Improving Australia's Regulatory System

Business Council of Australia

About this publication

The Business Council of Australia brings together the CEOs of Australia's largest companies to promote economic growth for the benefit of the nation.

This paper, *Improving Australia's Regulatory System*, sets out recommendations and priority actions aimed at creating a more efficient regulatory system in Australia.

Contents

EXECUTIVE SUMMARY

Major findings and recommendations

- This paper addresses the key actions that need to be taken to realise a more efficient regulatory system in Australia. It builds on the Business Council of Australia's Standards for Rule Making, released last year, which outlined the BCA's expectations of the characteristics of a high-performing regulatory system.
- Australia's regulatory system may be relatively well evolved and sophisticated on some measures, but this does not mean that it delivers efficient regulatory outcomes at all times. Australia has well-established regulatory institutions and mechanisms such as the Regulation Impact Statement (RIS), but they are not being used to their full potential in creating an efficient regulatory system.
- More and more, governments are resorting to new regulation to solve problems, often without a detailed understanding of what the problem is, or with false confidence that regulation is the best means of addressing the problem.
- Australia also has a large existing stock of regulation, much of which is inefficient and remains largely untackled despite attempts at reform. It is also continuing to grow. At last count Australia had well over half a million pages of regulation and the federal government over the last decade has introduced around 6,000 pages of new legislation on average each year.
- Just as governments are increasingly resorting to new regulation, their compliance with due process has been lacklustre. This is most acute for the biggest regulations impacting our whole economy at the Commonwealth level – fewer than half of which in a number of recent years were subject to Regulation Impact Statements before their introduction.
- This increasing build-up of new regulation has been accompanied by rapid growth in the resources of many regulators, with some major Commonwealth regulators growing faster than the budget and the economy over the last decade. Despite increasing resources and influence, the public accountability framework for regulators remains largely unchanged.

Priority actions

In tackling these challenges, we are cognisant of the importance of not spreading efforts on regulatory reform too thinly, and would prefer to see the Commonwealth Government take up a tightly focused regulatory reform agenda and implement it rigorously so that the full benefits of reform are experienced on the ground by business.

For this reason, we believe there are four actions that should be implemented as a matter of priority:

1. **Make the preparation of Regulation Impact Statements a mandatory legislative requirement for regulations.**
   - This should cover significant regulations. Exemptions from this requirement should be limited to issues of national security and emergency, and be strictly enforced by the Office of Best Practice Regulation (OBPR) and ministers.
   - If the Regulation Impact Statement process is to work, then all ministers must be fully committed to properly understanding and testing with stakeholders the nature and quantity of regulatory impacts before making decisions.
2. **Implement a new performance and accountability code for all major regulators in omnibus legislation. Such legislation should include provision for:**
   - The establishment of an Inspector-General of Regulation to provide additional oversight of regulators, including undertaking biennial performance audits of major regulators and responding to systemic issues identified by the public and the business community. Such a body could be established within the Productivity Commission with a clear mandate to take active steps to improve regulator performance and recommend the streamlining of

regulation where it is impeding the efficiency of regulators and placing unnecessary costs on regulated parties.

- A balanced performance reporting framework around regulator performance should assess not only the enforcement and compliance activities of regulators but the extent to which these are undertaken efficiently.
- Regulators to prepare annual 'Statements of Accountability' that outline the basis for measuring the success of the regulator, in agreement with the portfolio minister and the Inspector-General of Regulation.
- Regulators to establish public targets on streamlining their processes to reduce regulatory burden each year.
- Regulators to document, regularly update and adhere to a risk-based approach to compliance and enforcement activities.

3. Require all new regulations that will result in a significant increase in regulatory burden, to have an equivalent offsetting red tape reduction within the same portfolio.

- It may take some time for governments to establish both a meaningful and workable offsetting regime. Therefore, less sophisticated interim measures such as 'one in, one out' within the same portfolio may have to be employed to ameliorate the bias towards increasing the stock of regulation.

4. Introduce productivity payments from the Commonwealth to the states in order to encourage regulatory improvement and efficiency.

- Payments should target and reward state-led regulatory reform in areas of significance to the national economy and involving multiple levels of government regulators. This should not impact the budget position in the short term, given that payments should be linked to outcomes rather than outputs.

Other recommendations

The BCA is also making a number of other recommendations for governments to adopt in improving the efficiency of the regulatory system.

Stopping the flow of poor-quality regulation

5. The Commonwealth Government should publish a government risk policy that sets out clearly the criteria and approach it will take in determining if and how it will intervene to manage particular risks faced by the community.

Performance and accountability of regulators

6. The Commonwealth Government should publish consolidated information on the resources of its regulators on an annual basis, including how they are funded.
7. The Auditor-General, in updating the Australian National Audit Office's (ANAO's) *Guide to Administering Regulation*, should include guidance on the appropriate role of regulators in relation to policy and regulation making.
   - It should outline how regulations, procedures and guidance should be developed and monitored to ensure that it does not encroach on policymaking that is rightfully the role of the executive arm of government.
8. The Office of Parliamentary Counsel, in collaboration with the Department of Prime Minister and Cabinet, should issue guidance to policymakers and legislative drafters. This guidance should have regard to the appropriate constraints that should be placed on the regulation-making role of regulators when drafting such roles into legislation.
9. The Commonwealth Government should extend the Office of Parliamentary Counsel's 'Complexity Flag System' to cover existing legislation in addition to legislation being drafted.

- This would allow regulated parties, courts and regulators to identify and report existing areas of legislation that are complex and uncertain and that are driving unnecessary resort to courts and other formal mechanisms. Interim and longer-term actions to resolve these complexities could then be devised.

Reducing the stock of poor regulation

10. Extend the Productivity Commission's annual benchmarking and regulatory burden review programs by establishing rolling audits of the cumulative regulatory burden in each industry sector at least every five years.
11. Undertake a stocktake of – and implement, as appropriate – all of the 155 recommendations from the Productivity Commission's annual reviews of regulatory burden that were undertaken from 2007 to 2011.
12. Regularly refresh and streamline the regulatory stock by better targeting existing review and sunsetting requirements:
    12.1 Extend sunsetting requirements to primary legislation where it has a significant impact and it is practicable to subject it to a full remaking every 10 years.
    12.2 All primary legislation and legislative instruments that have highly significant or uncertain impacts on business and the community should be subject to statutory review every five years.
13. In introducing productivity payments to the states in order to encourage regulatory improvement, the first round of competitive funding bids should target reforms to planning and zoning, environmental assessment and approval, and retail sector regulation.
14. The Commonwealth Government should commission a study to quantify the cumulative compliance burden of corporate governance regulation in Australia.
    - This would provide policymakers with a better understanding of the existing regulatory burden from corporate governance regulation before introducing new requirements. It would also provide a strong basis for targeting areas of regulation for streamlining.
15. The Commonwealth Government should pursue a number of immediate changes to the Fair Work Act that aim to foster greater flexibility and innovation and constrain business costs. These changes would include:
    - reducing the range of matters that can be bargained over
    - providing access to employer-only greenfield agreements
    - enhancing the capacity to agree flexibility arrangements with employees including through individual flexibility arrangements
    - limiting access to protected industrial action where there has been unreasonable or capricious use of such action
    - make unlawful clauses which exclude the engagement of contractors or labour hire companies
    - modify the "better off overall test" to provide for a broadening of matters that may be taken into account in the application of the test.

Context

One of the key underpinnings of any country's competitive success internationally is the efficiency of its regulatory system. Having a well-targeted regulatory system can help markets operate more efficiently and help businesses to compete more effectively. Poorly designed and administered regulation holds back our performance.

Regulation has an important role to play in upholding critical rights and providing legitimate safeguards, but to be effective regulation must be properly thought-through and applied sensibly.

There is no escaping the fact that efforts by business to comply with unnecessary or poorly designed and administered regulation simply displace productive wealth-generating activities like innovation and investment in new technology. Poor regulation also frustrates attempts by companies to lower costs and reorganise their operations in response to competitive pressures and structural transition that is occurring through the economy. Regulatory delays can be a major deterrent to investment and add to the costs of major projects.

Until recently it has been easy to paper over the economic impact of the burden of regulation, with world demand for our natural resources seeing an incredible boost to our terms of trade and national incomes.

However, with the terms of trade down over the past year, pressures on the competitiveness of Australian goods, and a continuing stagnation of multifactor productivity growth, some of our advantages are fading.

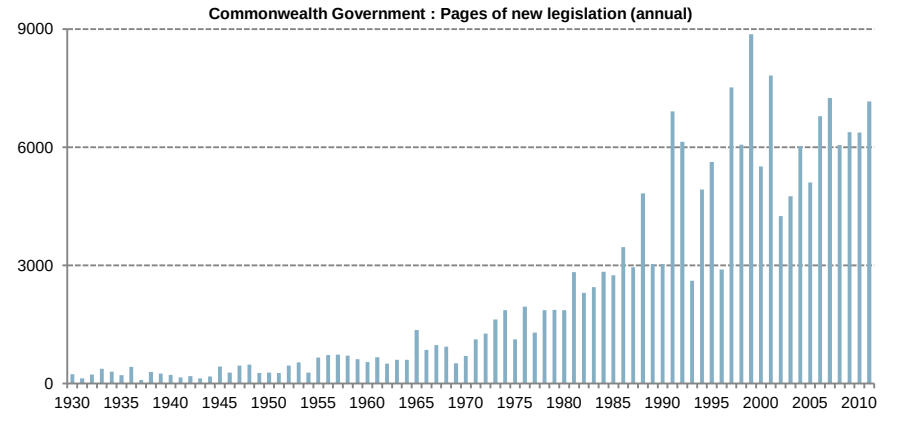
With the Australian economy facing new competitive pressures, innovation in particular will be the key to creating new forms of wealth. Whether we are able to respond to these pressures will depend on the capacity of business to change and adapt quickly to make the most of new opportunities. Today, however, this flexibility is curtailed by the amount of red tape that must be negotiated and which causes delays and increases the costs of developing and implementing innovative new ideas.

There has been some nominal progress in regulatory reform in recent years , including the Seamless National Economy reforms. However, such reforms have failed to make much headway on the ground. The impacts of such reforms have been overwhelmed by the substantial stock of existing regulatory burden still to be tackled, the increasing burden of new regulation and the increasing intervention of many of Australia's regulators.

This has left Australia less competitive than it should be – ranking 128th out of 148 nations on the World Economic Forum's Global Competitiveness Index for regulatory burden.

Australia's regulatory environment: key facts

- **Australia has a substantial stock of regulation**: At last count, Australia had well over half a million pages of regulation and 24,000 different licences across the country.
- **We are introducing more and more new regulations each year**: In 2011, the federal government introduced just over 7,000 new pages of legislation. Over the last decade the federal parliament has introduced over 6,000 pages of new rules each year.



Source: Deloitte Access Economics, *Reforming Australia's Regulatory Culture*, unpublished, 2011.

- **Increasing regulation is placing pressure on Australia's competitiveness**: By some measures, Australia's competitiveness on regulatory burden is slipping. The World Economic Forum's Global Competitiveness Index ranks Australia 128th out of 148 nations for regulatory burden, down 32 places from 2012.
- **Significant new regulations are often not subject to due process**: The Productivity Commission has found that in a number of recent years, less than 40 per cent of federal government regulations with highly significant impacts were subject to regulatory impact analysis.
- **Governments often do not have a proper appreciation of the costs of new regulation**: A Productivity Commission assessment of sample Regulation Impact Statements found that only a third provided quantification of costs for at least some of the impacts of the new regulation.
- **There is a worrying lack of belief in good regulatory processes in government**: In 2012, the Borthwick–Milliner review found that ministers and agencies viewed the process of regulatory scrutiny with "evident hostility", seeing it as "unnecessary red tape on government".
- **The resources of key regulators are also growing rapidly**: The BCA has found that expenditure by key economic regulators like the ACCC and ASIC has grown faster than the overall budget and economy in the last decade. Employment at these regulators has also outpaced employment growth in the wider economy over the last decade.
- **Significant overlap and duplication of regulation across levels of government imposes even further costs**: It has been estimated that recent reforms targeting 17 areas of overlap and duplication will yield business cost reductions of $4 billion a year.

Five principles of a high-performing regulatory system

This paper builds on the BCA's Standards for Rule Making released in late 2012, which outlined the BCA's expectations of the characteristics of a high-performing regulatory system. These expectations are based on five principles that:

1. The problem to be solved by regulation is well understood.

2. New regulation is subject to cost–benefit analysis.

3. Regulation achieves its objectives at least cost.

4. Regulators perform efficiently.

5. Regulation is constantly reviewed.

There has been a substantial body of work undertaken on regulation-making processes and areas of entrenched red tape that exists at all levels of government. For example, the Productivity Commission's annual programs of benchmarking and reviewing regulatory burdens have produced 155 recommendations since 2007.[1]

The approach of this paper is not to revisit this past work, but to highlight priority areas of our regulatory system that are underperforming and in need of reform – either because they have not been a strong focus of the existing body of work or have not been taken up by governments.

The paper aims to provide constructive suggestions on how federal and state governments can more closely align regulatory systems with best practice regulatory benchmarks. It does this by:

- Outlining actions that can be taken to stop the flow of poor regulation.
- Analysing current gaps in the performance and accountability framework that governs regulators and outlining actions to address these gaps.
- Outlining actions to reduce the current stock of poor regulation, by identifying mechanisms and priority areas of overly burdensome regulation and identifying those in need of reform, along with actions to address these areas.

Stopping the flow of poor regulation

There has been substantive work completed on regulatory gate-keeping processes recently, including the Borthwick–Milliner review of the regulatory impact analysis (RIA) process, the Productivity Commission's benchmarking of RIA processes, and the BCA's Standards for Rule Making.

We believe that the reform proposals to be implemented are broadly the right ones, but will ultimately require a major rethink in the way in which ministers and agencies commit to and engage with the process of regulatory scrutiny. There are further actions that must be taken to extend and complement these recent reviews.

Disciplined application of Regulation Impact Statements

As the OECD has long suggested, the application of regulatory impact analysis can fluctuate with political commitment and pose serious problems for the quality of regulation. This is particularly the case where the requirement to undertake Regulation Impact Statements is only an administrative requirement, as it is for the Commonwealth Government.

The Borthwick–Milliner review considered the case for giving greater legal status to the requirement to undertake a Regulation Impact Statement. It was of the view that mandating it in this way was not the preferred approach and should be considered as a last resort if the current arrangements cannot be made to work more effectively and consistently.

1. BCA calculations based on information obtained from the Productivity Commission website.

Since 2008–09 there have been 135 instances of non-compliance or exemption that have occurred in the Regulation Impact Statement process.[2] Over 70 per cent of these relate to non-compliance.[3] Improving the culture of compliance with Regulation Impact Statements requires a step change at the Commonwealth level through a commitment that will endure changes of government and changes at the senior levels of the public service.

We therefore recommend that the government institute a legislative mandate requiring the preparation of Regulation Impact Statements with only limited exceptions. The requirement should apply to any regulation with a significant impact on business or the community, with the exception of regulation to address a genuine emergency situation, critical national security issue or urgent community safety issue which cannot be addressed in absence of immediate regulation.

The case for legislation would appear far stronger than many other areas that are being legislated and it appears that it would likely pass a cost–benefit test and stand up to the scrutiny of regulatory impact analysis itself. For example, a recent study undertaken in Victoria showed that for every dollar invested in regulatory impact analysis, there was a return of $28 to $56 in avoided regulatory costs to the community.[4] Legislated requirements already apply to subordinate legislation in many of Australia's eastern states, and the number of OECD countries legislating the requirement has tripled in recent years.[5]

Priority Action 1: Make the preparation of Regulation Impact Statements a mandatory legislative requirement for regulations.

Risk-based approach to regulation

Regulatory proposals often enter the system even if regulation is not the most effective mechanism to manage the risk. This can result in an over-reaction to the perceived problem at hand and place a major cost on the community without addressing the underlying risk in the most sustainable manner.

This comes about because the community and policymakers rarely define acceptable risk, nor analyse who is best placed to reduce risk or assess the costs of reducing risk, before proposing regulation as the solution.

It would be useful to develop a central policy on risk management for the government to apply to all its policymaking. Such a policy would acknowledge that eliminating all risk is simply unattainable and undesirable and instead establish that policy interventions to manage risk should be targeted on those "most at risk". It would also commit government to using regulation or other government interventions only in instances where these mechanisms are the optimum solution for managing risk.

A government risk policy should set up more realistic expectations of the role of government and regulation in managing risk. It would provide a powerful anchor for government in making decisions around whether or not to regulate and communicating these to the public consistently.

2. OBPR, *Australian Government Regulation Impact Statement Status – by Agency 2012–13*, p.1. Total number includes all instances of non-compliance at decision-making and transparency stage as well as exemptions.
3. ibid.
4. S. Abusah & C. Pingiaro, 2011, *Cost-effectiveness of Regulatory Impact Assessment in Victoria – Staff Working Paper*, 2011, p. 1.
5. OECD, Regulatory Management Systems' Indicators Survey in *Government at a Glance*, 2009, p. 99.

Recommendation 1: The Commonwealth Government should publish a government risk policy that sets out clearly the criteria and approach it will take in determining if and how it will intervene to manage particular risks faced by the community.

Performance and accountability framework for regulators

Disciplined regulation making must be matched by effective administration if the whole regulatory system is to work more efficiently.

Australian Governments have given periodic attention to reforms aimed at strengthening the conduct and governance of regulators, particularly in the years following the Uhrig review and Banks Regulation Taskforce. However, this attention has never been sustained by ongoing reforms to strengthen the performance framework for regulators and place them on a path of continuous improvement.

Poor performance by regulators can have a significant effect on business through creating regulatory uncertainty, causing unnecessary delay to critical business transactions and placing an excessive burden on business through overly aggressive enforcement practices.

The recent growth of regulators

At the same time that there has been limited attention on improving performance and accountability mechanisms, the resources and influence of regulators have grown considerably.

While there is no consolidated information available on the resources of the hundreds of business regulators at the Commonwealth and state levels, BCA analysis of the resources of some major Commonwealth regulators reveals their considerable growth over the last decade.

In some cases, regulators have grown at a rate in excess of Commonwealth expenditure and the economy more broadly, although there has been some moderation in growth in recent years.

Some growth can be explained as the legitimate response to increased risks from events such as the global financial crisis as well as the considerable growth and innovation in financial and other markets. This obviously necessitates increased monitoring and surveillance to maintain orderly and well-functioning markets. There is also a need to ensure that the resources of regulators are targeted and prioritised in a manner that delivers effective and efficient oversight.

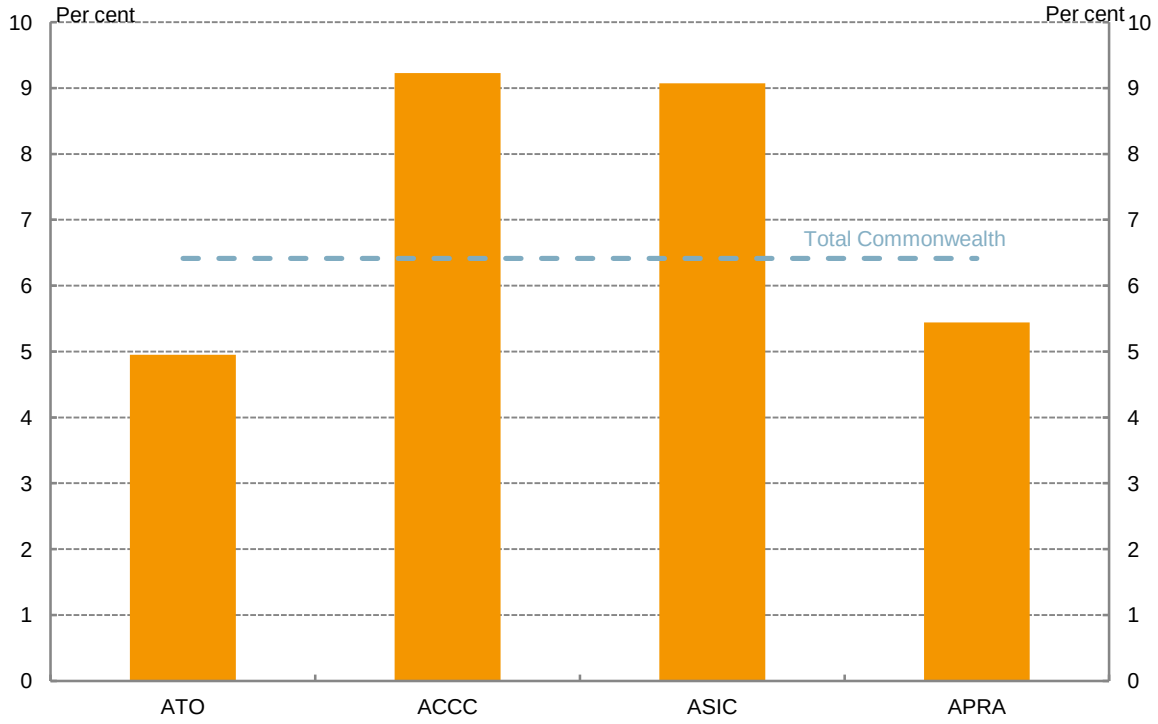
In the case of the ACCC, it is important to note that it has taken on the newly established Australian Energy Regulator (AER) and other new regulatory responsibilities with the introduction of the Australian Consumer Law during this time.[6]

Nonetheless, the BCA remains concerned that such significant increases in regulatory capacity over the past 10 years do not appear to have been accompanied by a strengthening of the performance and accountability framework.

