In this submission we have highlighted the fact that regulatory measures are often not well designed and targeted and therefore impose costs greater than needed to produce the sought after public benefit.

When there are requirements for the development of government policy and legislation at both the federal and state levels designed to ensure optimal regulatory outcomes and a balance between community (including business) costs and benefits, we show that these are not implemented with sufficient rigour to provide the needed level of control over the regulatory development processes. Further, we suggest that legislation is often passed in a form that allows it to bypass rigorous assessment.

We have detailed some of the mechanisms used overseas to ensure a higher quality of input into the regulatory process and recommend that these be adopted here.

We go on to show the need for such measures by detailing the abuses currently taking place in the process of development of legislation.

NARGA still has a number of concerns regarding current legislation and current regulatory trends which we will continue to promote. However, we believe that the processes involved in the development of policy and legislation need to be fixed as a primary means of ensuring that the costs of the regulatory burden on business and the community can be optimised.

WHO WE ARE

The National Association of Retail Grocers of Australia (NARGA) is the peak national body representing the independent retail grocery sector in Australia. It is composed of and related to the following organisations:

- Retail Traders and Shopkeepers Association of NSW
- The Master Grocers Association of Victoria
- Queensland Retail Traders and Shopkeepers Association
- WA Independent Grocers Association
- Tasmanian Independent Retailers
- IGA Retail Network
- State Retailers Association of SA

Together these represent more than 5000 small to medium sized businesses employing over 150,000 people

Retailers are at the end of a complex product supply chain and provide the interface between manufacturers and producers and the general public.

They are significantly impacted by government regulation that targets any of the sectors impacting on the more than 25,000 product lines they help to distribute.

INTRODUCTION

Australia has a multitude of regulation making bodies, parliaments at the federal and state levels, regulatory agencies and local governments, each of which have the power to increase our regulatory burden.

For every regulatory instrument promulgated there is an intended community benefit and an inherent community cost. These costs are either borne directly by the community – e.g. through direct charges or taxes levied to cover the cost of implementing the regulation – or indirectly through the community's purchase of goods from businesses that have been impacted.

In our submission to the Regulation Taskforce[1] in November 2005 we make the point that the regulatory burden falls disproportionately on small business who, because of their size and limited resources, are less able to keep up with an ever changing regulatory environment and to fund the cost of compliance with an increasing regulatory burden.

Whilst Australia's processes for the development of policy and legislation is notionally controlled by requirements imposed by law or intergovernmental agreements that specify that the costs and benefits of proposed legislation, and regulatory alternatives, need to be assessed before going down the regulatory path, we find that these requirements are either not being met or in other ways being circumvented. In some cases legislation proceeds in spite of the fact that costs substantially exceed the community benefit.

In many cases the regulatory burden imposed by legislation on business is simply a result of the fact that politicians or bureaucrats do not understand how business operates or how legislation can have a cost impact on business, particularly on small business.

The result is that our regulatory system imposes significantly greater costs on business and on society than it needs to in order to yield the required level of public benefit.

What we will seek to do in this submission is to outline some of the problems with the current approach being taken to the development of legislation and other regulatory mechanisms, and how these matters can be addressed via a benchmarking mechanism.

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[1] Reducing the Regulatory Burden on Business, Submission to the Regulation Task Force, NARGA, November 2005

OVERSEAS EXAMPLES OF THE MANAGEMENT OF REGULATORY PROCESSES

The Commission's issues paper lists a number of existing international studies of regulatory burdens on business, including models from the World Bank, the Dutch government's International Standard Cost Model.

The paper also refers to the EC 'Better Regulation Agenda' and the UK Cabinet Office Better regulation Executive.

We want to bring to the Commission's notice another initiative of the Dutch government, the establishment of an independent agency that assesses new regulatory proposals and regulations – ATAL – the Dutch Advisory Board on Administrative Burdens.

Regulators wanting to introduce new legislation or amend legislation are required to have it assessed by ATAL and need to negotiate optimum outcomes with ATAL.

ATAL has produced so called 'zero base measurements' of all policy areas and conducted systematic ex post assessments of legislation.

This has resulted in each ministry developing detailed regulation reduction plans based on ATAL's zero based measures. Plans have been presented to parliament to reduce the regulatory burden by a net 43%. In addition, regulatory burden caps and individual reduction targets have been set for each ministry.

NARGA is supportive of an ATAL style approach, as it addresses the regulatory proliferation problem at its source.