6. It has not been possible based on publicly available information to isolate the growth of the ACCC over this period, excluding the AER. However, calculating growth from a more consistent starting point when the AER was established in 2005–06 still yields expenditure and employment growth rates of a significant magnitude. For example, expenditure grew at an average nominal rate of 11.2 per cent per annum between 2005–06 and 2012–13 and 9.4 per cent per annum between 2006–07 and 2012–13.

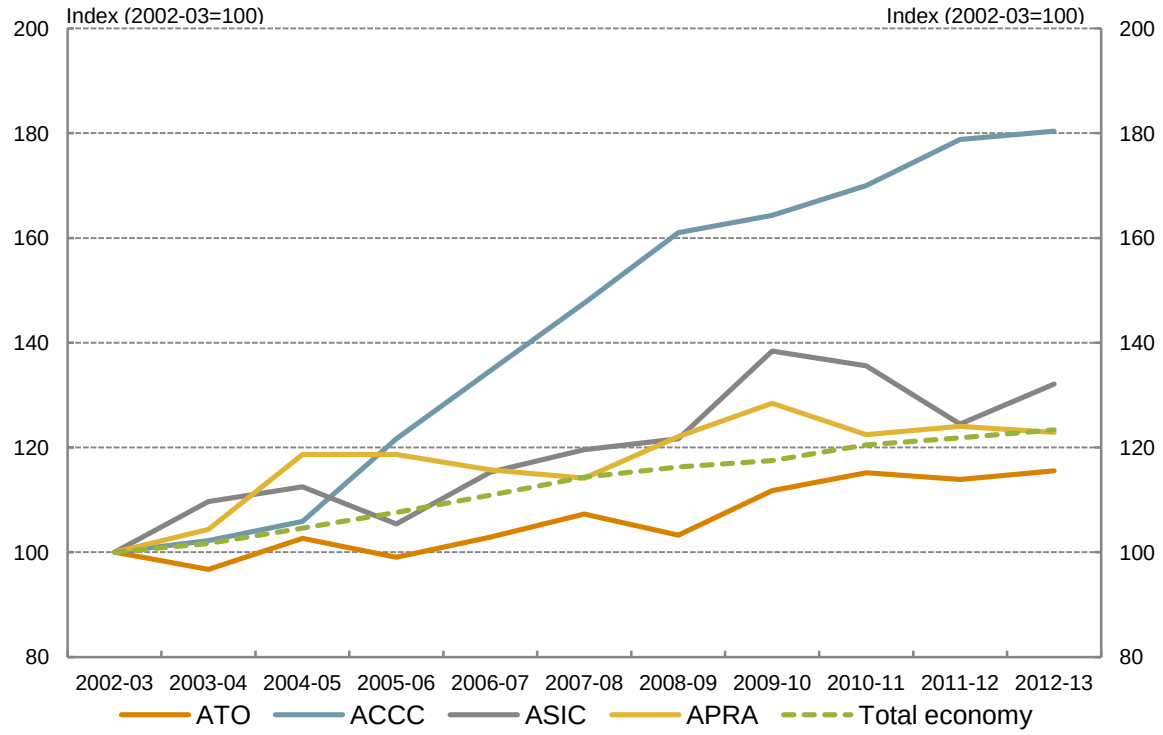
Recommendation 2: The Commonwealth Government should publish consolidated information on the resources of its regulators on an annual basis, including how they are funded.

Average annual expenditure growth 2003 to 2013 (% nominal)



Source: Regulator Annual Reports and Final Budget Outcome 2012–13. ACCC includes AER.

Regulators vs economy: Employment Index (2002–03 = 100)



Source: Regulator Annual reports and ABS cat. no. 6202.0.

Note: ATO, ACCC and APRA data are total employees as at end of financial year, except APRA data for 2010–11, 2011–12 and 2012–13 which exclude casual staff. ASIC staff numbers are full-time equivalent averages over the year. ACCC includes establishment of the AER in 2005–06.

Assessing the current performance and accountability framework

Given the important role that regulators play, the BCA's Standards For Rule Making include eight standards to underpin the objective of regulation being administered by regulators in the most efficient manner possible to facilitate economic progress. These standards are:

1. Regulators are subject to regular and meaningful performance assessment and reporting.

2. The government's expectations of a regulator are transparent, and are clearly within the scope of the regulator's powers.

3. Regulators follow a risk-based approach to enforcement and compliance activities.

4. Regulatory decisions are timely.

5. Regulators are continuously streamlining their processes.

6. There is a clear separation of roles between policymakers and regulators.

7. Regulators adopt a client-focused approach to regulated parties.

8. Regulatory decisions are fair and contestable.

The BCA has undertaken a desktop review of the performance and accountability framework as it relates to these standards for large economic regulators like the ATO, ACCC, APRA and ASIC.

The performance and accountability framework for these regulators were chosen because they are among the largest and most high-profile business regulators in the country, with the most evolved governance frameworks of Australian regulators. To the extent that there are weaknesses in the

framework governing these regulators, then such weaknesses could be expected to be common across the board.

Our review has revealed weaknesses in the current performance and accountability framework for regulators against the eight standards and found that there are some clear areas for improvement (see ‘Assessment of current performance and accountability framework’ below).

The weaknesses outlined here are by no means the sole responsibility of the regulators. Policymakers and the community have a role in influencing and designing legislative and other parameters within which regulators operate and against which their effectiveness is judged.

Assessment of current performance and accountability framework

Regulator standard	Overall assessment	Issues
1. Regulators are subject to regular and meaningful performance assessment and reporting	Needs improvement 	• Measurement is largely driven by variables such as enforcement actions and timely completion of highly transactional activities, without sufficient attention on the broader objective of efficiency and facilitating economic progress. • Regulators are not subject to regular scrutiny by an independent economic and regulatory expert like the Productivity Commission.
2. The government's expectations of a regulator are transparent, and are clearly within the scope of the regulator's powers	Best practice mechanisms not being applied 	• The last published statements of expectation from ministers are from 2007. • The lack of annual updates has come at a time when there have been significant events such as the global financial crisis and multiple changes of ministerial and senior personnel overseeing the regulators. • In New Zealand this process is legislated
3. Regulators follow a risk-based approach to enforcement and compliance activities	Needs improvement 	• It is difficult to confirm how some regulators (e.g. ACCC and ASIC) apply a risk-based approach to compliance and enforcement. • These regulators appear to have clearly articulated priorities, but the risk-based process for arriving at these priorities and how enforcement and compliance processes are aligned to risk need to be more transparent.
4. Regulatory decisions are timely	Needs improvement 	• Timelines are rarely legislated, and even if they are considerable flexibility remains. • Limited interrogation of performance for important decisions for regulatory parties that fall beyond standard timeframes. • Limited incentives to resolve matters quickly once deadlines have been exceeded, such as deemed approval provisions.
5. Regulators are continuously streamlining their processes	Absence of supporting initiatives 	• Notable lack of formal commitments from regulators to streamline their processes to reduce the burden of regulation. • Previous stakeholder surveys appear to suggest that they are not feeling the effects of reduced red tape through streamlined processes on the ground and that reducing the cost of regulation is not a high priority for regulators.
6. Clear separation of roles between policymakers and regulators	Needs improvement 	• There is a tendency to delegate the detail of regulation making to regulators, but checks and balances do not appear to have been strengthened. • There is also evidence of some regulators seeking to drive the policy debate rather than accepting the law as they find it.
7. Regulators adopt a client-focused approach to regulated parties	Needs improvement 	• Despite a range of formal mechanisms supporting a client-focused approach, the flawed starting point for client service charters are transactional targets first rather than understanding the business and circumstances of regulated parties. • The regulated community remains reluctant to raise complaints about a regulator for fear of regulatory retribution. This situation has not changed in a decade (since the last government review).
8. Regulatory decisions are fair and contestable	Needs improvement 	• Increasing resort to appeals and judicial avenues driven in part by increasing complexity of legislation, due to not getting regulatory design right. • Regulators also need to live up to their 'model litigant' aspirations.

Strengthening the performance and accountability framework

The BCA would like to see the performance and accountability framework for regulators fundamentally strengthened to more closely align with best practice.

As the Banks taskforce suggested "... the actions and attitudes of regulators, like those of business, are shaped by the incentives they face as well as by the requirements placed on them."[7] Therefore, the best way to drive greater accountability is to have major regulators operating within a new legislative framework that provides incentives to balance rigorous enforcement with efficiency and facilitating economic progress while continually improving their processes. This requires:

- A balanced performance framework that focuses not just on transactional enforcement and compliance activities by regulators, but also on the objective of facilitating economic progress, by balancing risk with the costs imposed.
- Greater oversight of regulators so that regulators have appropriate independence from government, but are not above scrutiny or accountability to portfolio ministers and a dedicated independent body.
- Regulators clearly documenting and consistently implementing a risk-based approach to enforcement and compliance activities.
- Appropriate checks and balances on the regulation-making and policy powers of regulators to manage the risk that regulators, in effect, become policymakers and seek to bestow increased powers upon themselves.
- A general requirement that regulators establish public targets on streamlining their processes and associated regulatory burden each year. This could be measured in terms of an annual reduction in average time spent by each regulated party on administrative compliance activities and administrative delays experienced.
- A requirement that client service charters more strongly focus on the need for regulators to understand the business of regulated parties better and outline their standards and approach for most effectively engaging and interacting with regulated parties.

Oversight of regulators under a new legislative framework

Independent oversight will be critical in facilitating and measuring adherence to a new legislative performance and accountability framework for regulators. This role could be undertaken by an Inspector-General of Regulation.

Clearly the creation of a new body to oversee regulators would need to avoid the pitfalls of duplication and the creation of another layer of bureaucracy that fails to deliver improvements to government regulation. Such a body would need to have a very clear and differentiated mandate from existing bodies.

Its role would need to involve critically reviewing the performance of regulators, with the objective of driving better regulator performance and also driving streamlined regulation where poor regulator performance and unnecessary costs are the direct result of poorly designed regulation.

This could have the useful benefit of more complete oversight of the entire regulatory system – with a body that has oversight of the regulatory system at the regulator interface where the practical impact of regulation begins to materialise. An independent and empowered body would have an incentive to drive change and suggest improvements in the design of regulations and practice of regulators based on practical and objective experience.

7. Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, January 2006, p. 159.

The proposal to improve the performance and accountability of regulators in this way is not new. Almost a decade ago the Uhrig review recommended that the Commonwealth establish an Inspector-General of Regulation with a view to providing the community with a mechanism to ensure that regulators are being held accountable, and as a matter of good governance.

Investing resources in such a body is justified on the basis of the considerable cost of poorly designed and administered regulation on the community. Eliminating just a fraction of this cost each year may derive a net benefit. In addition, active oversight may ultimately increase the efficiency and effectiveness of regulatory bodies.

- Various options and issues around the proposal for an Inspector-General of Regulation are canvassed in Part 2 of this paper.

Priority Action 2: Implement a new performance and accountability code for all major regulators in omnibus legislation. The code would be supported by provisions for:

- The establishment of an Inspector-General of Regulation to provide additional oversight of regulators, including undertaking biennial performance audits of major regulators and responding to systemic issues identified by regulated parties. Such a body could be established within the Productivity Commission with a clear mandate to take active steps to improve regulator performance and recommend the streamlining of regulation where it is impeding the efficiency of regulators and placing unnecessary costs on regulated parties.
- A balanced performance reporting framework that assesses not only enforcement and compliance activities but the extent to which these are undertaken efficiently.
- Regulators to prepare annual 'Statements of Accountability' that outline the basis for measuring the success of the regulator in agreement with the portfolio minister and the Inspector-General of Regulation.
- Regulators to establish public targets on streamlining their processes to reduce regulatory burden each year.
- Regulators to document, regularly update and adhere to a risk-based approach to compliance and enforcement activities.

Undertake a number of procedural quick wins

There are a number of opportunities for the government to extend current processes and procedures to ensure that regulators' efforts are well targeted.

Firstly, while there is little evidence of systemic failures in the separation of policymaking from regulators, there is room for more clearly defining the role of regulators in this area, particularly as technical regulation and guidance is increasingly issued by regulators.

Secondly, there is a need to ensure that there are transparent and effective mechanisms for regulated parties, courts and regulators to identify and report areas of regulation that are complex and uncertain and that lead to expensive and potentially unnecessary resort to formal dispute mechanisms. These costs occur at the back-end of the regulatory process due to poor design at the front-end or regulation failing to keep pace with economic and technological developments.

A number of procedural 'quick wins' are outlined below that should be pursued as a matter of priority and implemented within the next 12 months.

Recommendation 3: The Auditor-General, in updating the Australian National Audit Office's *Guide to Administering Regulation*, should include guidance on the appropriate role of regulators in relation to policymaking. It should also outline how regulations, procedures and guidance should be developed and monitored to ensure that it does not encroach on policymaking that is rightfully the role of the executive arm of government.

Recommendation 4: The Office of Parliamentary Counsel, in collaboration with the Department of Prime Minister and Cabinet, should issue guidance to policymakers and legislative drafters. This guidance should have regard to appropriate constraints that should be placed on the regulation-making role of regulators when drafting such roles into legislation.

Recommendation 5: The Commonwealth Government should extend the Office of Parliamentary Counsel's 'Complexity Flag System' to cover existing legislation in addition to new legislation being drafted. This would allow regulated parties, courts and regulators to identify and report existing areas of legislation that are complex and uncertain and that are driving unnecessary resort to courts and formal mechanisms. Interim and longer-term actions to resolve these complexities could then be devised.

Reducing the stock of poor regulation

As noted previously, regulators and the regulated community must also contend with a considerable stock of poorly designed and complex regulation.

Poor regulatory process, layering new requirements upon existing regulation without asking fundamental questions first, and failing to regularly review and streamline the stock of regulation have left a considerable challenge for governments to unwind the red tape burden.

As the Productivity Commission suggests, improving the efficiency, effectiveness and appropriateness of the regulatory stock requires continuous improvement through routine management and programmed reviews. It also requires prioritisation of individual areas of regulation where reform is likely to have high payoffs.

Proper management of the stock of regulation is absolutely critical for Australia's regulatory system to take the next step towards what the OECD refers to as "an embedded program of continuous improvement in regulation".[8]

On this basis, the BCA considers that there are two key fronts upon which efforts to streamline the existing stock of regulation should proceed:

- Embedding systematic processes to address the stock of regulation.
- Streamlining critical areas of regulatory burden.

8. OECD, *Australia: Towards a Seamless National Economy*, OECD, 2010, p. 118.

Systematic processes to address the stock of regulation

Systematic processes and mechanisms to deal with the stock of regulation should complement better regulation-making processes and act as an additional stop-gap in the regulatory system. Over time, these processes, if successful, should also reduce the need for costly wholesale stocktakes of regulation and large-scale regulatory reform processes.

Evening out the current bias towards new regulation

Currently, incentives in the regulatory system are largely in favour of introducing new regulation, rather than removing ineffective or overly burdensome regulation. In order to provide an incentive and regularly prompt government to reassess ineffective or overly burdensome regulation, agencies and ministers should be required to make every attempt to identify an offsetting reduction in existing red tape each time new regulation is introduced.

These sorts of mechanisms have been assessed by some regulatory experts as being a relatively crude mechanism for managing the regulatory stock. Notwithstanding these assessments, we believe that such a mechanism needs to be implemented as a stop-gap measure, with the case for its ongoing use re-evaluated after five years. It may take some time for governments to establish both a meaningful and workable offsetting regime. Therefore, less sophisticated interim measures such as 'one in, one out' within the same portfolio may have to be employed to even out the bias towards increasing the stock of regulation.

Priority Action 3: Require all new regulations that will result in a significant increase in regulatory burden to have an equivalent offsetting red tape reduction within the same portfolio.

Implement existing findings on the stock of regulation

Given the strong body of existing work from the Productivity Commission that has reviewed key areas of the regulatory stock, every effort should be made to utilise these reports. While in many cases the government has published responses to these reviews, in most cases such responses lack implementation plans and it would appear that many recommendations have not been implemented. The BCA would like to see these reviews taken seriously and their recommendations implemented thoroughly with reform progress monitored, unless there are particularly strong public interest grounds for not implementing a recommendation.

Recommendation 6: Australian Governments should seek to implement all of the 155 recommendations from the Productivity Commission's annual reviews of regulatory burden that were undertaken from 2007 to 2011.

Assess and address cumulative regulatory burdens

Many agencies introduce regulation without a complete understanding of the cumulative burden of regulation on the sector or part of the economy that they are regulating. As a result, there is often a narrow focus on the marginal effect of new rules without proper appreciation of duplication, overlap and the full costs of regulation that are being imposed on a sector.

In future, the Productivity Commission's annual benchmarking and regulatory burden review programs could be consolidated and structured to provide rolling audits of the cumulative regulatory burden in each industry sector at least every five years.

Recommendation 7: Reinvigorate the Productivity Commission's annual benchmarking and regulatory burden review programs by establishing rolling audits of the cumulative regulatory burden in each industry sector at least every five years.

Sunsetting and statutory reviews

The Legislative Instruments Act currently provides for the automatic sunsetting of a range of delegated legislative instruments every 10 years. Analysis conducted by the Office of Best Practice Regulation has also identified that legislation and regulation introduced since 2007 has generally been subject to statutory review provisions.[9]

These sorts of review mechanisms not only provide a prompt for regular refreshing of the regulatory stock but also a strong incentive to get regulatory design right in the first instance. They also put in place arrangements for monitoring the effectiveness of the regulation to justify its future reinstatement or continuation.

The BCA acknowledges that it is problematic to extend automatic sunset provisions to apply to all primary legislation due to uncertainty and because of the considerable parliamentary and legislative drafting workload that would be involved. However, this has not stopped jurisdictions such as the United Kingdom in implementing robust and well-targeted sunsetting mechanisms for primary legislation. For this reason, we believe that sunsetting arrangements should be extended to primary legislation that has a significant impact where it is practicable to do so. Part 3 of this paper highlights in further detail how this might be sensibly done.

Similarly, requiring statutory reviews would serve to reinforce and institutionalise current practice rather than creating additional burdens.

Recommendation 8: Regularly refresh and streamline the regulatory stock by better targeting existing review and sunsetting requirements:

- Extend sunsetting requirements to primary legislation where it has a significant impact and it is practicable to subject it to a full remaking every 10 years.
- All primary legislation and legislative instruments that have highly significant or uncertain impacts on business and the community should be subject to statutory review every five years.

Streamlining critical areas of regulatory burden

In identifying areas of priority for regulatory reform, the BCA does not consider that providing a long list of detailed regulatory irritants is the most constructive approach to progressing meaningful reform.

An efficient regulatory system focused on continual improvement and frequent dialogue with regulated parties should address these issues as a matter of course. Nonetheless, for illustrative purposes this paper does identify various examples of cumbersome regulatory provisions.

9. Commonwealth Government, *Preliminary Government Response to the Independent Review of the Australian Government's Regulatory Impact Analysis Process*, 11 October 2012, p. 10.

In doing so, the BCA has placed greater focus on identifying broad areas of regulation often spanning multiple regulatory instruments and jurisdictions that are systemically inefficient. We have also identified areas of regulation that are strategically important – that is, areas of regulation critical to future economic growth and meeting looming challenges.

On this basis, the paper identifies five areas of inefficient regulation that are in urgent need of reform. A number of recommended actions are also detailed.

Planning and zoning regulation

Taking full advantage of the substantial potential of our cities as they grow involves managing growth and mitigating the impacts of congestion. Our major cities support 80 per cent of GDP and they are key drivers of productivity.[10] This means that our planning and zoning regulation will need to become considerably more agile to promote both economic growth and liveability.

Despite the Productivity Commission finding that planning and zoning represents "one of the most complex regulatory regimes operating in Australia", COAG progress on this matter has been slow and state reform plans have been relatively unambitious with the possible exception of New South Wales.

The BCA has previously made a number of recommendations in this regard. These include the adoption of risk-based regulation by all jurisdictions, streamlining of environmental approvals by the states, improved best practice arrangements for assessment of major project approvals, and removing concurrent powers of other state government agencies. In addition, the BCA has recommended regional planning to identify major land use and associated infrastructure requirements, and the reservation of areas for designated activity as part of strategic planning.

Retail sector regulation

The retail sector is one of Australia's largest employers, accounting for over 11 per cent of Australia's workforce.[11]

It is confronting an increasingly challenging environment, including the recent strength of the Australian dollar, online competition and the newly cautious consumer. Given the considerable structural challenges before the retail sector, it is critical that there are not undue regulatory impediments to the sector responding and adapting flexibly to these challenges.

The retail sector operates across a range of burdensome and complex regulatory regimes including planning and zoning, retail tenancy regulation, transport restrictions, retail trading hours, workplace relations and a range of inconsistent state-based regulation. The Commonwealth Government's response to a comprehensive inquiry into the sector by the Productivity Commission noted or agreed in principle to many of the inquiry's recommendations without mapping out an implementation plan or seeking the explicit cooperation of the states to progress reform.

Environmental assessment and approvals

While resources investment is showing clear signs of easing, it is still expected to remain a critical part of our economy in the period ahead, representing 6 per cent of GDP in 2013–14.[12] This only serves to reinforce the importance of ensuring that any unnecessary or overly burdensome regulatory requirements on investment are addressed.

Regulatory impediments put at risk the cost-effectiveness and competitiveness of Australia's investment pipeline; there are almost $900 billion of committed and prospective investment opportunities in large-scale projects, mostly in resources and economic infrastructure.[13]

10. Australian Government, *Our Cities – Building a Productive, Sustainable and Liveable Future*, 2010, p. 18.
11. ABS, *Labour Force, Australia, Detailed, Quarterly*, cat. no. 6291.0.55.003, May 2013.
12. ABS, *Private New Capital Expenditure and Expected Expenditure*, *Australia*, cat. no. 5625.0, March 2013.
13. Deloitte Access Economics, *Investment Monitor*, September 2013.