The USA has taken a different tack. In December 2002, in an amendment attached to other legislation it passed the Data Quality Act (DQA). The Act is not a stand-alone piece of legislation, but a few key lines of text in another act that requires government departments and agencies to ensure that they have guidelines in place to maximise "the quality, objectivity, utility and integrity of information that it disseminates; establish administrative mechanisms to allow affected persons to seek and obtain correction…(and) report periodically to OMB (Office of Management and Budget) the number and nature of complaints received…."[2]

As most legislative initiatives are based on some type of information, the DQA has ensured that in any future regulatory action the data used has

[2] Treasury and General Government Appropriations Act for Fiscal Year 2001, Section 515(a)

to be of the highest quality and based on 'sound science', and has introduced an appeal mechanism that was not available to aggrieved parties before.

Under the complaints procedure a number of objections and challenges to rulings have been lodged, including challenges to dietary intake recommendations, bans on wood treatment chemicals, restrictions on forestry operations and standards for clothes driers.

Where previously regulatory agencies were free to regulate on the basis of their view of the data, the DQA allows that data to be challenged.

This mechanism addresses one of the major concerns NARGA has in relation to the policy and regulatory development process in Australia – that of the poor quality of regulatory impact assessments and of the data used to support these.

The USA also has a healthy network of 'think tanks' and public policy institutes that analyse and comment on policy and legislation. The Centre for Regulatory Effectiveness (CRE) focuses solely on improving the standard of regulation and regulatory reform, whilst organisations such as the Reason Public Policy Institute take a broad approach to public policy analysis. This type of independent analysis and discourse, capable of a positive influence on regulators, is not well developed in Australia, which means that our regulators tend not to be subjected to much public scrutiny.

The overseas experience suggests that benchmarking of the type initiated by the ATAL in Netherlands is a worthwhile exercise, but the a more immediate benefit would result from initiatives such as the USA DQA which immediately increases the accountability of politicians and bureaucrats framing new legislation and reviewing existing laws.

The need for such a measure is demonstrated in the next section.

AUSTRALIA'S POLICY AND REGULATORY DEVELOPMENT FRAMEWORK

In theory Australia has a rigorous approach to the development of policy and legislation. These are controlled by legislation at the federal and state levels, by intergovernmental agreements and guidelines. Examples of these mechanisms include COAG agreements and guidelines, Competition Policy legislation and, in the case of environmental law making, the NEPC Act which incorporates the Intergovernmental Agreement on the Environment.

In addition there are a number of ministerial councils that attempt to coordinate legislative measures nationally to try to minimise differences in legislation between the states in areas key to the national economy and public good.

In theory these mechanisms require all regulatory measures to undergo a regulatory impact assessment process and legislation to undergo review on a regular basis.

However the rational processes promoted by these mechanisms are undermined by a number of factors including the following:

- The development of legislation in response to a political knee – jerk reaction to an issue
- The development of legislation in response to 'public opinion' or 'public perception' however measured or defined.
- Legislation that gives ministers unfettered power to make key decisions – planning law in some states is an example
- The use (or abuse) of non- regulatory mechanisms such negotiated outcomes between industry groups and government entities, or 'voluntary' agreements
- The development of framework legislation or legislation that gives a head of power to regulate, but which cannot be effectively assessed in terms of costs and benefits
- The use of such legislation as a threat behind the development of 'voluntary' agreements

The process of regulation development is further complicated by bureaucrats who:

- Promote their own agenda, or that of an interest group or ideology
- Exceed their rule making powers beyond that implied under the legislation
- Act in other ways beyond the power granted to them by the legislation under their control

- Use the processes of negotiation with industry sectors to impose unreasonable demands
- Introduce other parties into these processes to increase the demands made on industry or the requirements under the proposed legislation. The current NICNAS legislation is an example.
- Demand the provision of unnecessary data
- Are not prepared to take into account legitimate industry concerns or input

New regulatory initiatives are often the result of the following:

- The copying of overseas initiatives (EU/Europe, Canada)
- The adoption of input from the OECD or a UN agency
- The copying of legislative initiatives from other jurisdictions – often with an 'improvement' (e.g. higher performance target)

- without an assessment of whether such initiatives are appropriate to the local situation, address a local issue or represent the optimum approach to addressing that issue.

When it comes to the process of regulatory impact assessment, in many cases it is obvious that attention has been paid to the detail of the steps that have to be undertaken to complete the process (a 'tick the boxes' approach) rather than to the quality of the input and subsequent assessment.

The Regulatory Impact Statement (RIS) can also be used to support a particular regulatory initiative by the simple mechanism of excluding from the assessment any alternative approach that would show up the proposed initiative in an unfavourable light.