The costs and delays associated with environmental impact assessment and approval are significant. An Australian National University study estimated direct costs to all industries of up to $820 million over the life of the Environment Protection and Biodiversity Conservation (EPBC) Act.[14] Further, the referrals process under the EPBC Act is resource and cost-intensive, with referrals ranging from $30,000 to $100,000.[15]

The BCA has previously cited the example of one BCA member company which completed an environmental assessment process that took more than two years, involved more than 4,000 meetings, briefings and presentations across interest groups, and resulted in a 12,000-page report. When approved, more than 1,500 conditions – 1,200 from the state and 300 from the Commonwealth – were imposed. These conditions have a further 8,000 sub-conditions attached to them. In total, the company invested more than $25 million in the environmental impact assessment.

Given the experience of the operators and of government departments in respectively conducting and assessing these kinds of activities, there is scope for removing the current double handing within and between governments, without compromising environmental objectives. One way of achieving this would be for the Commonwealth to negotiate bilateral agreements under the EPBC Act to accredit state government environmental approvals.

Workplace relations regulation

Improvements in productivity and competitiveness are likely to flow from working smarter, not harder, by being innovative in product and service design by adopting new technologies, work processes and supply chains – changing what businesses do and how they do it.

Industrial relations regulations have a rightful role to play in addressing legitimate community concerns about workers' basic rights. But equally they have to preserve the ability of businesses to engage effectively with their employees to change work arrangements in response to commercial imperatives and achieve improvements in competitiveness that are critical to the sustainability of companies and their workforces.

The Productivity Commission has outlined how flexible workplace arrangements enable firms to adapt more readily to changing circumstances, for example to meet changes in demand by:

- Adjusting the workforce size either through engaging or dismissing employees, the short-term use of casuals or contracting out of functions traditionally performed in-house.
- Varying the scheduling and intensity of use of the existing workforce – strategies include flexible rostering for overtime and shift work and scheduling rostered-days-off and annual leave to coincide with low demand.
- Moving labour between functional areas – this strategy requires that workers have both the skills and willingness to move between tasks and requires the removal or reduction of any barriers that may exist.
- Linking remuneration and therefore unit labour costs to product demand and output rather than hours worked – approaches include sales commissions or incentives and bonus or profit sharing schemes.

One way to enable firms to adapt in this way is to create the institutional, policy and regulatory environment in which businesses can respond effectively to competitive pressures. This should involve regulation that supports direct engagement between employers and employees at the enterprise level, reduces unnecessary uncertainty and risk, removes barriers to job creation,

14. A. Macintosh, 'The Environment Protection and Biodiversity Conservation Act 1999 (Cth): An Evaluation of Its Cost-Effectiveness', *Environmental and Planning Law Journal*, 26, 2009, p. 337; and A. Macintosh, *The EPBC Act Survey Project: Preliminary Data Report*, Australian Centre for Environmental Law, Australian National University, 2009.
15. Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, 2011.

creates incentives for collaboration and minimises industrial conflict, and delivers fair remuneration outcomes that reward effort.

Companies have identified provisions in the current legislative framework which are being used, frequently in combination, to undermine competitiveness, impede productivity and job creation, and add unnecessary delays and costs to doing business.

Corporate governance regulation

Corporate governance is a critical driver of company performance through its effects on entrepreneurialism, innovation, accountability and risk management. The level of corporate governance red tape has increased significantly in recent years as the regulatory framework has shifted from a performance to a conformance-based approach evident in approaches to executive remuneration and gender equity reporting.

For example, in the Australian Institute of Company Directors' most recent survey, company directors estimated red-tape compliance consumes an average of 26 per cent of their total board commitment, with more than half believing that this level of commitment has increased in the last 12 months.[16]

This rise in compliance burden comes despite Australia placing in the top 10 countries internationally for the efficacy of our corporate boards.[17]

How to streamline regulatory burden in these areas

Planning and zoning, retail sector and environmental regulation

Planning and zoning, retail sector regulation and environmental assessment and approvals are all areas that have previously been taken up on COAG's agenda for reform.

At a time when some are questioning the strength of Australia's federation, implementing ambitious reforms in these areas through a degree of collaboration and healthy regulatory competition requires a circuit-breaker that moves beyond the traditional models of COAG regulatory reform.

Productivity payments could encourage more timely and expansive regulatory reform in areas of significance to the national economy like planning, retail sector regulation and environmental approvals.

It would be a 'bottom-up' reform process with states submitting their best proposals for deregulating and lifting productivity in these areas and others through a competitive bid process. The possible benefits of reform proposals would be assessed by the Productivity Commission to inform choices around bid funding. The Productivity Commission could also assess state eligibility for payments, should the reforms meet their objectives.

The experience of National Competition Policy demonstrated that reward payments work in driving major microeconomic reform by the states and territories.

With the Commonwealth continuing to collect over 80 per cent of taxes in the federation,[18] it stands to gain greater fiscal benefits from the economic gains of state reform and it is therefore appropriate that some of these gains are distributed to the states for their efforts through the productivity payments.

16. Ipsos–Australian Institute of Company Directors, *Director Sentiment Index: Research Findings*, April 2013, p. 17.
17. World Economic Forum, *The Global Competitiveness Report 2013–14*, 2013.
18. ABS, *Taxation Revenue in Australia 2011–12*, cat. no. 5506.0, April 2013.

Priority Action 4: Introduce productivity payments from the Commonwealth to the states in order to encourage regulatory improvement and efficiency. Payments should target state-led regulatory reform in areas of significance to the national economy and involving multiple levels of government regulators.

Recommendation 9: In introducing productivity payments to the states in order to encourage regulatory improvement and efficiency in areas of significance to the national economy, the Commonwealth Government should target the first round of competitive funding bids on state reforms to planning and zoning, environmental assessment and approval and retail sector regulation.

Corporate governance regulation

While the government should consider reform of the corporate governance regulatory environment with a view to streamlining requirements, there is also a case for hastening slowly so as not to increase uncertainty for firms.

A useful first step would be for the government to commission a study to quantify the cumulative compliance burden of corporate governance regulation in Australia. This would provide policymakers with a better understanding of the existing regulatory burden from corporate governance regulation before introducing new requirements. It would also provide a strong basis for targeting areas of regulation for streamlining.

Recommendation 10: The government should commission a study to quantify the cumulative compliance burden of corporate governance regulation in Australia.

Workplace relations

It is inevitable that the workplace regulatory framework will need to change substantially to cope with an increasingly competitive global landscape, rapid technological developments, changing consumer demand and an ageing workforce. In the longer term this requires a fundamental rethink of the regulatory framework that will be most conducive to productive workplaces, in light of these trends.

In the shorter term, the government should pursue a number of immediate changes to the Fair Work Act that aim to foster greater flexibility and innovation and constrain business costs.

Recommendation 11: The government should make immediate changes to the Fair Work Act to foster greater flexibility and innovation and constrain business costs. Amendments should include:

- reducing the range of matters that can be bargained over
- providing access to employer-only greenfield agreements
- enhancing the capacity to agree flexibility arrangements with employees including through individual flexibility arrangements
- reducing the scope of the adverse actions provisions
- limiting access to protected industrial action where there has been unreasonable or capricious use of such action
- limiting union entry rights to employer premises
- making unlawful clauses which exclude the engagement of contractors or labour hire companies
- modifying the “better off overall test” to provide for a broadening of matters that may be taken into account in the application of the test
- modifying provisions relating to majority support determinations
- amending the transfer of business arrangements to include a sunset clause after 12 months.

Progressing the regulatory reform agenda

The actions outlined in this paper are intended to address gaps in the regulation-making process; place greater checks and balances on our regulators; and streamline critical areas of existing regulation. If implemented, they should help set Australia on a course that sets the regulatory balance right and in doing so improve our competitiveness.

Like the substantial body of regulatory reviews and reform proposals that have come before them, these actions will ultimately be ineffective and quickly forgotten if ministers and public servants are not genuinely committed to them. A ‘hearts and minds’ commitment is needed.

Dedicated adherence to good process, rigorous policymaking practices and continuous improvement must become ‘business as usual’ for Australia’s regulatory system. Reform alone cannot achieve this; there must be a major cultural shift towards using regulation and its institutions in a more disciplined and discerning manner. This will increase its effectiveness and at the same time lower the unnecessary burden that poorly targeted regulation places on our competitiveness.

INTRODUCTION

The importance of efficient regulation

Well-designed regulation can help to clarify the rules of the game, which increases certainty and reduces barriers to investment and expansion for business.

However, poorly designed and administered regulation imposes significant costs on the community in terms of less consumer choice, higher prices, lower wages and reduced job creation.

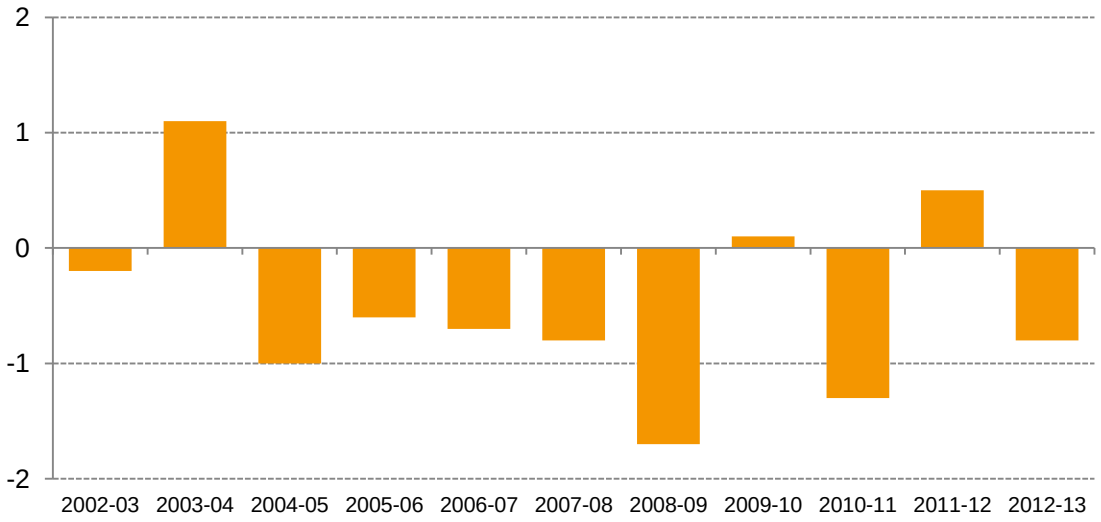
Commentary on the impact of regulation often focuses solely on the direct effects of regulation, which are easier to quantify – for example the direct costs to business of complying with a regulation and the financial cost to government of administering the regulation.

While these costs are important, regulatory proposals often neglect to take into account the indirect effects of regulation. These are far more difficult to measure, but nevertheless have a significant effect on the long-term productivity and competitiveness of business, as evident from the example in Exhibit 1.

These indirect effects can stifle the incentives of firms to innovate, invest and employ new workers. They also limit the flexibility of businesses to quickly adapt to changing circumstances and structural pressures.

Where this occurs, regulation ultimately impedes productivity at a time when Australia can least afford it: multifactor productivity growth has been negative in seven of the last 10 years (see Figure 1). While there are a range of structural explanations for Australia's recent performance in this regard, it remains the case that excessive and poorly designed regulation will only further impede productivity growth prospects.

Figure 1: Australia's recent multifactor productivity performance (annual % growth)



Source: ABS, *Australian System of National Accounts,* cat. no. 5204.0, 2012–13. Note: Multifactor productivity is measured on a quality-adjusted hours-worked basis.

We must undertake a critical analysis of the indirect effects on productivity of each piece of new and existing regulation, as well as the performance of the bodies responsible for enforcing them.

This is particularly critical at a time when long-term multifactor productivity growth is largely stagnant, and when commodity prices are no longer trending upwards to keep incomes growing.

Exhibit 1: Regulation and innovation in practice

Cochlear is an Australian-based exporter of medical devices. A key regulatory issue it faces is that a number of countries require a device to be approved in its country of origin before it can be approved for use in the export destination country.

In one recent case, approval for an important product innovation took 14 months longer in Australia than in Europe. That is, after obtaining regulatory approval in Europe, it took an additional 14 months before Cochlear could even start to apply for product registrations in other key markets such as India. As a result, Cochlear was several years behind its European competitor in getting its product into a number of key markets.

This delay is a reflection of the legislative framework under which the relevant regulator (the Therapeutic Goods Administration) operates and the allocation of resources.

Dr C. Roberts (CEO of Cochlear Limited), 2012 JJC Bradfield Institute Lecture, Sydney, 23 October 2012.

Current state of regulation in Australia

The BCA acknowledges that there has been progress in regulatory reform in recent years in Australia – most notably the progression of some of the Seamless National Economy reforms.

However, these efforts have been overshadowed by the substantial stock of existing regulation that remains to be tackled, as well as the ever-increasing burden of new regulation.

In this context, the BCA considers that there are five key issues that governments must take into account when approaching regulatory reform:

- Australia has a substantial stock of existing regulation, a significant proportion of which is likely to be unnecessary, excessive or poorly designed.
  - *At last count, Australia had well over half a million pages of regulation and 24,000 different licences across the country for a range of activities.*[19]
- The stock of regulation in Australia is growing at a rapid rate.
  - *The Commonwealth Parliament has on average introduced 6,000 pages of new legislation each year over the last decade.*[20]
- This regulatory burden is increasing the pressure on Australia's competitiveness, at a time when the economy is experiencing significant structural changes. This will result in substantial costs if scarce resources are unnecessarily tied up in responding to over-regulation.
  - *Australia currently ranks 128th out of 148 nations on the World Economic Forum's Global Competitiveness Index for regulatory burden, down another 32 places from 2012.*[21]
- Over the past decade there have been numerous detailed analyses of regulatory systems in Australia, together with recommendations on what needs to be done to make them more effective and efficient, thereby reducing the burden on business.
  - *Since 2007 the Productivity Commission's annual programs of benchmarking and reviewing regulation alone have produced over 4,500 pages of analysis and 155 recommendations, while attracting 600 submissions from the community.*[22]

19. Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Quantity and Quality and Cost of Business Registration*, December 2008 and Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, January 2006. Note that the number of pages of regulation does not include local government.
20. Deloitte Access Economics, 'Reforming Australia's Regulatory Culture' *(Unpublished)*, 2011.
21. World Economic Forum, *The Global Competitiveness Report 2012–13*, 2012.

- Yet, the challenge remains in putting good principles and processes into practice and successfully implementing sensible reforms to existing regulation.
  - *The Productivity Commission recently concluded that a "degree of cynicism is pervading the regulatory landscape in response to the perceived lack of integrity in regulation making."* [23]

This paper should be considered as the latest in a series of contributions to the public policy debate on how to restore the integrity of our regulatory system and work towards more efficient regulation.

Purpose and structure of the paper

Last year the BCA released its Standards for Rule Making, outlining the BCA's expectations of a high-performing regulatory system capable of delivering regulatory outcomes in the public interest.

The objective of the standards is to improve the accountability of governments and regulators for achieving these outcomes, by measuring their performance against the standards.

This paper represents the first step in this process. In it, we undertake a high-level assessment of key aspects of the regulatory system, with a focus on the performance and accountability frameworks that govern Commonwealth regulators. In doing this we have focused on four key Commonwealth agencies responsible for economic regulation: the ATO, ASIC, the ACCC and APRA.

The paper also provides a number of recommendations on the specific steps that governments can take to ensure that regulation is better targeted, regulators are held more accountable and governments begin to tackle areas of the existing stock of regulation that are most important to future economic growth.

The paper is structured in the following parts:

- **Part 1: Stopping the flow of poor regulation**

This part reiterates the BCA's expectations of a good regulatory system, and outlines how regulatory gatekeeping could be improved to stop poor-quality regulation being made in the first place.

- **Part 2: Performance and accountability framework for regulators**

The first section of Part 2 describes recent trends in the growth of regulators and the implications of this for our regulatory system. It then examines how the performance and accountability framework for major Commonwealth Government regulators aligns with best practice.

- **Part 3: Reducing the stock of poor regulation**

This part outlines actions to reduce the current stock of poor regulation by identifying ongoing stock management mechanisms and priority areas of overly burdensome regulation that are in need of reform, along with actions to address these areas.

22. BCA calculations based on information obtained from the Productivity Commission website. This excludes one-off inquiries.
23. Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, August 2012, p. 281.

PART 1: STOPPING THE FLOW OF POOR REGULATION

A good regulatory system will respond to emerging risks in a rational, predictable, efficient and effective manner. It will allocate the risks to those in society who are best able to manage them.

The BCA has developed the Standards for Rule Making to make clear how a regulatory system must operate to produce outcomes in the public interest.

In a good regulatory system, regulations will be enforced in a way that assures the community that their objectives are being achieved in the most efficient and low-cost manner.

We believe that, by their very nature, the standards should have bipartisan support.

The standards apply to the entire regulatory system, from the initial identification of a problem or risk that may need a regulatory response, to determining the responsibility and accountability of regulators, and through to the review and ultimate repeal of regulations.

There are 30 standards that are organised around five central principles, which are based on commonsense propositions.

The BCA recognises that some of these principles are not new, and a number already feature in governments' guidance materials for regulation making. Yet, performance against them often falls short and sooner or later these shortcomings manifest themselves in poor regulation, with a permanent cost to the economy.

The principles of a high-performing regulatory system

1. The problem to be solved is well understood

   Before government seeks to regulate, it must understand the problem or policy priority in depth and test the case for regulation, along with the risks and consequences of not regulating a particular activity.

2. New regulation is subject to cost–benefit analysis

   The costs of new regulation are thoroughly assessed and tested through a cost–benefit analysis, including an explicit understanding of the costs to both business and the wider community.

3. Regulation achieves its objectives at least cost

   Regulation is carefully targeted to achieve its stated objectives and minimise the cost impacts on the community including business.

4. Regulators perform efficiently

   Regulation is administered in the most efficient manner possible to facilitate economic progress.

5. Regulation is constantly reviewed

   Existing regulations are continuously reviewed from first principles through new regulatory impact assessments, with regulations amended or removed if it cannot be established that they are appropriately targeted to an ongoing risk or problem.

The following exhibit summarises the 30 standards.

Exhibit 2: BCA Standards for Rule Making

1. Principle 1

- Before government seeks to regulate, it must understand the problem or policy priority in depth and test the case for regulation, along with the risks and consequences of not regulating a particular activity.

Standards

1.1 Government conducts an early up-front risk assessment.

1.2 Government has clear objectives for considering regulation.

1.3 All options that are proportionate to the problem at hand are considered, including non-regulatory options.

1.4 Preliminary analysis and the need for regulation is tested with stakeholders.

2. **Principle 2**

- The costs of new regulation are thoroughly assessed and tested with the community through cost–benefit analysis, which includes an explicit understanding of the costs to the community including business.

Standards

2.1 Cost–benefit analysis that includes a detailed understanding of the costs to business is the centrepiece of regulatory impact assessment processes.

2.2 The depth of assessment is proportionate to the impact of the proposed regulation.

2.3 The benefits of any new regulation are demonstrably assessed to outweigh the costs.

2.4 Impact assessments ensure that proposed regulation does not unnecessarily restrict competition.

2.5 Government and business regulatory treatment is neutral (where applicable).

2.6 Regulatory impact assessments go hand-in-hand with policy development.

2.7 Regulatory impact assessments are subject to independent oversight.

2.8 Regulatory impact assessments are mandatory for significant regulations, with exceptions confined to very limited circumstances.

2.9 Regulatory impact assessments are subject to adequate public consultation.

2.10 Impact assessments have an eye to implementation.

3. **Principle 3**

- Regulation is carefully targeted to achieve its stated objectives and minimise the cost impacts on the community including business.

Standards

3.1 Regulation is generally drafted to be outcome-focused rather than prescriptively defining the inputs to regulatory compliance.

3.2 Regulation is drafted in plain language and actually reflects the policy intent.

3.3 Before drafting new regulation, governments test whether existing regulations or other Australian governments already address the same or related problem.

3.4 Regulatory powers are designed to be proportionate to the problem being managed.

4. **Principle 4**

- Regulation is administered by regulators in the most efficient manner possible to facilitate economic progress.

Standards

4.1 Clear separation of roles between policymakers and regulators.

4.2 Regulators are subject to regular and meaningful performance assessment and reporting.

4.3 The government's expectations of a regulator are transparent and are clearly within the scope of the regulator's powers.

4.4 Regulators adopt a client-focused approach to regulated parties.

4.5 Regulators follow a risk-based approach to enforcement and compliance activities.

4.6 Regulatory decisions are timely.

4.7 Regulatory decisions are fair and contestable.

4.8 Regulators are continuously streamlining their processes.

5. **Principle 5**

- Existing regulation is constantly reviewed from first principles through new regulatory impact assessments, with regulations amended or removed if it cannot be established that they are appropriately targeted to an ongoing risk or problem.

Standards

5.1 Previous estimates of costs and benefits are tested against actual experience shortly after regulation is introduced.

5.2 The ongoing relevance and effectiveness of regulation is regularly tested.

5.3 Regulators collect data that makes it easier to evaluate the performance of regulation over time.

Substantive work has recently been completed on regulatory gate-keeping processes including the Borthwick–Milliner review of the RIA process, the Productivity Commission's benchmarking of RIA processes, and the BCA's Standards for Rule Making.

We believe that the reform proposals to be implemented are the right ones, but will ultimately require a major cultural change in the way in which ministers and agencies commit to and engage with the process of regulatory scrutiny.

In order to facilitate a major cultural change in regulatory design, there is a need to lift compliance with Regulation Impact Statements and also to prevent poorly conceived proposals entering the regulatory system in the first place by applying a risk-based approach to regulation.

Lifting compliance with Regulation Impact Statements

As the OECD has long suggested, the application of regulatory impact analysis can fluctuate with political commitment and pose serious problems for the quality of regulation.[24] This is particularly the case where the requirement to undertake regulatory impact analysis is only an administrative requirement.

24. OECD, *Regulatory Impact Analysis: Best Practice in OECD Countries*, 1997, p. 19.

Since 2008–09 there have been 135 instances of either non-compliance or exemption in the Regulation Impact Statement process, with over 70 per cent of these representing cases of non-compliance.[25]

The Borthwick–Milliner review considered the case for giving greater legal status to the requirement to undertake a regulatory impact analysis. It was of the view that mandating the RIA in this way was not the preferred approach and should be considered as a last resort if the current arrangements cannot be made to work more effectively and consistently. It rightly observed that designing legislation for this purpose would require careful attention to ensure that it was not too general thereby providing too much leeway for agencies, or on the other hand not so specific that it constrains agencies too much.

While the BCA acknowledges the challenges in legislating requirements for regulatory impact analysis to be undertaken, it is worth noting the strong case in favour of legislating for significant regulations to be subject to this analysis as a matter of course. The case would appear far stronger than many other areas that are being regulated and it appears that it would likely pass a cost–benefit test and stand up to the scrutiny of regulatory impact analysis. For example:

- **It is likely to provide a net benefit**. Various studies undertaken in this area demonstrate that the regulatory impact analysis process delivers net benefits. A recent study undertaken in Victoria showed that for every dollar invested in these processes, there was a return of $28 to $56 in avoided regulatory costs to the community.[26]
- **There are already examples of such legislation operating effectively in Australia**. Queensland, New South Wales, Victoria and the ACT all require subordinate legislation to be subjected to a Regulation Impact Statement.
- **There is an increasing trend for legislating RIAs in OECD countries**. Between 1998 and 2008, the number of OECD countries formally requiring RIAs by law almost tripled, from 10 to 29 countries.[27]

Improving the culture of compliance with regulatory impact analysis requirements needs a step change at the Commonwealth level through a commitment that will endure changes of government and changes at the senior levels of the public service.

We therefore recommend that the government institute a legislative mandate for Regulation Impact Statements to be undertaken with only limited exceptions. The requirement should apply to any regulation with a significant impact, with the exception of regulation to address a genuine emergency situation, critical national security issue or urgent community safety issue, which cannot be addressed in the absence of immediate regulation.

When combined with the new two-step Regulation Impact Statement process that is designed to embed regulatory analysis earlier in the policy process, this legislative requirement should facilitate early, consistent, rigorous and consultative regulatory analysis.

Priority Action 1: Make the preparation of Regulation Impact Statements a mandatory legislative requirement for significant regulations.

25. OBPR, *Australian Government Regulation Impact Statement Status by Agency 2012–13*, p. 1.
26. S. Abusah & C. Pingiaro, *Cost-effectiveness of Regulatory Impact Assessment in Victoria – Staff Working Paper*, 2011, p. 1.
27. OECD, Regulatory Management Systems' Indicators Survey in *Government at a Glance*, 2009, p. 99.

A risk-based approach to regulation

We believe that the Standards for Rule Making effectively encapsulate a risk-based approach to regulation, with the identification, measurement and efficient management of risk in a proportionate manner as a key focus from the beginning to the end of the regulatory cycle.

There is significant work to be done within government to develop a coherent risk policy, together with the necessary tools for decision-makers and regulators to implement an effective risk-based approach to policy.

Risk-based regulation can only work if the community is prepared to accept some level of risk. As a first step, this requires the central government to develop a risk policy.

This policy should include the notion of:

- Acceptable risk: what risk can the community live with, are all risks equal, do perceptions of risk matter?
- Risk allocation: who should bear a risk, who is best placed to reduce risk and what are the costs of reducing risk?

Such a policy has the potential "... not only to reduce dramatically the burdens of regulation on society but also to reinforce national qualities of self-reliance, resilience and a spirit of adventure."[28]

This policy should broadly define the level of risk that is acceptable to the community. It should also set out how acceptable risks are allocated among stakeholders and where regulation is appropriate in managing risks.

The purpose of such a risk policy is to firmly anchor the community's expectations of what can and cannot be achieved by the regulatory system. Regulatory options should then be informed by this risk policy, Regulation Impact Statements should quantify and evaluate the impact of an intervention designed to reduce risks, and regulators should use this risk policy to prioritise their work and to allocate resources.

Recommendation 1: The Commonwealth Government should publish a government risk policy that sets out clearly the criteria and approach that it will take in determining if and how it will intervene to manage particular risks faced by the community.

28. UK Better Regulation Commission, *Risk, Responsibility and Regulation – Whose Risk Is It Anyway?*, October 2006, p. 5.

PART 2: PERFORMANCE AND ACCOUNTABILITY FRAMEWORK FOR REGULATORS

Having effective performance and accountability mechanisms for regulators is critically important to the proper functioning of regulatory systems. Regulators operating effectively and efficiently serve to ensure that confidence in public administration and governance is maintained and enhanced.

Consequently, how a regulator performs its role is as important as the regulation itself. As the IMF recently stated, "... essential elements of good supervision need to be given as much attention as the regulatory reforms that are being contemplated."[29]

In spite of this, recent efforts at regulatory reform have had limited focus on the profound impact that regulators have on the efficient operation of our regulatory system.

Part 2 seeks to address this by outlining:

- the impacts of inefficient practices by regulators
- the recent growth in the resources of the Commonwealth Government's regulatory bodies
- how the performance and accountability frameworks governing major regulators compare with best practice.

The desktop review undertaken on the performance and accountability frameworks of regulators focuses on those regulators which are likely to have a significant impact on business transactions in the economy and which, because of their size and profile, might be expected to be subject to relatively better corporate governance and other controls. These regulators are the ATO, ASIC, ACCC and APRA.

The impact of inefficient regulators

The cost of less-than-optimal regulator performance manifests itself in a number of ways, with the most significant impacts for the community coming in the form of unnecessary delays, uncertainty, excessive compliance costs and regulatory spread.

Delays

Unnecessary delays to approvals, decisions and other regulatory processes are a major deterrent to investment and economic growth, with significant costs for the community and government. For example:

- The Productivity Commission has found that expediting the average approval process for oil and gas projects would increase the value of projects by 10 to 20 per cent with billions of dollars of income gains for Australians.[30]
- At a coking coal price of $200 a tonne, a 12-month delay to a 10 million tonne per annum export coking coal mine in Queensland would reduce Queensland Government mining royalty revenue by $170 million.[31]

29. J. Vinals & J. Fiechter , *The Making of Good Supervision: Learning to Say "No"*, IMF, 2010, p. 4.
30. Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*, 2009, p. 197.
31. BCA calculation based on Queensland royalty rate of 7% of value up to $100 million and 10% value above $100 million.

Uncertainty

Consistency and predictability regarding regulatory processes, timing and outcomes are critically important factors that not only influence business decision-making, but also serve to bolster or undermine the credibility of the regulator in executing its responsibilities. As Christine Varney, former Assistant Attorney-General of the United States Department of Justice's Antitrust Division has remarked:

> Regardless of the substantive outcome of a government investigation, it is important that parties involved know that the process used to reach that outcome was fair. The two concerns – substance and process – go hand in hand. Complaints about process lead to concern that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the substantive outcome. Both are important.[32]

Consequently, while it is more difficult to measure, uncertainty over timeframes for decisions, or the approach that a regulator will take in a particular matter, can be a major impediment to innovation, investment and job creation.

Excessive compliance costs

Where the regulator takes an excessive approach to enforcement, compliance and its information- gathering powers the cost to the community of regulation will be higher than anticipated.

These compliance costs can also be exacerbated by a lack of delineation between the roles of regulators, lack of clarity over their powers and objectives, as well as a lack of coordination between regulators. The attitude of the regulator to the industry subject to regulation also has a major impact.

Regulatory spread

While increasing regulation is often driven by legislators in meeting political imperatives, regulatory spread occurs as regulators make a concerted effort to expand their powers to fulfil what they consider to be their rightful objectives.[33]

This form of increased regulatory burden is particularly insidious as it is less easy to quantify and increases incrementally, as highlighted by former Trade Practices Commissioner Warren Pengilley:

> A particular problem in evaluating regulatory spread is to ascertain the true reason for the imposition of regulation in the first place. Regulators are anxious to point out that parliament has bestowed upon them certain powers and that they, the regulators, are but the passive recipients of that power and the instruments through which the parliamentary will is carried out. On the other hand, it is clear that it is frequently the regulator which approaches the relevant minister, often privately, to seek a bestowal of greater regulatory power. Distinguishing the two cases is usually difficult and often impossible by reference to any verifiable material, oral or written.[34]

In addition, the precursor to a regulator gaining additional powers can involve vigorous testing of the limits of existing powers against business through the courts, even where it is expensive and the outcome is highly uncertain.

32. C. Varney, 'Procedural Fairness', Speech to the 13th Annual Competition Conference of the International Bar Association, Fiesole, Italy, 12 September 2009.
33. C. Berg, *The Growth of Australia's Regulatory State*, IPA, 2008.
34. W. Pengilley, 'Competition Regulation in Australia: A Discussion of a Spider Web and its Weaving', *Competition and Consumer Law Journal*, Vol. 8, 2001, p. 13.

Recent growth in the resources of regulators

Just as regulatory reform efforts have had a limited focus on the performance and accountability framework of regulators, regulators in Australia have grown at a relatively rapid rate.

While there is no consolidated information on the resources of Australia's different business regulators at the Commonwealth and state levels, the sample of 10 significant Commonwealth Government regulators outlined in Table 1, demonstrates the robust growth in the resources available to regulators over the last decade. Between 2001–02 and 2011–12, expenditure for these regulators grew by over 75 per cent, while the number of staff employed increased by around 27 per cent.

Table 1: Sample of 10 significant Commonwealth Government Regulators

Regulator	Expenditure ($000)		Total staff	
	2001–02	**2011–12**	**2001–02**	**2011–12**
Australian Customs Service^	706,842	1,135,400	4,891	5,671
Australian Maritime Safety Authority^	71,530	169,400	243	332
Australian Prudential Regulation Authority	59,231	121,119	424	624
Australian Securities and Investments Commission	159,900	384,488	1,284	1,738
Civil Aviation Safety Authority^	106,819	173,498	727	818
Australian Pesticides and Veterinary Medicines Authority^	20,623	30,332	129	181
Australian Taxation Office^	2,028,311	3,444,183	19,318	22,315
Australian Competition and Consumer Commission^	72,185	179,063	540	876
Australian Communications and Media Authority*^	57,357*	112,769	486	618
Australian Fisheries Management Authority^	27,688	38,378	128	205
Total:	**3,310,486**	**5,788,630**	**28,170**	**33,378**

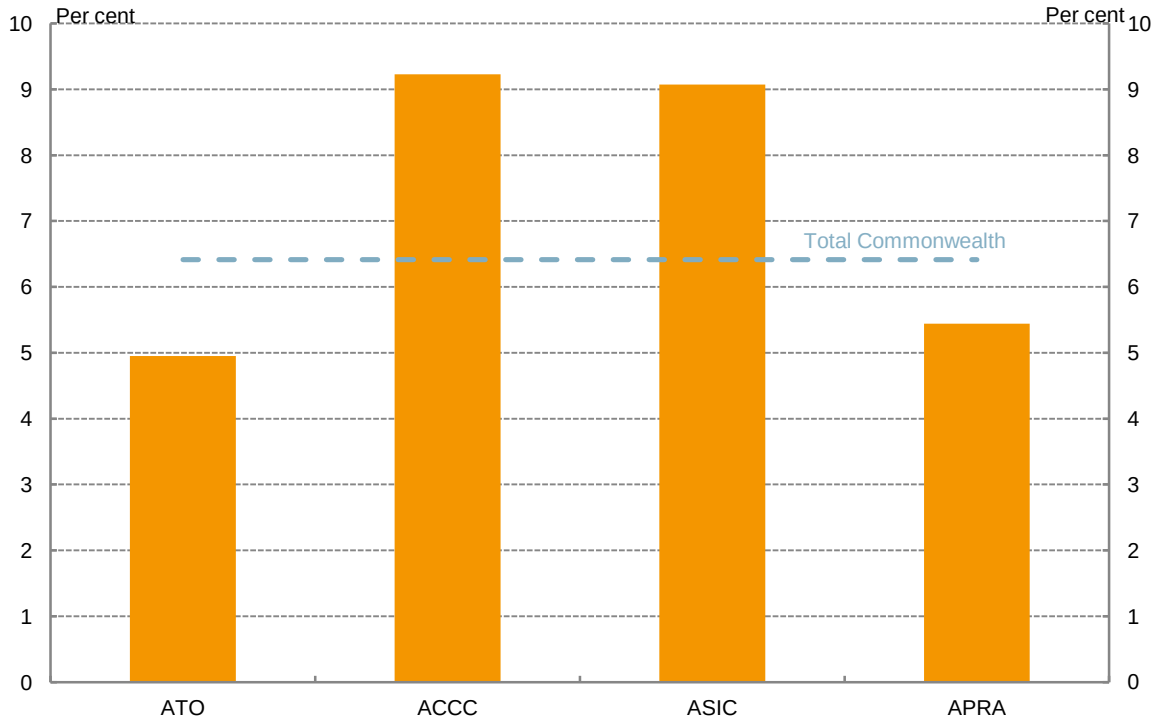
Source: Regulator annual reports. Note: ^Total staff reported based on total employees as at the end of the financial year. For APRA, total employees applies to 2009–10, with FTE excluding casuals reported from 2010–11 onwards. For ASIC, staff numbers are based on an FTE average over the year. *Based on combined expenditure of previously unmerged Australian Communications Authority and Australian Broadcasting Authority).

The current lack of transparency in this area is illustrated by the recent Commonwealth Government initiatives directed at the reform of regulators. These included a commitment to publish a consolidated list of Commonwealth regulators, which currently doesn't exist.

Growth of key regulators

As illustrated in Figure 2, the ACCC and ASIC grew at an average annual rate in excess of the Commonwealth Budget over the last 10 years. This expenditure is funded in some cases by government tax revenues and in others by levies and charges on regulated parties.

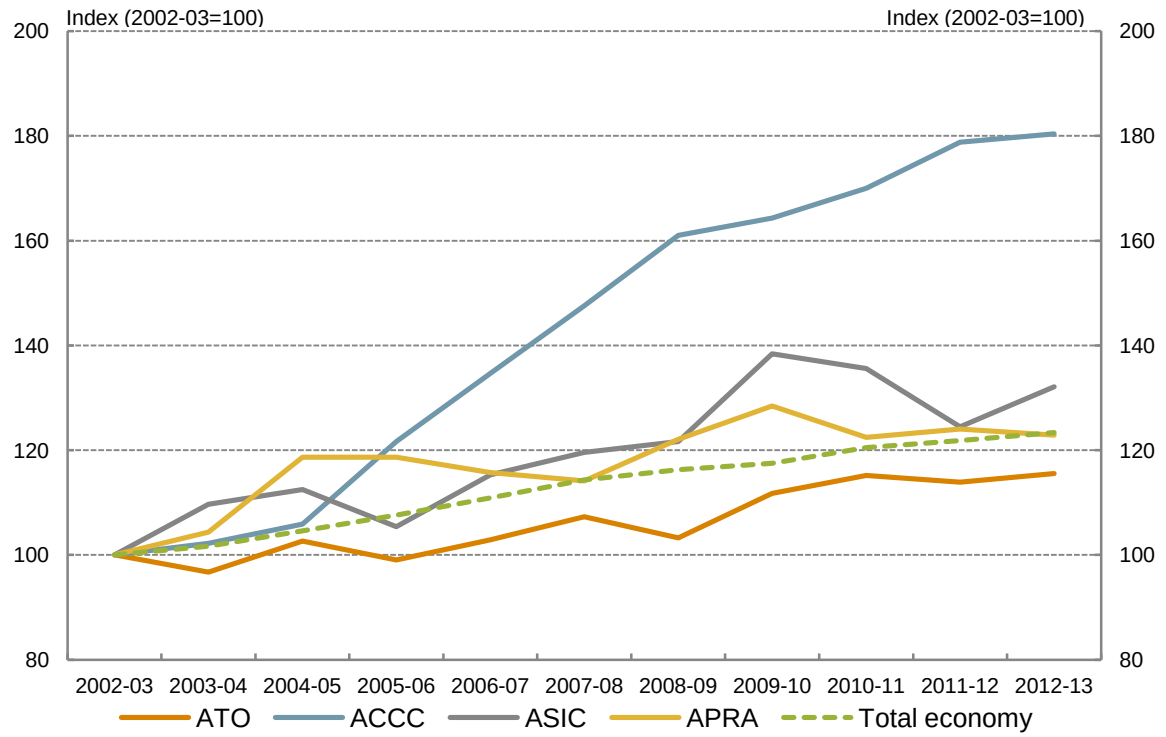
Figure 2: Average annual expenditure growth 2003 to 2013 (% nominal)



Source: Regulator Annual Reports and Final Budget Outcome 2012–13. ACCC includes AER.

Similarly, these regulators experienced substantial growth in staff numbers, with ASIC and the ACCC outstripping the rate of employment growth across the broader economy during the same period, although there has been some moderation in recent years, as illustrated in Figure 3.

Figure 3: Index of employment growth: Economy vs regulators



Source: Regulator annual reports and ABS cat. no. 6202.0.

Note: ATO, ACCC and APRA data are total employees as at end of financial year, except APRA data for 2010–11, 2011–12 and 2012–13 which exclude casual staff. ASIC staff numbers are full-time equivalent averages over the year. ACCC includes establishment of the AER in 2005–06.

Implications of the rapid growth of regulators

Some growth in these regulators over the last 10 years can be explained by historical events and the government's response – for example the collapse of HIH in 2001 obviously changed the regulatory landscape significantly for ASIC and APRA. More recently, the global financial crisis has had a profound impact on the regulatory landscape for ASIC and APRA.

In addition, the ongoing growth in the economy and the increasing sophistication of product markets during this time, particularly in areas like financial services, could be expected to alter the role and duties of regulators and it is incredibly important that these markets are orderly and well functioning. As APRA also suggests, its expenditure per dollar of assets supervised across the economy has remained relatively stable over a number of years.[35]

In the case of the ACCC, it is important to note that it has taken on the newly established Australian Energy Regulator and other new regulatory responsibilities with the introduction of the Australian Consumer Law during this time.[36]

Increased expenditure could also be justified by more timely regulatory decisions, but there is no evidence that increased expenditure has necessarily been accompanied by increased timeliness.

It is also notable that expenditure has moderated for some of these regulators in recent years as the fiscal position comes under greater pressure.

35. APRA, *2011–12 Annual Report*, October 2012.
36. It has not been possible based on publicly available information to isolate the growth of the ACCC over this period, excluding the AER. However, calculating growth from a more consistent starting point when the AER was established in 2005–06 still yields expenditure and employment growth rates of a significant magnitude. For example, expenditure grew at an average nominal rate of 11.2 per cent per annum between 2005–06 and 2012–13.

Notwithstanding these factors, the significant growth in regulatory capacity over 10 years that outstrips broader growth in government expenditure and the economy more generally does not appear to have been accompanied by a strengthening of the performance and accountability framework for these regulators.

Significant growth, if left unchecked over a long period, may raise concerns for a number of reasons:

- *Even if there is more regulatory capacity than necessary, it will likely be utilised – leading to increased regulatory costs in the community*
  - Like any organisation, a regulator faces strong incentives to grow and extend its reach. As suggested by a former British Prime Minister it is "... part of the DNA of regulatory bodies that they acquire their own interests and begin to grow."[37]
  - Once established to perform a particular duty, there is little incentive for regulators to moderate their enforcement and compliance activities at any point in time, or to lightly regulate emerging issues. As the Banks Regulation Taskforce suggested, regulators operate in an environment in which "... any adverse event with the regulator's field of influence is held up publicly as a 'failure'".[38]
- *A risk-based approach may not be being adopted widely enough*
  - Such an approach would allow regulators to reallocate resources and respond to new risks without increasing resources as substantially.
- *Increasing resources may never satisfy regulatory demands*
  - Despite the considerable increases outlined, the IMF recently recommended the government should increase funding to ASIC.[39] The previous government rejected the IMF's suggestion.
  - Expenditure at the Australian Communications and Media Authority has almost doubled in the last decade following the merger of the previously separate communications and media authorities. This did not stop recent government reviews proposing the establishment of a new super-regulator for the media.
- *Costs add up over time*
  - If current trends continue for the ATO, ASIC, ACCC and APRA for the next decade, then there would be around $3 billion in additional expenditure each year by 2023 – on account of just four regulators.[40] In some cases, it will be regulated parties that bear this cost through charges and levies.

Recommendation 2: The Commonwealth Government should publish consolidated information on the resources of its regulators on an annual basis, including how they are funded.

37. T. Blair, 'Common Sense Culture, not a Compensation Culture', Speech to Institute for Public Policy Research, 26 May 2005.
38. Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, January 2006, p. 159.
39. IMF, *Australia: IOSCO Objectives and Principles of Securities Regulation – Detailed Assessment of Implementation*, 2012.
40. BCA calculation based on current expenditure in 2011–12 increasing at the same average annual rate that it has in the 10 years to 2011–12.

Performance and accountability framework for regulators

Standards for effective regulation

As noted in Part 1, the BCA considers that a fundamental principle for an efficient regulatory system must be that regulations are administered in the most effective manner possible to facilitate economic progress.

This refers to the exercise of powers and discretion in such a way that the regulator achieves the intended policy or legislative outcome, while avoiding unexpected consequences or over-regulation.