Mechanisms that can frustrate the RIS process include:

- Poor definition of the underlying problem or issue to be addressed
- Failure to determine the true significance of the issue (i.e. decide whether or not intervention is truly warranted)
- A less than complete assessment of the available data
- A less than complete review of the available options (including non-regulatory options)
- Misrepresentation of the available data
- Invention of data
- Denial of access to critical data when discussion issues with stakeholders
- Failure to properly assess the relevance of data (i.e. give it a 'reality check')
- Giving an unwarranted weighting to 'public opinion' factors
- Exaggeration of the benefit side of the regulatory equation

- Limiting or skewing the consultation process to include a predominance of supportive comments
- Not identifying comments from parties with a vested interest
- Use of consultants who will come up with the 'right' answer
- Use of unqualified consultants, who will come up with a less than complete report – but allow the RIS box to be 'ticked'

Another weakness of the RIS approach is that, in spite of continued references to the need for 'whole of government' decision making processes, the RIS is prepared by the same department (often the same officers) proposing the regulatory measure being assessed.

It is possible that the officers involved in these processes may not understand their significance or be suitably qualified. If that is the case, an education program should be instigated.

NARGA can supply the Commission with examples of each of the above mentioned problems with the regulatory process, but in the first instance the Commission may wish to review the submissions we have made to the current Productivity Inquiry into Waste Management and Resource Efficiency.

The points made above suggest the need for an independent review agency such as ATAL in Netherlands – or at the very least the involvement of a ranger of departments in an RIS process - and the adoption at all levels of government a data quality requirement similar to that imposed by the US DQA.

More importantly, these abuses of process survive in the system because of the absence of a simple appeal mechanism for affected parties. The US DQA model provides an implied appeal process as the underlying data used to generate a measure can be challenged. However, it is our view that a more direct and more broadly based appeal mechanism needs to be made available – one that allows current regulatory abuses and failures to be addressed more directly.

CURRENT CONCERNS

NARGA continues to be concerned about the following:

- A trade practices framework that does not adequately protect small business
- The high cost to business of managing the GST legislation
- The impact of payroll tax on business costs
- The expansion of OH&S regulatory requirements beyond those that yield a direct safety benefit (see note A below)
- The increasing costs of WorkCover insurance
- The cost impact of 'Country of Origin' labelling requirements
- The costs associated with the proliferation of health, hygiene and food safety requirements
- The costs associated with a trend towards the use of common foodstuffs as a dosing mechanism for dietary supplementing of the general community (see note B below)
- Costs associated with changes in legislation covering the sale of tobacco (see note C below)
- Costs associated with the implementation of environmentally based industry agreements (see note D below)
- The increasing costs associated with the provision of data to government
- The tendency to use business as a means of imposing extra taxes on the community – prevalent in Extended Producer Responsibility schemes. Such mechanisms can also be used to bypass constitutional constraints on state taxes.
- The costs associated with the frequent changes in legislative requirements, in the absence of an effective change tracking and advisory mechanism

Many of these burdens impact disproportionately on small business.

Notes:

A. Employer concern has increased with the passage in some states of legislation that makes employers personally liable to a charge of industrial homicide following the death of an employee.
B. ANZFA has proposed the addition of folate to bread *at the bakery/retail level* as a means of overcoming low levels of folate intake by some pregnant women – even though a large proportion of these women do not eat bread and, in any case, a more effective means of dosing with folate would be at the milling or master batching stage.

C. Continual changes to tobacco display requirements impose costs, including those associated with what is effectively the commandeering of valuable retail and retail display space.
D. Costs to business associated with government plastic bag initiatives have been well documented.

CONCLUSIONS

- Australia's processes for the development of policy and legislation are notionally controlled by legislative requirements and intergovernmental agreements. However, these have not provided the community with a guarantee that government policies and the legislation developed from these have delivered optimal benefit.

- The regulatory burden on business is increasing and is often disproportionate to the public benefit because politicians and bureaucrats do not understand business and how it is impacted.

- The costs imposed by legislation fall disproportionately on small business.

- There are a number of overseas examples of regulatory benchmarking exercises and of other mechanisms used to improve the efficiency and cost-effectiveness of regulation. Most notable in the latter category is the Dutch agency – ATAL – and the US Data Quality Act.

- Australia's policy and regulatory development processes exhibit a number of flaws that result in a less than rigorous approach being taken to both of these tasks.

- It is our view that the absence of a quality control mechanism (such as ATAL), data quality requirement and appeal mechanism allows policy and legislation to be developed without full accountability, the result being a sub-optimal outcome.

- We have listed a range of deficiencies in the current process that need to be addressed. These have resulted in increased regulatory burdens for business, without a corresponding increase in public benefit.

- NARGA will continue to support the type of regulatory reform that reduces the regulatory burdens on business and improves the regulatory environment for small business. The current benchmarking exercise is just one step in that process.