This general principle is underpinned by the following eight 'Regulator Standards' that we believe represent best practice in this area:

1. Regulators are subject to regular and meaningful performance assessment and reporting.
2. The government's expectations of a regulator are transparent, and are clearly within the scope of the regulator's powers.
3. Regulators follow a risk-based approach to enforcement and compliance activities.
4. Regulatory decisions are timely.
5. Regulators are continuously streamlining their processes.
6. Regulators adopt a client-focused approach to regulated parties.
7. There is clear separation of roles between policymakers and regulators.
8. Regulatory decisions are fair and contestable.

Selection of agencies for review

As discussed above, in undertaking this desktop review we have selected a sample of four key Commonwealth regulators as outlined below.

Australian Taxation Office

The ATO is the principle revenue collection agency of the Commonwealth Government. It is also responsible for the administration of important aspects of the superannuation system, the operation of the Australian Valuation Office and the Australian Business Register.

Australian Securities and Investment Commission

ASIC is responsible for the regulation of Australian companies, financial markets, financial services organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.

Australian Competition and Consumer Commission

The ACCC is an independent Commonwealth statutory authority whose role is to enforce the Competition and Consumer Act 2010 (the CCA) and a range of additional legislation, promoting competition, fair trading and regulating national infrastructure.

Australian Prudential Regulation Authority

APRA is the prudential regulator of the Australian financial services industry. It oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies, and most members of the superannuation industry. APRA is funded largely by the industries that it supervises.

Why these regulators were chosen

These regulators have been chosen because they have the most evolved governance frameworks of Australian regulatory agencies, and their performance is already subject to a high degree of public scrutiny. Consequently, the performance and accountability frameworks under which they operate should, ideally, set the benchmark for other regulators.

They are also among the largest and most high-profile regulatory agencies, and the consequences of their decision-making processes have a far-reaching impact on the Australian economy. As a result, if the framework in which these regulators administer the rules has weaknesses, this is likely to have a greater overall impact on the way companies are able to do business in Australia.

Furthermore, if weaknesses exist with respect to the performance and accountability frameworks applied to 'the big four', it seems likely these issues will be exacerbated in other regulatory bodies which receive less public scrutiny or have less sophisticated governance arrangements.

Reviewing the current performance and accountability framework: aims and expectations

The BCA undertook a desktop review and consultation with selected BCA members. It is not an exhaustive audit of the agencies' performance and accountability frameworks. Our work relies primarily on 2011–12 data, with regulators' annual reports for 2012–13 being released as this paper was being launched.

We have taken account of the recommendations and outcomes of past regulatory reviews, in particular the Uhrig review and the Banks taskforce, to identify areas where room for improvement still exists, particularly with respect to policies or practices that deal with risk-based decision-making, streamlining and activities aimed at improving transparency.

The identification of areas for improvement does not imply that Australia's regulatory system is at risk of failure.

The weaknesses outlined here are also not necessarily the responsibility of the regulators. Policymakers and the community more generally need to take their share of responsibility for influencing and designing the legislative and other parameters within which regulators operate and against which their effectiveness is judged. As the Banks taskforce found, "... [regulators] are often criticised for doing the job government and the community expects them to do."[41]

We also recognise that there may be trade-offs between accountability and independence. We are in no way suggesting that improvements should compromise the independence of these regulators or their governance as statutory authorities.

Nevertheless, we would like to see the performance and accountability framework for regulators fundamentally strengthened to conform with best practice.

41. Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, January 2006, p. 159.

Regulator Standard 1: Regulators are subject to regular and meaningful performance assessment and reporting	 Needs improvement

Summary of current arrangements

While all four regulators are subject to a number of formal performance assessment and reporting processes, these processes exhibit a number of weaknesses, meaning that performance reporting does not provide a full and balanced picture of performance.

Existing mechanisms

Each of the four regulators is subject to various forms of formal performance assessment and reporting, including those outlined below.

Publication of annual reports

All four agencies are required to publish an annual report, which sets out the information against which their performance will be assessed by parliament. This includes a description of program deliverables and the agency's performance against various key performance metrics such as client satisfaction levels, response times, the number of inquiries handled or enforcement actions undertaken.

Appearance before parliamentary committees

All four agencies appear before various parliamentary committees at which they are required to provide information or respond to questions from committee members. For example, in 2011–2012, the four agencies made a number of appearances before parliamentary committees including:

- The ATO appeared before three Senate Estimates Committee hearings and five other parliamentary committee hearings.
- ASIC is subject to oversight by the Joint Committee on Corporations and Financial Services, which holds regular public hearings with ASIC and reports these findings to parliament.
- The ACCC appeared before parliamentary committees on 11 occasions including several appearances before the Senate Standing Committee on Rural and Regional Affairs.
- APRA appeared or made submissions on more than 10 occasions before various parliamentary committees including the Parliamentary Joint Committee on Corporations and Financial Services and the Senate Economic References Committee.

Stakeholder surveys

Three of the four agencies undertake stakeholder surveys on a regular basis; only the ACCC does not appear to do so.

For example, APRA undertakes a stakeholder survey every two years in accordance with its client service charter and ASIC undertook an initial stakeholder survey in 2008, again in 2010 and 2013. Likewise, the ATO undertakes biennial professionalism surveys and business perception surveys. The results of these surveys are generally published on the agencies' respective websites.

Independent oversight

Some regulators also have additional bodies that oversee their performance. For example, the government has announced that the ATO will be subject to the oversight of an independent tax system advisory board, in addition to the oversight of the Inspector-General of Taxation who has wide-ranging powers to examine systemic tax administration issues.

Court or tribunal adjudication

Administrative decisions made by regulators may be challenged before independent tribunals or courts to determine their validity. In general, tribunal decisions are reviewed to determine whether or not they lack procedural fairness and if this is found to be the case, they are remitted to the regulator. Merits review before the Administrative Appeals Tribunal is only available where it is specifically provided in the legislation governing the regulator's decision-making.

Acts of officials may also be brought before the courts and their actions may give rise to both civil or criminal liability, although in general public officials enjoy immunity where their actions are undertaken in the performance of their duties. These issues are analysed further at Regulator Standard 8.

Shortcomings of current mechanisms

There are a number of shortcomings with the current performance assessment mechanisms, which make regulators less accountable than they should be.

Narrow focus on reporting metrics and a limited analysis of performance

In relative terms Australia's regulatory agencies often rank among the world's best. For example, last year the ACCC was named the Global Competition Review's 'Agency of the Year' for Asia Pacific and the Middle East[42] and it regularly ranks among the top five or top 10 agencies globally.

Nevertheless, any appraisal of a regulator's performance is made difficult by the challenges associated with measuring and assessing performance in a meaningful way.

The current performance and accountability framework for regulators is too narrow and tends to be driven by an "activity-oriented calculus."[43] In other words, currently the measurement of regulators' performance tends to be driven by easily quantifiable variables, such as the number of enforcement actions or the timely completion of highly transactional activities.

As Joanna Bird, a former Associate Professor at Sydney Law School and now a senior executive at ASIC suggests, "it is notoriously difficult to set meaningful performance measures or standards for regulators and to actually measure their substantive, as opposed to procedural or financial, performance."[44]

For instance, annual reports tend to focus on reporting regulatory 'transactions'. All four agencies include information such as the number of inquiries or complaints received, response times and outcomes, compliance initiatives, summaries of enforcement proceedings and the quantum of any penalties imposed.

One only has to consider media coverage of regulators to see the degree to which 'big wins' in court cases are treated as a measure of effective regulation. A recent article referring to ACCC Chairman Rod Sims included the suggestion from a former ACCC Chairman that the main criterion against which his tenure will be judged is the size and number of litigation cases: "... the jury is still out ... Sims needs to bag one or two big cases to truly make his mark."[45]

Limited attention is paid to assessing whether, in completing these tasks, the regulators have achieved the right regulatory balance – reducing risk while preventing impediments to economic progress.

42. See http://www.accc.gov.au/media-release/accc-receives-international-agency-of-the-year-award-from-global-competition-review.
43. W. Kovacic, 'Rating the Competition Agencies: What Constitutes Good Performance?', *George Mason Law Review*, Vol. 16:4, 2009, p. 908.
44. J. Bird, 'Regulating the Regulators: Accountability of Australian Regulators', *Melbourne University Law Review*, Vol. 16, Issue 4, 2011, p. 745.
45. P. Durkin, 'Spare the Rod, Spoil the Competition', *The Australian Financial Review*, 5 December 2012.

Likewise, these assessment methods offer a limited interrogation of, and response to, poor performance. One of the weaknesses of regulators' stakeholder surveys is that while the results are made public, in most cases there is no meaningful response or specific remedial action proposed by the regulator in response to stakeholder perceptions of poor performance. There is not even further interrogation of the exact reasons why regulated parties have given the responses that they have. This would help to avoid the simple explanation that regulated parties will always complain about a regulator regardless of their conduct.

There is no regular independent expert opinion regarding performance

Regulators will at times be the subject of audits by the ANAO or investigation by the Commonwealth Ombudsman. In spite of this, their performance is not subject to regular independent review by an economic and regulatory expert body such as the Productivity Commission. Indeed, in 2006 the Banks regulatory taskforce acknowledged that a range of concerns regarding regulators had been brought to its attention but in the time available to it, it had not been able to complete a detailed assessment about the performance of particular regulators.[46]

Regulatory experts have also been quick to point out that parliament is not necessarily well placed to monitor performance and that increased parliamentary scrutiny may encourage greater regulatory intervention to address short-term political pressures rather than more effective or measured intervention.[47]

Consequently, it may be concluded that there is a preponderance of narrow and sometimes weak accountability mechanisms.[48]

Previously, the Uhrig review had recommended the appointment of an Inspector-General of Regulation, based upon the existing model of the Inspector-General of Taxation. The role proposed for the Inspector-General of Regulation was to act as an objective and independent office to investigate nominated regulators' systems and procedures. Uhrig considered this was needed to address deficiencies in the level of meaningful engagement between regulators and their regulated constituency, and to create a mechanism by which potential issues could be identified and addressed.

This was the only recommendation put forward by the Uhrig review not endorsed by the government. At the time, it was felt that adoption of the other Uhrig recommendations was sufficient to ensure effective governance over regulators.

Given the exponential growth in regulation and the expansion of regulators' powers, it is appropriate to once again give consideration to implementing a more comprehensive ongoing assessment of regulators' performance. Such an assessment would also assist in measuring performance against the other Regulator Standards discussed below. The BCA's recommendations in this regard are provided at the conclusion of our assessment against the standards.

46. Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, January 2006.
47. A. Ogus, *Regulation: Legal Form and Economic Theory*, 2004.
48. J. Bird, 'Regulating the Regulators: Accountability of Australian Regulators', *Melbourne University Law Review*, Vol. 16, Issue 4, 2011, p. 741: 'Weak' accountability mechanisms refers to those where a regulator is only required to explain and justify its actions, but does not require some response to under-performance.

Regulator Standard 2: The government's expectations of a regulator are transparent, and are clearly within the scope of the regulator's powers	 Best-practice mechanisms not being applied

Summary of current arrangements

Based on publicly available information, none of the regulators have clear ministerial expectations. There are no up-to-date statements of government expectations publicly available.

Existing mechanisms

An important outcome of the Uhrig review of public sector corporate governance was the recommendation that regulators receive a ministerial statement of expectation.

The last publicly available statements of expectation from the government were issued to the regulators assessed here by the then Treasurer in early 2007. In response, regulators outlined their statement of intentions and submitted these to the then Treasurer.

Shortcomings of current mechanisms

Success for a regulator is often judged by how efficiently and effectively it achieves the objectives set by government and parliament. However, these objectives are often not clear or transparent for either the regulator or its stakeholders.

As the Banks Taskforce suggested:

> These statements will provide scope to outline the government's current objectives relevant to the authority and any expectations the government may have of how the authority should conduct its operations. They have the potential to be helpful and transparent vehicles for guiding a regulator's approach – and simultaneously educating the community – without infringing on a regulator's essential independence.[49]

At the time there was a strong impetus to implement the recommendations of the Banks taskforce and Uhrig review on the governance of regulators. In this respect, it was recommended that the statements be updated annually.

This best practice appears to have been abandoned in the intervening period. Since 2007, there has been a complete absence of published annual updates, over a period when there have been significant changes and developments for each of the regulators. For example, since 2007:

- the ATO has been overseen by four different Assistant Treasurers
- the ACCC and ASIC have new chairmen and both have had four different ministers responsible for their administration
- There have been significant changes to the role of regulators. For example, the ACCC has new powers to pursue criminal price fixing cases, and changes to the laws regarding price signalling and the Australian Consumer Law have been introduced. Likewise, APRA's role has been enhanced in the wake of the global financial crisis.

It is encouraging that the current government has committed to enhancing the oversight of regulators in areas like this.

The BCA notes that these practices are taken much more seriously in jurisdictions such as New Zealand (see Exhibit 3).

49. ibid., p. 161.

Exhibit 3: Statements of Intention for New Zealand regulators

In New Zealand, the requirement for regulators to prepare statements of intention has statutory backing under the *Crown Entities Act 2004*.

The statement promotes public accountability by allowing the government to participate in setting its medium-term intentions and providing a base against which its performance can be assessed.

The statement is prepared annually and covers at least three years' future performance. Mandatory content of the statement includes how the entity proposes to manage the organisational health and the capability of the entity and a statement of forecast services for the first year covered by the statement.

Source: *Crown Entities Act 2004* (NZ).

Regulator Standard 3: Regulators follow a risk-based approach to enforcement and compliance activities	 Needs improvement

Summary of current mechanisms

The extent of transparent risk-based approaches being adopted varies by regulator:

- *The ATO has one of the more well-developed and communicated risk-based approaches of the regulators surveyed, although by its nature it still has the potential to capture many large business taxpayers with a good compliance record in higher-risk quadrants.*
- *APRA also has a relatively well-defined risk-based approach to its enforcement and compliance activities.*
- *ASIC suggests that it takes a "proactive risk-based approach" but its risk framework is not necessarily transparent.*
- *The ACCC communicates a relatively clear set of priorities but it does not appear to have an explicit risk-based approach to enforcement and compliance activities*.

Existing mechanisms

ATO

The ATO probably has the most developed risk-based approach of any of the regulators. The ATO adopts a systematic risk-management approach to its compliance activities and publishes details of this approach. The ATO's Risk Differentiation Framework for large business is an example of this. The framework clearly outlines the risk filters it applies, with only 1.2 per cent of large businesses in the high-risk quadrant subject to continuous real-time tax reviews.

APRA

APRA has also adopted a risk-based approach to its supervisory activities, which is set out in *The APRA Supervision Blueprint*. APRA '... explicitly recognises the balance that must be struck between achieving a desired level of comfort regarding a supervised institution's prudential soundness and the ability to pursue risk-based supervision.'[50] APRA's risk-based approach is supported by a Probability and Impact Rating System.

ASIC

50. APRA, *The APRA Supervision Blueprint*, January 2010, p. 5.

ASIC has suggested in various documents that it takes a proactive risk-based approach to surveillance – including identifying, analysing and evaluating the risks in the regulated population and focusing surveillance on areas they consider to be the highest risk. ASIC also publishes information showing the surveillance coverage of each of its regulated populations, including the resourcing and the frequency of surveillance that can be expected in different sectors.

ACCC

The ACCC does not appear to have a systematic or explicit risk-based approach to its enforcement and compliance activities. Its Compliance and Enforcement Policy suggests a relatively flexible approach to determining its priorities. The policy suggests that the ACCC gives enforcement priority to matters that meet one or more of 12 criteria, some of which are relatively broad in nature (e.g. conduct involving a significant new or emerging market issue). Both the chairman and the policy document suggest the regulator's focus as being on highly concentrated sectors, telecommunications, energy, online competition, carbon pricing, enforcing new consumer law provisions and protecting Indigenous consumers.

Shortcomings of current mechanisms

It would appear that at the very least there may be an opportunity for some regulators to better articulate the risk-based approach that they apply.

While ASIC does actively consider risk in its regulatory model, its overall framework and process for assessing and analysing risk is not transparent, making it difficult to confirm that the regulator does actually adopt a risk-based approach.

The ACCC may judge its priority areas as high-risk and deserving of the greatest compliance and enforcement focus and communicate this to the public, but how it arrived at this list and how it intends to pursue a risk-based approach within these sectors is far from transparent. In fairness to the regulator, this may be at least partially explained by the complexity of competition policy and determining accurately where particular activities are more or less likely to jeopardise the competitive process.

Regulator Standard 4: Regulatory decisions are timely	 Needs improvement

Summary of current arrangements

Most regulators report at a high-level that their regulatory decisions are timely. However, we have found:

- *A lack of transparency of the distribution of performance for the timeliness of regulatory decisions, particularly for those cases exceeding service standards.*
- *A lack of strong incentives for timeliness, particularly for minimising further delay once a deadline has already been exceeded for decision.*

Existing mechanisms

The ATO and ASIC both have significant volumes of financial transactions, enquiries and registrations, with relatively clear service standards under their service charters, which they report on annually.

Given that the majority of these sorts of transactions are relatively simple, it should not be surprising that both regulators' overall performance against the standards is relatively positive.

For example in 2011–12, the ATO met 20 of its 22 service standards.[51] ASIC managed to complete transactions like registering a business in one business day in 98 per cent of cases.[52]

The ACCC also has a number of clearly defined key performance indicators for the timeliness of decisions, although its reporting of performance against these is less systematic than the ATO and ASIC.

APRA has less clearly defined measurable service standards for timeliness and they report less on timeliness, but this largely reflects their fundamentally different role and activities.

Shortcomings of current mechanisms

Although regulators report high-level performance statistics that suggest the vast majority of their decisions are timely, there remain a number of systemic weaknesses in the decision-making framework. These relate in particular to a lack of clear incentives to minimise the delays brought about by contentious or complex decisions, especially where these have already exceeded general timelines.

The timelines for decisions are rarely legislated and even if they are, the regulator retains considerable flexibility

Many of the service charters that the regulators have prepared contain self-determined timeframes within which they aspire to respond to queries or make decisions. However, there is no direct penalty or other negative outcome for regulators that do not meet these self-determined timeframes. Rather, any frustration or negative outcome caused by the delay falls on the regulated parties.

There is limited interrogation of 'outlier' decisions

This is particularly important if the regulator has a poor-performing tail for timeliness of approvals, with important decisions for regulated parties falling significantly beyond the standard timeframes.

For example, in its *2010–11 Annual Report*, the ACCC reports on its "prompt and effective" assessment of mergers, with 84 per cent of merger reviews concluded in less than eight weeks. These statistics will mean little to the remaining 16 per cent of regulated parties who experience delays in some cases well beyond these already generous timeframes. For example, the Austar–Foxtel merger took almost 12 months from announcement to final approval.

Greater transparency and reporting of the extent of delays and the nature of decisions that have not met deadlines may not necessarily increase compliance, but it should provide increased accountability and an incentive on regulators to lift overall timeliness and reduce the extent of the delays they experience beyond deadlines.

Lack of incentives

There are limited incentives for regulators to resolve matters quickly once a deadline has been exceeded. In fact, for extremely complex or contentious matters there may be an incentive on the regulator to stall or frustrate efforts as long as possible so that the regulated party withdraws from the process or agrees to negotiate concessions. For these sorts of cases, there is a need for some form of stop-gap – for example a point of such delay that the regulatory decision is deemed approved. Other jurisdictions adopt such mechanisms for merger decisions (see Exhibit 4). This will no doubt be considered in the upcoming review of competition policy.

51. ATO, *Commissioner of Taxation Annual Report 2011–12*, October 2012, p. 16.
52. ASIC, ASIC Service Charter Results, viewed 15 November 2013, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Service+charter+results?openDocument>.

Exhibit 4: Merger review timeframes

Merger transactions are nearly always time critical – the longer it takes to close a deal, the greater the cost and disruption to the business of the merging parties and the greater the risk the deal will not close.

To reduce the risk of this occurring, the regulatory assessment of a deal's effects on competition needs to be completed within a reasonable time period. This is recognised by the International Competition Network (ICN) – the international forum for competition agencies, of which the ACCC is a founding member. In its Recommended Practices for Merger Notification Procedures, the ICN recommends that, 'review periods should be subject to definitive and readily-ascertainable deadlines'. It recommends that "initial waiting periods should expire in six weeks or less, and extended or 'Phase II' reviews [where an in-depth analysis of complex issues is needed] should be completed or capable of completion within six months or less following the submission of the initial notification."

This practice is followed in many major economies where merger reviews are subject to prescribed periods in which the competition agency must issue a decision, e.g. to clear the deal, to open a 'Phase II' inquiry or (rarely in the initial investigation) to block the deal. If no decision of any kind is issued within the prescribed period, then the transaction is deemed to have been approved by the regulator (e.g. this is the case in the US and the EU as well as EU Member States such as Germany and France). This imposes deadlines to assess the deal and make a decision, and in turn this creates greater transparency around the review process.

In Australia, by contrast, the timelines for review (both formal and informal) are non-binding and come with the qualification that:

> Indicative timelines are published by the ACCC to give the merger parties and the public the best possible guide to the likely timing of an informal merger review. However, these timelines are subject to review and amendment where circumstances require, such as when a Statement of Issues is published [...] the information set out below should be used only as a guide to the possible stages in an informal merger review.
> (ACCC Merger Review Process Guidelines 2013, p. 11.)

This flexibility can be useful to a degree, if it results in faster decisions and fewer information requirements in straightforward cases. However, the benefits of flexibility should not come at the cost of lower levels of certainty around the timing of decisions – flexibility should not be used as a justification for delay.

According to analysis by Gilbert + Tobin, the average time taken for the ACCC to complete a public merger review rose approximately 45 per cent in 2012 compared to 2011 (from 65 to 94 calendar days) and has more than doubled since 2009.

Regulator Standard 5: Regulators are continuously streamlining their processes	 Absence of supporting initiatives

Summary of current arrangements

There does not appear to be evidence to suggest that any of the four regulators have been effective in continuously streamlining their processes.

Existing mechanisms

In general, the BCA has found that while regulators often report a number of initiatives being undertaken to streamline their processes and reduce regulatory burden on business, the results are not being felt on the ground by regulated parties. For example:

- ASIC has a performance outcome of "streamlined and cost-effective interaction" and 72 per cent of all its forms are lodged online. Despite this, ASIC's most recently published stakeholder survey suggested that only 11 per cent of people agreed that ASIC has reduced regulatory red tape.[53]
- APRA has been involved in a number of online initiatives to streamline its processes, including Standard Business Reporting. Despite this, recent stakeholder surveys have suggested the one area in which APRA's stakeholder rating is lower than neutral is in the area of consideration of the costs of regulation to industry in changes to the prudential framework.[54]
- Only 37 per cent of businesses surveyed in the ATO's most recent Business Perceptions Survey felt that completing business tax returns was easier than in past years.[55]

Shortcomings of current mechanisms

Benefits of streamlining are not being felt by regulated parties

As noted above, the effects of streamlining are often not felt by regulated parties.

In other cases, initiatives appear to fall by the wayside following their introduction. For example, in 2006 ASIC announced its Better Regulation initiative. While many of these initiatives were introduced, we could find no evidence of further streamlining, or any kind of appraisal of their effectiveness. Streamlining is an iterative process, rather than a one-off event, and consequently, we would expect that further, incremental improvements could be identified and implemented.

Streamlining should not be at the cost of regulated parties

The BCA considers that streamlined effective processes should be an objective of regulators and a right of regulated parties that reasonably seek to comply with the law. However, at times regulators are prone to suggest that regulated parties must give up something in return for the privilege of streamlined processes, whether this is a cost-recovery fee or greater information.

Regulated parties should cooperate with regulators in their efforts to streamline processes wherever it is feasible and cost-effective to do so. Additionally, there will be circumstances in which cost-recovery may be appropriate. However, the extra cost of streamlined processes should not necessarily be borne by regulated parties and the offer of streamlined processes should not be conducted as a negotiation or something that may be withdrawn at any point.

53. Susan Bell Research, *ASIC Stakeholder Survey 2013*, September 2013, p. 67.
54. APRA, *APRA Stakeholder Survey 2011 – Report of Overall Findings 2011*, July 2011.
55. Ipsos–Eureka Social Research Institute Project, *Business Perceptions Survey Wave 16 Full Report*, May 2010, p. 11.

For example, last year the ACCC put forward a fast-track protocol to deal with supermarket acquisitions. According to the ACCC:

> In return for advanced notice of a wider range of acquisitions, and for particular information being provided upfront with each transaction, [the ACCC] would establish a dedicated team to assess these transactions within specified times. [...] With repeated transactions in local markets [the ACCC's] processes can be streamlined. This can, however, only occur with appropriate notification, co-operation and upfront information. Unless and until some new arrangements are put in place, however, our review of those local acquisitions we become aware of will continue under current processes.[56]

The BCA queries why in this case the establishment of a dedicated team by the ACCC requires a quid pro quo from the supermarkets. The use of ACCC staff with previous sectoral experience would be a more efficient approach with or without the provision of additional upfront information, and it begs the question why the ACCC would not do so in any case.

Regulator Standard 6: Clear separation of roles between policymakers and regulators	 Needs improvement

Summary of current arrangements

While all four regulators are structurally independent of the policymaking process, there is room for better checks and balances to ensure that regulators limit their role appropriately in relation to policy matters, with regulation-making powers granted selectively and used judiciously.

Existing mechanisms

Unlike a number of smaller government regulators, the regulators considered here are structurally independent of the policymaking process, and each has been established as a statutory authority that is a separate legal entity to the Commonwealth. This gives appropriate independence to the regulator to administer and in some cases make delegated legislative instruments, such as regulations and determinations, without interference from the government.

At the same time, there are some checks and balances on the independence of regulators, although in practice these are rarely utilised; for example, parliament can disallow legislative instruments made by regulators, and in some cases a minister has directions power. In the case of ASIC and APRA this power is limited to policies they should pursue or priorities they should follow rather than direction about a particular case.

Based on publicly available information, there are certainly no concerns that the independence of these large regulators is in any way under threat.

Shortcomings of current mechanisms

There are legitimate questions to be asked about whether or not regulators exercise undue influence over policymaking, particularly in light of the rapid increase in regulation and resources of regulators noted earlier.

While the views and expertise of regulators should be taken into account in making policy and they may provide useful evidence to government of the need for change, the BCA does not believe that they should be the primary drivers of change.

56. R. Sims, 'Better Communicating the ACCC's role, Its Approach to Reviewing Mergers Involving Small Retail Acquisitions and the Benefits of Competition in Electricity', Speech to CEDA, Sydney, 14 June 2012.

In this context it is notable that former head of the Commonwealth Department of Prime Minister and Cabinet, Peter Shergold, recently remarked in relation to the Chairmen of ASIC and APRA that:

> ... They certainly seem to be speaking in ways that are actually making public policy ...
>
> When both Laker and Medcraft speak they have a significant impact on business and, on occasion, unwittingly increase the level of investment uncertainty.[57]

Resolving whether certain regulators are exercising undue influence over policymaking will certainly be highly contested, particularly by the regulator in question. Nevertheless, there appear to be two trends that could be driving increased potential for regulators to exercise undue influence over policymaking:

- Increasing technical complexity and pressures on government to progress regulatory solutions to problems quickly means that in some instances there may be pressure to delegate more regulation making to regulators and increase their scope of powers for certain matters. This can increase the risk of policymaking in effect being delegated or a regulator's actions having the same impact as policy change.
- Regulators are increasingly using the media and other public devices to educate, raise public awareness and put their concerns about emerging regulatory issues on the public record, which can then draw comments on policy matters.

Risks of increased regulator involvement in policy

It is appropriate for regulators to have some flexibility and a capacity to make regulations in particular circumstances. However, over time it becomes very difficult to identify the point at which regulation making does indeed become policymaking.

Various studies have identified the risks in combining policy and regulatory functions, including:[58]

- Increased potential for regulatory creep, due to a tendency for a regulator to align policy with its overarching interest to maintain or expand its role.
- Potential for regulator to be drawn into the political process and compromise its perceived or actual independence.
- Increased likelihood of a narrow policy perspective being applied by a regulator.

Use of the media by regulators will sometimes lead to questions of these regulators about the need for policy change or increased powers. In the absence of a public counter view from government, this can focus public debate on regulatory options put forward by the regulator before a proper analysis of the problem has been undertaken.

The use of delegated legislative instruments, other regulatory guidance and powers

Use of legislative instruments

The delegation of legislative instruments is not new and has been the subject of analysis for some time now.[59] Delegating detailed technical issues to instruments brings advantages like greater flexibility to change over time. It is also well established that regulators have the ability to develop instruments within defined legislative powers. For example, the Memorandum of Understanding between Treasury and APRA suggests that:

57. *AFR Magazine* Power, Issue 2012, 28 September 2012.
58. UK Better Regulation Task Force, *Avoiding Regulatory Creep*, 2004 and State Services Authority (Victoria), *Review of the Rationalisation and Governance of Regulators: Final Report*, April 2009.
59. See for example S. Bottomley, 'Where Did the Law Go? The Delegation of Australian Corporate Regulation', *Australian Journal of Corporate Law*, Vol. 15, 2003.

> APRA is established by statute as an independent regulatory agency and so it too has a policy role, but one primarily related to the exercise of its powers conferred under the various laws for which it has administrative responsibility.[60]

To this end APRA sets the prudential standards, which are legally binding and form the basis of its supervisory approach.

On average, the Commonwealth has made around 330 legislative legislative instruments each year over the last decade.[61] While the Commonwealth Government does publish its legislative instruments, there is currently no function to disaggregate these instruments according to the responsible regulator. In the absence of this data, the BCA is unable to verify whether the number of instruments made by the regulators in particular has increased in recent times.

Quasi-regulatory documents

The flexibility and discretion of regulators tends to extend further with quasi-regulatory documents having a significant effect on how the broad intention of legislation is ultimately enacted.

For example, ASIC has well over 200 active regulatory guides,[62] which by their very nature represent more than just 'hints and tips', including by describing how ASIC will exercise its powers and how ASIC interprets the law. The significant impact of these documents as part of the regulatory environment is evidenced by the fact that some are subject to Regulation Impact Statements.

Granting of broad powers

Regulators also have a significant impact through administrative processes. For example, under the ACCC's merger review process, there is no legal requirement for transacting parties to obtain ACCC approval. Instead, over time an informal merger notification process has emerged as the principal method of reviewing the competitive effects of a deal. These informal decisions are not subject to administrative review by the Australian Competition Tribunal, and the formal merger process, under which decisions are reviewable, has never been used. Consequently, interpretation of section 50 of the CCA has been left almost entirely to the ACCC.[63]

There have also been more recent proposals for policymakers to grant significant powers to regulators that if used could have a dramatic impact on the regulatory environment. For example the Council of Financial Regulators recently proposed to grant ASIC the explicit power to:

> … direct a licensed market operator [such as the ASX] to make listing rules with specified content, with the consent of the minister, where ASIC views that the making of that rule is appropriate and proportionate for the enhancement and/or protection of market integrity.[64]

As a general rule, delegating regulation-making or broad powers to the regulator should be avoided or the scope of matters delegated to regulators for regulation making limited wherever possible. This also highlights the need for checks and balances on such powers to ensure that regulators do not exceed their mandate over time. For example:

- The boundaries of regulator discretion and regulation making need to be clearly defined.
- Ministers and policy agencies should carefully monitor the regulation-making activities (including quasi-regulation) of regulators.

60. Memorandum of Understanding between Treasury and APRA, p. 1.
61. BCA calculations based on Federal Register of Legislative Instruments as at June 2013, viewed 15 November 2013, <http://www.comlaw.gov.au/Browse/ByTitle/LegislativeInstruments/Current#top>.
62. For regulatory guides, see <https://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument#>, viewed 15 November 2013.
63. There have been only two section 50 cases heard by the Federal Court in the past 10 years: *AGL v ACCC (No 3) [2003] FCA 1525 (19 December 2003)* and *ACCC v Metcash Trading Limited [2011] FCAFC 151*.
64. Council of Financial Regulators, *Review of Financial Market Infrastructure Regulation*, Consultation Paper, October 2011, p. 29.

If ministers and agencies are not adequately equipped or sufficiently independent to undertake this role, then it could be undertaken under the Inspector-General of Regulation model canvassed later in this section.

Regulators seeking to drive policy change

A recent example on the second of these trends relates to the debate about auditor quality in Australia. Following the release of its two most recent 18-monthly audit inspection reports which show a decline in the performance of external auditors, the industry has been issued with a warning from ASIC that if performance does not improve, the regulator will recommend a mandatory audit firm rotation policy to government.[65]

In addition, ASIC has been active in pushing for changes to takeovers policy and suggesting online tests for people investing in complex financial products. This relatively proactive approach to influencing policy is in contrast to the former ASIC Commissioner Tony D'Aloisio, who in one of his final interviews before stepping down from ASIC commented:

> I try to separate the law, the policy of the law and the way ASIC enforces it. At the end of the day, ASIC is a regulator. It enforces the law as it finds it.[66]

While it is inevitable that changes to legislation will be required over time to ensure a fair and competitive business environment, the BCA would prefer to see changes to the law initiated at the government level rather than at the regulator level.

The role of the regulator should be focused on administering regulation through encouraging compliance, education and enforcement. It should also bring emerging issues and evidence to light through its technical expertise to inform government decision-making. However, it should not be the chief public agitator for policy change.

Governments must also play their part, by taking active leadership of the policy agenda.

Regulator Standard 7: Regulators adopt a client-focused approach to regulated parties	 Needs improvement

Summary of current arrangements

The BCA finds that regulators assessed have in place a range of formal mechanisms that are consistent with and acknowledge the importance of a client-focused approach. There are, however, signs across all regulators that these formal mechanisms are not doing enough to support a client-focused approach to regulated parties.

Existing mechanisms

It is important to note upfront that adopting a client-focused approach to regulated parties does not and should not detract from compliance with the law. This standard requires a client-focused approach to minimising as far as possible the costs and complexity involved in complying with the law. As the Banks taskforce suggested, there is a need to ensure impartial decision-making, but effective communication can help regulators to perform better and support business confidence in the regulatory environment.

Table 3 highlights some of the formal mechanisms that regulators have in place to provide a client-focused approach to regulated parties. In summary:

- All of the regulators have some form of client service charter.

65. P. Durkin, 'ASIC Threatens Auditors with Mandatory Rotation', *The Australian Financial Review*, 5 December 2012.
66. Z. Efrat, 'Q&A with Tony D'Aloisio', *Company Director*, March 2011, p. 26.

- Each of the regulators has relatively clear instructions for how regulated parties should approach the regulator with complaints.
- All of the regulators have a range of consultative forums and advisory groups designed to increase their understanding of the regulated population and provide feedback.

Table 2: Mechanisms supporting a client-focused approach

Regulator	Mechanisms
ACCC	ACCC Service Charter • Outlines service commitments regarding quality of service and responsiveness, and avenues of complaint if clients are dissatisfied with the service they receive. Complaints handling • Complaints about how the ACCC has handled a matter are to be brought to the attention of a more senior ACCC staff member or directly to the CEO. There are no further guidelines or timelines provided. • Complaints may also be lodged with external bodies including the Commonwealth Ombudsman, the Privacy Commissioner, the Administrative Appeals Tribunal or the Human Rights and Equal Opportunities Commissioner. Client relations • The ACCC participates in a number of consultative forums including the Consumer, Health Sector, Infrastructure, Fuel, Small Business, Franchising and Wholesale Telecommunications Consultative Committees.
ASIC	**Client Service Charter** • Service Charter outlining expectations that regulated parties and clients should have of the regulator. The charter has a range of targets, performance against which is measured and reported on an annual basis. **Complaints handling** • ASIC has avenues to discuss its decisions and will provide reasons for their decision in writing, upon request. Parties must do this within 28 days of being told about the decision. • Complaints about how ASIC has handled a matter are to be brought to the attention of a more senior ASIC staff member than the officer with whom you have been dealing. There are no further guidelines or timelines provided. • Complaints about staff can be lodged with ASIC's Professional Standards Unit. ASIC will acknowledge receipt of complaints in writing within 14 working days of receipt. ASIC suggests that it will resolve complaints as promptly as possible but different procedures will apply depending on the seriousness of the allegation. **Client relations** • ASIC has an External Advisory Panel to better understand the market it operates. • ASIC has regular dialogue with industry groups and lists the number of meetings it has annually in its surveillance coverage of regulated populations – for example, in 2011–12 it had 67 industry meetings with financial advisers.
ATO	**Client Service Charter** • Taypayers' Charter, which includes the ATO's approach to dealing with taxpayers, along with the obligations of taxpayers. • The ATO also has 21 Service Standards, primarily relating to timeframes in which it will complete a range of transactional activities. On its year-to-date performance it has met 19 of 21 standards. **Complaints handling** • Under the ATO complaints system, initial contact from the responsible officer in the ATO will occur within three days of the complaint being lodged. **Client relations** • Operates a range of consultative forums with business where systemic issues can be raised – for example, the large business advisory group with senior ATO members.

Regulator	Mechanisms
APRA	**Client Service Charter** • APRA operates according to a service charter. **Complaints handling** • Handles complaints according to Australian Standard on Customer Satisfaction (ISO 10002:2006) and the Commonwealth Ombudsman's Better Practice Guide to Complaint Handling. Complaints are responded to within 15 working days. **Client relations** • Appoints a 'Responsible Supervisor' for each entity that it regulates. This role is designed to maintain a network of relationships across both the entity and APRA. Regulated companies can make any complaints through this supervisor. In its 2011 Stakeholder Survey, regulated entities strongly supported its one 'Responsible Supervisor' model.

Source: Regulator websites and annual reports.

Shortcomings of current mechanisms

Client service charters

Most of these service charters are focused on what the regulator will do to provide what it considers to be an acceptable level of service. In some cases this leads to a highly transactional target approach as evident in the performance reporting of regulators – for example, ASIC's Charter is largely concerned with the most common interactions that ASIC has with regulated parties and how quickly ASIC will respond.

The flaw in all of these charters, with the possible exception of APRA, is that they don't have the client as the starting point. For example, as a fundamental starting point for better service, none of the charters suggest that the regulator will ensure that they have a strong understanding of the business or the circumstances of the regulated party. At the same time, there are signs that this lack of acknowledgement translates into a lack of understanding on the ground. For example, in its most recently available survey, only 38 per cent of people agreed that ASIC staff understood the industries and markets it regulates.[67]

Complaints handling

It is unclear whether the outlined complaints handling processes are actually effective in practice, particularly when it comes to identifying systemic issues across complaints data and addressing them.

BCA members contacted as part of the preparation of this paper also expressed a reluctance to speak out publicly on specific complaints that they have of regulators. Businesses are concerned that doing so may have an adverse impact on their relationship with the regulator or the way in which current or future regulatory decisions are approached.

It is concerning that this situation, even if it is only a matter of perception, does not appear to have improved in the last 10 years. The Review of Corporate Governance of Statutory Authorities and Office Holders (the Uhrig review) found:

> ... a reluctance of individuals or businesses in the regulated community to voice complaints with a regulator about the way in which it uses its discretionary powers, because of the perceived possibility for an adverse future reaction.[68]

Unlike more formal complaints bodies such as the Commonwealth Ombudsman, the regulators do not make complaints data transparent so that performance over time can be measured and there can be confidence that problem areas are being dealt with appropriately.

67. Susan Bell Research, *ASIC Stakeholder Survey 2013*, September 2013, p. 66.
68. Commonwealth of Australia, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, 2003, p. 51.

Even the ATO, which receives the greatest volume of complaints, could do much more to utilise complaints data to improve its approach to clients. As the former Commonwealth Ombudsman suggested at the 2011 Tax Forum, the ATO needs:

> ... a much better complaints handling system that treats complaints as the river of gold that it is. An organisation that takes complaints seriously, learns from them, does root cause analysis is going to slash its own costs, increase its own staff sense of wellbeing and actually relieve taxpayers of a vast burden as well.[69]

Issues concerning the effectiveness of complaints handling also raise the question of whether regulators will ever be in a strong position to properly handle complaints. As the Uhrig review noted:

> The nature of the relationship between regulators and the regulated, including the potential use of punitive powers, may make it less likely that concerns with the administration of legislation will be highlighted through regular interactions.[70]

This is another area that may be suited to being dealt with by an Inspector-General of Regulation. This could provide an independent mechanism for regulated parties to voice their complaints about a regulator. This is analysed further at the end of this part.

Reforms to complaints mechanisms would assist in implementing commitments of the COAG National Regulatory and Competition Reform compact signed late last year, which suggests that governments will provide 'effective mechanisms for business to provide feedback on regulators' performance.'[71]

Client relations

Provided that groups and forums to foster client relations are convened by officers in the regulator with sufficient seniority to act on issues and concerns raised, then these mechanisms are valuable.

The BCA also considers that the idea of having central points of contact in regulators so that large businesses have one rather than many points of entry into a regulator has merit – as far as the BCA is aware the ATO, ACCC and APRA all apply this model to varying degrees. However, the success of this position will depend on the seniority of the contact and their mandate within the organisation to require other parts of the organisation to respond to a regulated party's concerns.

Regulator Standard 8: Regulatory decisions are fair and contestable	 Needs improvement

Summary of current arrangements

While there are formal appeal mechanisms in place to ensure that regulatory decisions are fair and contestable, these mechanisms are inevitably time-consuming and resource intensive. The focus should be on reducing legislative complexity and ensuring that regulators live up to claims to be model litigators so as to prevent the need for regulated parties to resort to formal appeal mechanisms in the first place.

69. A. Asher, then Commonwealth Ombudsman, 'Session 6: Tax System Governance' at the 2011 Tax Forum, 4–5 October 2011.
70. Commonwealth of Australia, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, 2003, p. 68.
71. COAG, *National Compact on Regulatory and Competition Reform: Productivity Enhancing Reforms for a More Competitive Australia*, 2012, p. 3.

Existing mechanisms

In line with the BCA's standards, regulatory decisions are fair and contestable to the extent that they are subject to fair and efficient appeal mechanisms that are proportionate to the impact of the decision.

Regulators in Australia are generally answerable to courts and tribunals as part of the administrative law regime. A challenge to a regulator's decisions in the courts through judicial or administrative law review can only be on the basis that the decision was beyond the power of the regulator or there was a lack of procedural fairness.

There are also independent tribunals such as the Administrative Appeals Tribunal, where a party can seek a merits review of a regulatory decision, provided the legislation under which the regulator's decision is made provides this right of review. A wide range of decisions made by ASIC, APRA and the ATO are subject to this review. Many decisions made by the ACCC are subject to the Australian Competition Tribunal, but there are some exceptions to this such as mergers.

Exhibit 5: Review of ACCC merger decisions

One example of a lack of contestability in decision-making is the ACCC's informal merger review process. Decisions by the ACCC to oppose a merger or impose conditions are rarely challenged in the courts and, by virtue of their informal nature, they are not capable of review by the Australian Competition Tribunal (to date, the formal merger filing mechanism has not been used). This has resulted in a thin body of precedent, as well as a process that arguably continues to lack a sufficient degree of transparency, certainty and accountability, particularly in cases giving rise to complex competition issues where, arguably, greater probity is needed.

In theory, the merging parties can apply to the Federal Court for a decision on the applicability of section 50. However, given the critical need for a quick decision in mergers versus the lengthy duration of legal proceedings, practically, litigation is not a realistic option in all but the most exceptional cases. The lack of any practically accessible review option over the ACCC's merger decision-making is at odds with the treatment of other provisions of the CCA, particularly given the potentially significant and long-term economic consequences, both positive and negative, that can flow from merger activity.

Shortcomings of current mechanisms

The independence and thoroughness of these review and appeal processes can come at a major cost to efficiency – decisions are significantly delayed and there are substantial legal costs.

For example, in 2011–12 the ATO's legal costs were $96.4 million.[72] While this may seem reasonable in the context of the ATO's large budget and significant revenues it collects each year, it should be noted that these costs are of a similar magnitude to the global legal budget of many large multinational companies. Despite this, the ATO and many other regulators are keen to suggest that they are striving to be 'model litigators'.

Resort to formal mechanisms can be driven by legislative complexity

Of course, resources are often tied up in courts and appeals processes due to legislative complexity or uncertainty, which is instigated early in the regulatory design process, long before regulators become involved. As the former Tax Commissioner Michael D'Ascenzo suggested at the 2011 tax forum 'As an administrator, you often have to work with the law you have.'[73] The ATO is also keen to point out that its recent High Court record in which it has lost 10 out of 17 cases since

72. Australian Taxation Office, *Your Case Matters 2012 – Tax and Superannuation Litigation Trends*, Ed. 2, 2012, p. 28.
73. Australian Government, 2011 Tax Forum – 'Session 6: Tax system Governance', 5 October 2011, for transcripts of proceedings see <http://www.futuretax.gov.au/content/Content.aspx?doc=TaxForum/Transcripts.htm>, viewed 15 November 2013.

July 2008 has been affected by eight test cases funded by the ATO to resolve contentious issues and areas of uncertainty in law interpretation.[74]

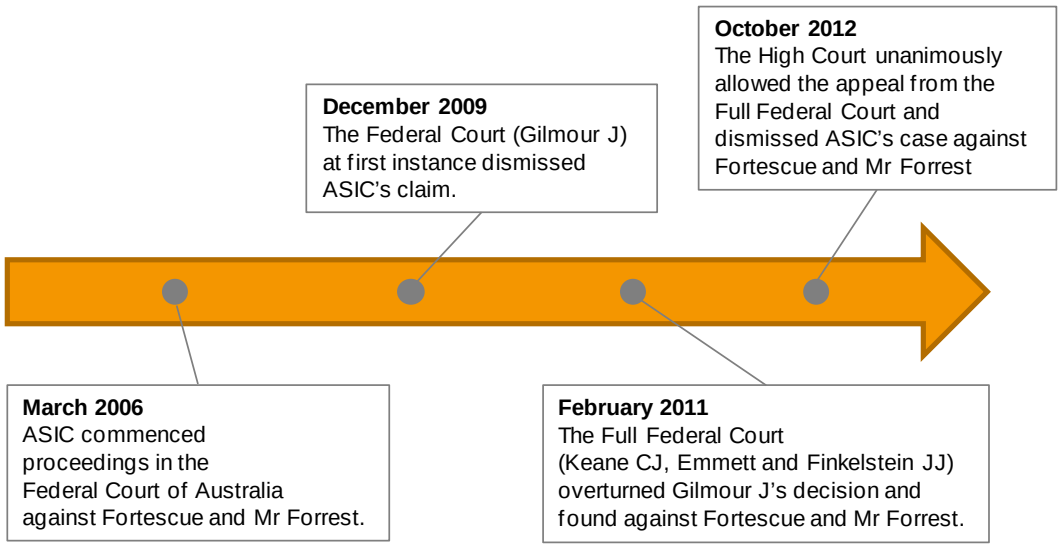
The idea that clumsy regulation making is driving complex legislation that is difficult to resolve through the courts and other appeal mechanisms has also been cited by some judges. For example, Chief Justice Keane of the Federal Court made the following comments last year regarding the increasing volume and complexity of federal laws:

> ... Opening the Tax Act is like entering the door to a parallel universe
>
> ... It's really hard. At the end of the day, our job is to make the best we can out of what emerges from the sausage machine.
>
> ... Often, you could almost be forgiven for thinking that when legislation is being drafted, people come to a difficulty, and think, 'We could actually resolve that, but that would require a level of disputation that we don't want to have among ourselves at this stage, so we will leave it for the judges to work out'.[75]

In reducing the complexity of legislation at the design stage, the Commonwealth Government has recently introduced the Clearer Commonwealth Laws Initiative, which is designed to provide mechanisms for the Office of Parliamentary Counsel and instructing agencies to identify and reduce complexity in legislation. This includes a 'Complexity Flag System' to raise, document and address issues around legislative complexity in a more structured way during the drafting phase. This system does not extend to existing legislation, and the benefits of this system will take some time to materialise.

Another area of legislative complexity and uncertainty has been continuous disclosure. It resulted in a costly and time-consuming set of appeals processes in the well-publicised case between ASIC and Fortescue regarding claims of misleading and deceptive conduct brought by ASIC, which was ultimately resolved in the High Court. Figure 4 sets out the timeline of the matter over more than six years, from the time proceedings were first initiated until the full process of appeals ran its course.

Figure 4: Timeline of the Fortescue Decision



Source: Ashurst Company Law and Governance Update, 'High Court upholds Fortescue Appeal: Fortescue and Mr Forrest successful', 11 October 2012.

The need for prevention

Some regulators are taking steps both formally and informally to reduce the need for parties to resort to courts and other appeal mechanisms in resolving disputes. For example, the ATO seeks to apply alternative dispute resolution mechanisms and has an *ATO Code of Settlement Practice*,

74. Australian Taxation Office, *Your Case Matters 2012 – Tax and Superannuation Litigation Trends*, Ed. 2, 2012, p. 20.
75. J. Eyers, 'Top Judge Hits out at Federal Laws', *The Australian Financial Review*, 21 January 2011.

which provides a principled basis upon which to negotiate liability. There are also instances where cases are resolved through mediation before reaching court.

This highlights that the most effective mechanism in boosting the efficiency and effectiveness of appeals processes is through reducing the number of cases where regulated parties must resort to them. This could involve:

- An extension of the Office of Parliamentary Counsel's 'Complexity Flag System' to cover existing legislation. This would allow regulated parties, courts and regulators to identify existing areas of legislation that are complex and uncertain and driving unnecessary resort to formal mechanisms. Policymakers could then prioritise areas for reform and devise both interim and long-term solutions to address issues of existing legislative complexity and uncertainty.
- An independent body auditing major regulators to ensure that they are living up to their commitments to be 'model litigators' and instituting legal action and appeals only where it is absolutely necessary. This could be undertaken by an Inspector-General of Regulation as outlined below.

A new performance and accountability framework for regulators

In light of the issues raised in this paper, it is clear that the existing machinery of government could be improved to strengthen regulator accountability, promote a more balanced approach to measuring their performance, and investigate systemic issues with their performance.

The BCA would like to see the performance and accountability framework for regulators fundamentally strengthened to more closely align with best practice.

As the Banks taskforce suggested "... the actions and attitudes of regulators, like those of business, are shaped by the incentives they face as well as by the requirements placed on them."[76] Therefore, the best way to drive greater accountability is to have major regulators operating within a new legislative framework that provides incentives to balance rigorous enforcement with efficiency and facilitating economic progress. This requires:

- A balanced performance framework that focuses not just on transactional enforcement and compliance activities by regulators, but also on the objective of facilitating economic progress, by balancing risk with the costs imposed.
- Greater oversight of regulators so that regulators have appropriate independence from government, but are not above scrutiny or accountability to portfolio ministers and a dedicated independent body.
- Regulators clearly documenting and consistently implementing a risk-based approach to enforcement and compliance activities.
- Appropriate checks and balances on the regulation-making and policy powers of regulators to manage the risk that regulators, in effect, become policymakers and bestow increased powers upon themselves.
- A general requirement that regulators establish public targets on streamlining their processes and associated regulatory burden each year. This could be measured in terms of an annual reduction in average time spent by each regulated party on administrative compliance activities and administrative delays experienced.
- A requirement that client service charters more strongly focus on the need for regulators to understand the business of regulated parties better and outline their standards and approach for most effectively engaging and interacting with regulated parties.

76. Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, January 2006, p. 159.

Inspector-General of Regulation

Independent oversight will be critical in facilitating and measuring adherence to a new legislative performance and accountability framework for regulators. This role could be undertaken by an Inspector-General of Regulation.

This is not a new idea. The ATO already has an Inspector-General of Taxation, whose mandate is to identify systemic issues with the administration of the tax law.[77] This is one of the few accountability mechanisms that examines the overall regulatory approach of a regulator and the Inspector-General can initiate their own review based on complaints that they receive.

In addition, almost a decade ago the Uhrig review recommended that the Commonwealth establish an Inspector-General of Regulation with a view to providing the community with a mechanism to ensure that regulators are being held to account for the way in which they exercise their powers. It was the opinion of the Uhrig review that business would be more likely to feel comfortable making complaints about regulators to such an independent body.

This recommendation was not taken up by the government at the time, and while official explanations for rejecting this recommendation reveal little, there have been some suggestions that the recommendation was rejected following considerable opposition from some regulators.[78]

Clearly, the creation of a new body would need to avoid the pitfalls of duplication and the creation of another layer of bureaucracy that fails to deliver improvements to government regulation.

Investing resources in such a body is justified on the basis of the considerable expenditure on regulatory functions identified earlier and the considerable cost of poorly designed and administered regulation on the community.

Eliminating just a fraction of this cost each year may derive a net benefit. In addition, the creation of an Inspector-General may ultimately reduce expenditure on regulatory bodies by helping them to operate more efficiently. The introduction of such a body could also be accompanied by streamlining existing weak and ineffective accountability mechanisms currently in place.

In doing this, there could be an opportunity to create an independent umpire that has oversight of the full regulatory system – right from regulatory impact analysis through to the implementation of regulation. This could involve subsuming the functions of the Office of Best Practice Regulation, Ombudsman handling of regulator-related complaints, and some Auditor-General functions in relation to regulators. This would be a fundamental change from the current model and a range of considerations would impact the net benefit of adopting such a model.

Nonetheless, such an operational model would make an Inspector-General uniquely positioned to identify and address the root causes of unnecessary regulatory burden across the regulatory cycle, potentially resulting in more meaningful, substantive improvements in performance.

Alternatively, an operational model focused solely on regulators could be adopted.

An Inspector-General could undertake a number of roles in relation to regulators, including:

- Establishing a risk-based performance audit process, where those regulators with the most significant impact on the community and those with a poor track record being subject to more frequent audits.
- Developing best practice guidance, tools and templates for regulators including in relation to implementing more balanced performance frameworks, client service charters, risk-based compliance and enforcement approaches.
- Reporting on the progress of regulators in streamlining their approaches and reducing regulatory burden.

77. *Inspector-General of Taxation Act 2003*, Section 3.
78. S. Bartos, 'The Uhrig Report: Damp Squib or Ticking Timebomb?', *Australian Journal of Public Administration*, March 2005, pp. 95–99.

- Identifying systemic cases of legislative complexity that are unnecessarily leading to time-consuming and expensive judicial processes.

There are trade-offs between increased accountability and independence, and no doubt regulators would argue that an Inspector-General would compromise independence to some extent. However, the Commonwealth already has a working model in the Inspector-General of Taxation, which has not undermined the independence of the ATO.

Priority Action 2: Implement a new performance and accountability code for all major regulators in omnibus legislation. Such legislation should include provision for:

- The establishment of an Inspector-General of Regulation to provide additional oversight of regulators, including undertaking biennial performance audits of major regulators and responding to systemic issues identified by regulated parties. Such a body could be established within the Productivity Commission with a clear mandate to take active steps to improve regulator performance and recommend the streamlining of regulation where it is impeding the efficiency of regulators and placing unnecessary costs on regulated parties.
- A balanced performance reporting framework should assess not only enforcement and compliance activities but the extent to which these are undertaken efficiently.
- Regulators to prepare annual 'Statements of Accountability' that outline the basis for measuring the success of the regulator in agreement with the portfolio minister and the Inspector-General of Regulation.
- Regulators to establish public targets on streamlining their processes to reduce regulatory burden each year.
- Regulators to document, regularly update and adhere to a risk-based approach to compliance and enforcement activities.

Undertake a number of procedural quick wins

There are a number of opportunities for the government to extend current processes and procedures to ensure that regulators' efforts are well targeted.

Firstly, while there is no evidence of systemic failures in the separation of policymaking from regulators, there is room for more clearly defining the role of regulators in this area, particularly as technical regulation and guidance is increasingly issued by regulators.

Secondly, there is a need to ensure that there are transparent and effective mechanisms for regulated parties, courts and regulators to report areas of regulation that are complex and uncertain leading to expensive and potentially unnecessary resort to formal dispute mechanisms. These costs occur at the back-end of the regulatory process due to poor design at the front-end or regulation failing to keep pace with economic developments.

A number of procedural quick wins are outlined below that should be pursued as a matter of priority and implemented within the next 12 months.

Recommendation 3: The Auditor-General, in updating the Australian National Audit Office's *Guide to Administering Regulation*, should include guidance on the appropriate role of regulators in relation to policymaking. It should also outline how regulation making by regulators should be undertaken and monitored to ensure that it does not encroach on policymaking that is rightfully the role of the executive arm of government.

Recommendation 4: The Office of Parliamentary Counsel, in collaboration with the Department of Prime Minister and Cabinet, should issue guidance to policymakers and legislative drafters regarding the appropriate constraints that should be placed on the regulation-making role of regulators when drafting such roles into legislation.

Recommendation 5: The Commonwealth Government should extend the Office of Parliamentary Counsel's 'Complexity Flag System' to cover existing legislation in addition to legislation being drafted. This would allow regulated parties, courts and regulators to report existing areas of legislation that are complex and uncertain and that are driving unnecessary resort to courts and formal mechanisms. Interim and longer-term actions to resolve these complexities could then be devised.

PART 3: REDUCING THE STOCK OF POOR REGULATION

This final part of the paper addresses where governments should focus their efforts in beginning to remove and in some cases modernise the existing stock of regulation. This includes:

- Embedding systematic processes to address the stock of regulation.
- Streamlining critical areas of regulatory burden.

Where does regulation go wrong?

The Banks Regulation Taskforce identified five features that contribute to excessive compliance burdens and inefficient regulation:

1. **Excessive coverage, including 'regulatory creep'**: These are regulations that over time capture more businesses or activities than was originally intended.
2. **Overlapping and inconsistent regulatory requirements**: These can arise within one government but the most pervasive form in Australia tends to occur across jurisdictions, affecting national companies.
3. **Regulation that is redundant or not justified**: These regulations were either poorly designed from the start but have endured, or became ineffective over time and were not reviewed.
4. **Excessive reporting or recording burden**: Multiple demands for similar information from different arms of government without coordination can create significant burdens for business.
5. **Variations in definition and reporting requirements**: These differences create confusion and require considerable effort for business in understanding how to comply with its obligations.

The BCA considers that these five features are more likely to be found in regulations that have been designed through processes that depart from the BCA's Standards for Rule Making. By this, we are not simply referring to processes that comprehensively fail to meet the 30 standards, but even processes that fail on one or two of the standards.

We believe that there is very little margin for error when it comes to designing efficient regulation, underlining the importance of dedicated adherence to good process and rigorous policymaking practices at all times and at all stages of regulatory development.

Exhibits 6 to 8 demonstrate recent examples of poor practice against the BCA's standards.

Exhibit 6: BCA Standards for Rule Making in Practice: Government vs business regulatory treatment

Standard 2.5 – Government and business regulatory treatment is neutral (where applicable)

- In the first half of 2012, parliament passed the Equal Opportunity for Women in the Workplace Amendment Bill 2012, which made all businesses employing 100 or more people subject to requirements to report on a range of gender equity indicators.
- It is notable that the compliance burden of these changes were seen as too burdensome for the public sector but appropriate for the private sector. The Regulation Impact Statement to the Bill suggests [emphasis added]:

  > **... the size of the public sector workforce may itself be a compelling reason to defer its inclusion in the regime. Significant extra resources would be required** to monitor and work with these organisations, as well as a specific skill set which has not been developed in EOWA to date.

Source: Australian Government, *Reform of the Equal Opportunity for Women in the Workplace Act 1999 – Regulation Impact Statement*, 2012, p. 65.

Exhibit 7: BCA Standards for Rule Making in Practice: New South Wales Fuel Price Board Regulation

In June 2012, in response to concerns that motorists could be misled by petrol stations displaying only the discounted price of fuel with shop-a-docket discounts, the New South Wales Fair Trading Minister proposed new regulation of fuel price boards. The regulation had a number of critical flaws, with major departures from good regulation making outlined below.

Standard 1.3: All options that are proportionate to the problem at hand are considered, including non-regulatory options.

- The proposed regulation not only banned the display of discounted petrol prices, but required the display of **all** fuel products available at petrol stations. Common practice is for fuel retailers to display only a few of their most popular fuels. The regulation therefore required a substantial increase in the size of fuel price boards – a requirement largely unrelated to the perceived problem.

Standard 2.1: Cost–benefit analysis, that includes a detailed understanding of the costs to business is the centrepiece of regulatory impact assessment processes

- Industry estimates that the regulation will cost NSW fuel retailers $70 million, but the 25-page Regulation Impact Statement contains no quantification of costs or benefits.

Standard 2.9: Regulatory impact assessments are subject to adequate public consultation

- The proposed regulations were released on 28 June 2012, with less than a month for submissions (due 25 July) for a start date of 1 September 2012.

Standard 3.3: Before drafting new regulation, governments test whether an existing regulation or other Australian governments already address the same or related problem

- The regulatory proposal comes at the same time that the Ministerial Council on Consumer Affairs has agreed to consider the development of a national approach to fuel price board regulation.
- The Commonwealth Government has also undertaken substantial work on this issue that was neglected in the rush to regulate. In the 460-page report of the ACCC, *Monitoring of the Australian Petroleum Industry, December 2011*, there is an extensive discussion of retail competition but no discussion of any problem with inadequate fuel price boards.

Disappointingly, Consumer Affairs Ministers have released a public consultation paper canvassing a possible national model along similar lines to New South Wales, on the basis of around 70 complaints received by the ACCC each year on this issue.

Exhibit 8: BCA Standards for Rule Making in practice: Public consultation

Standard 2.9 – Regulatory impact assessments are subject to adequate public consultation

- The BCA's standards recommend a consultation period of at least two months. Recent experience has suggested a common tendency to release complex regulation for just one month over the Christmas holiday period:
  - On **20 December 2010**, the then Parliamentary Secretary to the Treasurer released an exposure draft of the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011 and associated explanatory material. The draft Bill contained measures relating to the regulatory framework surrounding the remuneration of company directors and executives. **Closing date for submissions: 20 January 2011**.
  - On **12 December 2010**, the then Deputy Prime Minister announced the Competitive and Sustainable Banking System Package. The exposure draft legislation, as set out in the Competition and Consumer (Price Signalling) Amendment Bill 2011, proposed amendments to the Competition and Consumer Act 2010 to address anti-competitive price signalling and information exchanges. **Closing date for submissions: 14 January 2011**.
  - On **28 February 2013**, the then Assistant Treasurer released a consultation paper on the government's proposed changes from quarterly to monthly company tax instalments. These changes have a significant compliance cost impact on businesses and also have an adverse impact on cashflow. **Closing date for submissions: 13 March 2013.**

Systematic processes to address the stock of regulation

Evening out the current bias towards new regulation

Currently, incentives in the regulatory system are largely in favour of introducing new regulation rather than removing ineffective or overly burdensome regulation. In order to provide an incentive and regularly prompt government to reassess ineffective or overly burdensome regulation, agencies and ministers should be required to make every attempt to identify an offsetting reduction in existing red tape each time new regulation is introduced.

These sorts of mechanisms have been assessed by some regulatory experts as being a relatively crude mechanism for managing the regulatory stock. Notwithstanding these assessments, we believe that such a mechanism needs to be implemented as a stop-gap measure, with the case for its ongoing use re-evaluated after five years. It may take some time for governments to establish both a meaningful and workable offsetting regime. Therefore, less sophisticated interim measures such as 'one in, one out' within the same portfolio may have to be employed to even out the bias towards increasing the stock of regulation.

Priority Action 3: Require all new regulations that will result in a significant increase in regulatory burden to have an equivalent offsetting red tape reduction in the same portfolio.

Implement existing findings on the stock of regulation

Given the strong body of existing work from the Productivity Commission that has reviewed key areas of the regulatory stock, every effort should be made to utilise these reports. While in many cases the government has published responses to these reviews, in most cases such responses lack implementation plans and it would appear that many recommendations have not been implemented at this stage.

The BCA would like to see these reviews taken seriously and their recommendations implemented thoroughly with reform progress monitored, unless there are particularly strong public interest grounds for not implementing a recommendation.

Table 3: Recent Productivity Commission reviews of regulatory burden

Annual Reviews of Regulatory Burdens	Performance Benchmarking of Australian Business Regulation
2007 – Primary sector	2008 – Quantity and Quality
2008 – Manufacturing sector and distributive trades	2008 – Cost of Business Registration
2009 – Social and economic infrastructure services	2009 – Occupational Health and Safety
2010 – Business and consumer services	2009 – Food Safety
2011 – Identifying and Evaluating Regulation Reforms	2010 – Planning, Zoning and Development Assessment
	2011 – Role of Local Government as Regulator
	2012 – Regulatory Impact Analysis: Benchmarking
	2013 – Regulator engagement with small business (current)

Source: Productivity Commission website, 2013.

Recommendation 6: Australian Governments should seek to implement all of the 155 recommendations from the Productivity Commission's annual reviews of regulatory burden that were undertaken from 2007 to 2011.

Assess and address cumulative regulatory burdens

Many agencies introduce regulation without a full understanding of the cumulative burden of regulation on the sector or part of the economy that they are regulating. As a result, there is often a narrow focus on the marginal effect of new rules without proper appreciation of duplication, overlap and the full costs of regulation that are being imposed on a sector.

In future, the Productivity Commission's annual benchmarking and regulatory burden review programs could be consolidated and structured to provide rolling audits of the cumulative regulatory burden in each industry sector at least every five years.

Recommendation 7: Reinvigorate the Productivity Commission's annual benchmarking and regulatory burden review programs by establishing rolling audits of the cumulative regulatory burden in each industry sector at least every five years.

Sunsetting and statutory reviews

Regulation is rarely perfect at a point in time particularly given rapid changes in markets and technology. Therefore, there must be regular systematic opportunities to refresh regulation, including going back to first principles and making the case again for continuing regulation.

The prospect of regular review provides a strong incentive for regulation-makers to be more diligent and thorough in designing high-quality regulation at the start of the regulatory cycle.

The Legislative Instruments Act currently provides for the automatic sunsetting of a range of delegated legislative instruments every 10 years. Analysis conducted by the Office of Best Practice

Regulation has also identified that legislation and regulation introduced since 2007 has generally been subject to statutory review provisions.

These sorts of review mechanisms not only provide a prompt for regular refreshing of the regulatory stock but also a strong incentive to get regulatory design right in the first instance and to put in place arrangements for monitoring the effectiveness of the regulation to justify its future remaking.

The Borthwick–Milliner review and Productivity Commission have recommended introducing a sunset clause or a review provision into all primary legislation that has a significant impact on business. While some Commonwealth regulation is subject to sunsetting requirements and statutory review, there are a range of instruments that are not subject to these requirements.

In its response, the previous government chose not to accept the recommendation for a sunsetting requirement, preferring for review mechanisms to be incorporated into new legislation as necessary. In effect, any requirements to regularly review regulation continue to be at the discretion of the responsible minister.

It is problematic to extend automatic sunset provisions to apply to all primary legislation due to uncertainty and because of the considerable parliamentary and legislative drafting workload that would be involved. However, this has not stopped jurisdictions such as the United Kingdom in implementing robust and well-targeted sunsetting mechanisms for primary legislation. For this reason, we believe that sunsetting arrangements should be extended to primary legislation that has a significant impact where it is practicable to do so.

Similarly, requiring statutory reviews would serve to reinforce and institutionalise current practice rather than creating additional burdens.

The BCA's proposed approach recognises that the greatest priority for detailed re-examination of the need for regulation from first principles should be targeted to legislation and legislative instruments that have the greatest impact with appropriate exceptions from these requirements. These proposed arrangements are outlined further in Exhibit 9.

Recommendation 8: Regularly refresh and streamline the regulatory stock by better targeting existing review and sunsetting requirements.

- Extend sunsetting requirements to primary legislation where it has a significant impact and it is practicable to subject it to a full remaking every 10 years.
- All primary legislation and legislative instruments that have highly significant or uncertain impacts on business and the community should be subject to statutory review every five years.

Exhibit 9: Scope and coverage of proposed sunsetting and statutory review arrangements

- All primary legislation and legislative instruments such as regulation that has highly significant or uncertain impacts to be subject to statutory review every five years.
- Legislative instruments to be subject to automatic sunset at least every 10 years and primary legislation where it has a significant impact and it is practicable to subject it to a full remaking every 10 years.
  - This recognises that an automatic lapse could be problematic for some primary legislation and if applied too widely would result in considerable additional parliamentary and legislative drafting workload. It would instead be applied to all new legislation on a case- by-case basis where it is practical and there is a net benefit.
- Instruments that have been introduced on a temporary basis or in industries subject to frequent change (particularly due to technological developments) should be subject to shorter sunset requirements of at least every five years (where practicable).
- Existing instruments that are judged to have a significant impact are subjected to a Regulation Impact Statement before being remade.
- Exceptions from these requirements to apply for both legislation and legislative instruments such as those:
  - that are critical to the ongoing functioning of government, such as the budget
  - relating to matters of national security or emergency response
  - upon which consistent and certain application is absolutely critical to upholding justice, business continuity, democratic institutions, community safety and security.

Streamlining critical areas of regulatory burden

In identifying areas of priority for regulatory reform, the BCA does not consider it is sufficient to simply provide a long list of detailed regulatory annoyances. An efficient regulatory system focused on continual improvement and frequent dialogue with regulated parties should address these issues as a matter of course. Nonetheless, this part of the paper does identify various examples of highly illogical regulatory provisions that are present under the areas of strategic importance outlined here.

The BCA has placed greater focus on identifying broad areas of regulation often spanning multiple regulatory instruments and jurisdictions that are systemically inefficient, in line with the five criteria outlined above. We have also chosen areas of regulation that are strategically important – that is, areas of regulation critical to future economic growth and meeting looming challenges.

On this basis, the BCA has identified five areas of inefficient regulation that it considers are in need of reform:

1. Planning and zoning regulation
2. Retail sector regulation
3. Environmental assessment and approvals
4. Workplace regulations
5. Corporate governance regulation

Table 4 outlines how each of these areas aligns with the criteria for inefficient regulation.

Table 4: Priority areas for regulatory reform

Area	Excessive coverage	Generates unnecessary delays	Excessive reporting or recording	Variation in definitions and reporting requirements	Inconsistent and overlapping requirements
Planning and zoning	✓	✓✓	✓	✓✓	✓✓
Retail sector		✓		✓✓	✓✓
Environmental assessment and approvals		✓✓	✓✓	✓✓	✓✓
Workplace regulations	✓✓	✓			✓
Corporate governance regulation	✓	✓	✓✓		✓

These regulations involve areas of Commonwealth Government responsibility as well as areas that have traditionally been dealt with through Commonwealth–state collaboration. The impetus for reform and plan for progressing the reform agenda is outlined below.

Actions to progress state-based reforms

Planning and zoning, retail sector and environmental assessment and approvals are all areas that have previously been taken up on COAG's agenda for reform.

This presents challenges at a time when some are questioning the strength of Australia's federation. The outgoing Chairman of the COAG Reform Council recently suggested that the 2008 reforms to COAG, which were directed at a new form of federalism that placed fewer prescriptions on states, were effectively unravelling.[79]

Implementing ambitious regulatory reforms such as these through a degree of both collaboration and healthy regulatory competition requires a circuit-breaker that moves beyond the traditional models of COAG regulatory reform.

This could be achieved through a productivity payments scheme designed to encourage more timely and expansive regulatory reform in areas of significance to the national economy such as planning, retail sector regulation and environmental assessment and approvals.

It would be a bottom-up reform process with states submitting their best proposals for deregulating and lifting productivity in these and other areas through a competitive bid process. The possible benefits of reform proposals would be assessed by the Productivity Commission to inform choices around bid funding. The Productivity Commission could also assess state eligibility for payments should the reforms achieve their objectives.

The experience of National Competition Policy demonstrated that reward payments work in driving major microeconomic reform by the states and territories.

With the Commonwealth continuing to collect around 83 per cent[80] of taxes in the federation, it stands to gain greater fiscal benefits from the economic gains from state reform and it is therefore

79. P. McClintock, 'Harnessing Federalism – The Missing Key to Successful Reform', Public Lecture presented by the Sir Roland Wilson Foundation and Crawford School of Public Policy, Canberra, 19 November 2012.
80. BCA calculation based on ABS, *Taxation Revenue 2010–11*, cat. no. 5506.

appropriate that some of these gains are distributed to the states for their efforts through productivity payments.

In a tight fiscal environment for states, the increase in direct funding linked to deregulation could be a powerful incentive. Further detail on how such a scheme could work is provided in Exhibit 10.

Priority Action 4: Introduce productivity payments from the Commonwealth to the states in order to encourage regulatory improvement and efficiency. Payments should target state-led regulatory reform in areas of significance to the national economy and involving multiple levels of government regulators.

Recommendation 9: In introducing productivity payments to the states in order to encourage regulatory improvement, the Commonwealth Government should target the first round of competitive funding bids on state reforms to planning and zoning, environmental assessment and approval, and retail sector regulation.

Exhibit 10: National Productivity Payments

Purpose of productivity payments

The purpose of Productivity Payments is to encourage bottom-up state government competition and regulatory reforms that have a national benefit.

Why are productivity payments needed?

State governments require incentives to initiate and undertake difficult microeconomic reforms that have a national benefit. This is because proportionately fewer of the fiscal benefits of productivity-enhancing reforms accrue to state governments. This is due to national taxation arrangements which see less than 50 per cent of state government revenue collected through state government taxes; the remaining revenue is comprised of Commonwealth grants, the GST and charges.

The current approach to incentivising states to undertake microeconomic reforms that have a national benefit is via National Partnership Agreements. This approach has not delivered the desired results. For example, the Seamless National Economy Reforms have not delivered all the productivity-enhancing outcomes that were intended.

A new approach is need for two reasons. Firstly, the approach taken under the Seamless National Economy, which was characterised by close Commonwealth oversight of milestones that were often not related to reform outcomes, is ill suited to incentivising state government reform.

The Commonwealth adopted a 'micromanagement' approach to incentivising states to deliver reforms. This approach focused on administrative outcomes – such as producing reports or Regulation Impact Statements – rather than reform outcomes. Consequently, states were able to achieve most milestones without necessarily delivering reform benefits on the ground. There were also national partnerships to deliver Commonwealth-own initiatives, which did not necessarily have the buy-in of state governments.

Secondly, many of the big gains from microeconomic reform do not need a national approach. National partnerships are inherently a joint reform agreement between the Commonwealth and states, and this form is ill suited to incentivising state-only reform.

A new system of Productivity Payments would incentivise state governments to undertake microeconomic reforms that have a national benefit by:

- delivering autonomy to state governments in implementing the reforms but only paying upon the achievement of outcomes
- ensuring state governments received increased fiscal benefits from reform.

Exhibit 10: National Productivity Payments (continued)

What reforms should be eligible?

Competition and regulatory reforms would be eligible to be included in a National Productivity Payments scheme. To be eligible reforms would need to meet certain criteria. The proposed reforms:

- would need to have a demonstrable and measurable impact on national productivity – the scheme should not reward states for undertaking routine reforms
- should be innovative and be able to be emulated by other jurisdictions – this will ensure that states that have already undertaken difficult reforms are not penalised for being first movers.

Productivity payments should not be made with respect to infrastructure projects, privatisation of public assets, or reforms to government service delivery, all of which are dealt with in other schemes and processes.

Productivity payments should not be used to incentivise a national scheme – harmonisation and national schemes should be pursued on a multilateral basis, for example through more selective use of national partnerships.

While these criteria will define broad eligibility, further focus on particular reform areas will be required. For this reason, there should be three-year periods of focus on specific reform areas. For example, in the first three-year period, the Commonwealth should call for competition and regulatory reform proposals (consistent with the above criteria) relating to:

- state government planning processes
- access to natural resources (water, energy and minerals)
- project costs and construction sector regulation (construction codes)
- local government reform
- retail sector deregulation.

Governance and institutions

The Productivity Commission should be responsible for, and given full authority and independence to carry out the following functions:

- assessing eligibility for proposed reforms
- defining the outcomes/achievements that must be met to obtain payment
- ranking the reforms by their potential to lift productivity
- determining if reform objectives have been achieved and the associated eligibility for payments
- publishing its assessments and rankings.

The Treasurer will ultimately be responsible for determining if a reform is included in the scheme and if a payment should be made.

The National Productivity Payments Scheme could be established by way of intergovernmental agreement negotiated with state government heads of treasuries.

Exhibit 10: National Productivity Payments (continued)

Payments

Payments should only be made once the reform outcomes (as originally determined by the Productivity Commission) have been achieved. In this regard there should be four options open to the Treasurer when making payments:

- make a payment in full
- make a partial payment where the reform has not achieved the full desired outcome
- suspend a payment until an outcome is delivered
- suspend all productivity payments to a jurisdiction where a key reform outcome has not been delivered, or previous reforms have been unwound or reversed.

Funding

It is important to note that payments need not flow immediately with the design of the scheme and reforms all taking time before outcomes are realised.

Planning and zoning regulation

Rationale

Taking full advantage of the incredible potential of our cities as they grow involves managing growth and mitigating the impacts of congestion. This means that our planning and zoning regulation will need to become considerably more agile to promote both economic growth and liveability.

Australia's cities will experience significant growth in the coming decades – Sydney and Melbourne are each projected to grow to approximately seven million people by 2050, and Brisbane to four million people.[81]

In addition, Australia's cities are integral to strong economic growth in the future. For example:

- Major cities account for around 80 per cent of GDP growth and nearly 75 per cent of Australia's workforce. Even during the resources boom, major cities' share of the national economy has increased.
- Our cities are also the prime drivers of productivity arising from the concentration of firms and the deeper pool of workers in cities which promotes the sharing of knowledge and expertise.

Evidence

The extensive shortcomings of Australia's current system of planning and zoning regulation have been well acknowledged. For example, in its review of planning, zoning and development assessment, the Productivity Commission found that:

> The regulations and agencies involved in planning, zoning and development assessments constitute one of the most complex regulatory regimes operating in Australia. This regulatory system is not like most other regimes which have a clearer delineation between policymaking, regulation writing and administration.[82]

81. ABS, *Population Projections, Australia*, 2006 to 2101, cat. no. 3222.0, 2012.
82. Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment*, 2011, p. xxvi.

Planning regulation has a significant impact on the cost and ultimate attractiveness of investment – BCA members have advised that lenders apply different risk premiums when funding developments, based on the expected delays in different jurisdictions' planning systems. The potential magnitude of the cost of delays has been well illustrated by the OECD:

> The time cost of delay for a company is not simply the interest rate it pays on borrowed funds while waiting for approval; it is the opportunity cost of its funds, which is higher than the interest rate. **If the opportunity cost of money is 15 per cent per year, and planning adds three years to the time to opening a new site, as is possible with complex projects with appeals, the cost of delay is 52 per cent of the initial investment.**[83]

In Victoria, which is considered to be one of the better performing states, the average planning scheme amendment takes around 50 weeks from receipt to finalisation. Complex amendments and those requiring environmental approvals generally exceed these timeframes.[84]

Recent reform progress

A number of states are progressing reforms to their planning systems, most notably New South Wales with its recently released *A New Planning System for New South Wales – White Paper*.

In addition, through the Business Advisory Forum, COAG has previously agreed to progress reforms to encourage better development assessment processes for low-risk, low-impact development, although progress to date has been disappointing.

Retail sector regulation

Rationale

The retail sector is one of Australia's largest employers, accounting for over 11 per cent of Australia's workforce.[85]

It is confronting an increasingly challenging environment with the high Australian dollar, online competition and the reduced confidence of consumers. Given the considerable structural challenges before the retail sector, it is critical that there are not undue regulatory impediments to the sector responding and adapting flexibly to these challenges.

Evidence

In its 2011 inquiry into the retail sector, the Productivity Commission found that "Retailers operate under several regulatory regimes that restrict their competitiveness and ability to innovate."[86]

These regimes include planning and zoning, retail tenancy regulation, transport restrictions, retail trading hours, workplace relations and a range of inconsistent state-based regulation. Examples of these burdens are highlighted at Exhibit 11.

Australian's retail sector productivity does not compare well with other jurisdictions and this gap has widened over time. Deloitte Access Economics estimates that if the Australian retail sector had enjoyed the same productivity growth that the US has experienced over the last decade, then output in the sector would be 9.2 per cent higher, prices would be 3.5 per cent lower and there would be 180,000 more people employed.[87]

83. OECD, 'Land Use Restrictions as Barriers to Entry', *Policy Roundtables*, 2008, p. 36.
84. Municipal Association of Victoria, Submission to the Victorian Government's review of the *Planning and Environment Act 1987*.
85. ABS, *Labour Force, Australia, Detailed, Quarterly*, cat. no. 6291.0, May 2013.
86. Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, December 2011, p. xiv.
87. Deloitte Access Economics, *The Structure and Performance of the Australian Retail Industry*, June 2011, p. 5.

Exhibit 11: Retail sector regulatory burdens

Storage of dangerous goods

- The licensing and notification limits for each class of dangerous goods are different in each jurisdiction.
- For example, in Victoria if a company holds over 10,000 kg of aerosols then you need to notify the regulator but in some other jurisdictions such as South Australia you do not.
- Each jurisdiction also has different requirements for how and when requirements are discharged (e.g. placarding, manifests, registers).

Quarantine rules

- Tasmania claims quarantine is required for fruit fly when in reality fruit fly does not occur over winter in Tasmania.
- Only honey which is made in Western Australia can be sold in Western Australia.
- Only fin fish which is caught in Tasmania can be sold in Tasmania.
- Only Australian rice which is made in the Riverina district can be sold in the Riverina district.

Transport restrictions

- A number of councils apply curfews generally from 6pm to 7am that restrict night time deliveries for major retailers. They are designed to reduce light and noise disturbances for residents.
- The impact of these restrictions is to increase transit time due to congestion on roads in peak hours, increase unload times due to congestion at stores, increase travelling distances, increase fleet requirement as deliveries are more concentrated through the day and increase congestion at distribution centres.

Persistent Trade Measurement inconsistency

- One company described the highly variable advice received from different states in regards to the interpretation of the word “meat” in the Uniform Trade Measurement Legislation. In one state meat was defined as red meat only while in another it was defined as all animal flesh other than seafood.

Food labelling

- A number of jurisdictions have introduced or are planning to introduce new regulatory regimes requiring major fast food outlets to display kilojoule information alongside the price of the product on their menu boards, website, leaflets and menus.
- Supermarkets have also become caught in this regulatory regime – for items such as BBQ chickens, bread products and salads made in store. Implementing the laws will cost large and small supermarkets over $10 million in one state with new ticketing machinery, new display infrastructure and catalogue changes.

Trading hours restrictions

There are a range of outdated trading restrictions across states, including:

- In Western Australia, hardware stores cannot open before 11am on Sundays if they stock both light bulbs and light fittings. This is because the Retail Trading Hours Regulation 1988 prohibits the sale of light fittings before then.
- In NSW, the Retail Trading Act 2008 makes Boxing Day shopping legal in 40 local government areas, but illegal in another 112.
- In South Australia, the Shop Trading Hours Act 1977 prevents shops in Adelaide from opening before 11am on a Sunday. But an exemption is available that allows shops to open early if they sell “asbestos cement sheet and articles”.

Recent reform progress

The Commonwealth Government's response to the Productivity Commission's inquiry into the retail sector did not seek to proactively progress the issues raised . It noted or agreed-in-principle to the 12 recommendations and did not map out an implementation plan. It also took no responsibility for coordinating state and local government based regulatory issues raised by the inquiry. There is no evidence of any progress being made against the Productivity Commission's recommendations at this stage.

Environmental assessment and approvals

Rationale

While resources investment shows clear signs of easing, it is still expected to remain a critical part of our economy in the period ahead, representing 6 per cent of GDP in 2013–14.[88] This only serves to reinforce the importance of ensuring that any unnecessary or overly burdensome regulatory requirements on investment are addressed.

Regulatory impediments put at risk the cost effectiveness and competitiveness of Australia's investment pipeline – there are almost $900 billion of committed and prospective investment opportunities in large-scale projects, mostly in resources and economic infrastructure.[89]

The community must be assured that under the environmental approvals system, Australia's unique environment and heritage values will be maintained or enhanced. This can be achieved while reducing regulatory duplication between the Commonwealth and state governments and enhancing the competitiveness of project proponents.

Evidence

Recent research suggests that the efficiency of Australia's regulatory approvals process is not world standard. A recent report commissioned by the Minerals Council of Australia noted that the average Australian thermal coal project experiences an additional 1.3 years of delay relative to those elsewhere.[90]

Competitor countries are moving to further reduce the time taken to deliver environmental approvals. Canada, for example, has introduced statutory time limits for environmental approvals and made provisions for accrediting provincial governments' approvals as part of this process.

The costs and delays associated with environmental impact assessment and approval are significant. An Australian National University study estimated a direct costs to all industries of up to $820 million over the life of the Environmental Protection and Biodiversity Conservation Act (EPBC Act).[91] A significant part of this cost is the result of double-handling between the state and Commonwealth Governments. The referrals process under the EPBC Act is resource and cost-intensive, with referrals ranging from $30,000 to $100,000.[92]

The BCA has previously cited the example of one BCA member company[93] that completed an environmental assessment process that took more than two years, involved more than 4,000 meetings, briefings and presentations across interest groups, and resulted in a 12,000-page report. When approved, more than 1,500 conditions – 1,200 from the state and 300 from the Commonwealth – were imposed. These conditions have a further 8,000 sub-conditions attached to

88. ABS, *Private New Capital Expenditure and Expected Expenditure, March 2013*, cat. no. 5625.0, May 2013.
89. Deloitte Access Economics, *Investment Monitor September 2013*, p. 1.
90. Minerals Council of Australia, *Opportunity at Risk: Regaining our Competitive Edge in Minerals Resources*, 2012, p. 13.
91. A. Macintosh, 'The Environment Protection and Biodiversity Conservation Act 1999 (Cth): An Evaluation of Its Cost-Effectiveness', *Environmental and Planning Law Journal*, Vol. 26, 2009, p. 337; and A. Macintosh, *The EPBC Act Survey Project: Preliminary Data Report*, Australian Centre for Environmental Law, Australian National University, 2009.
92. Productivity Commission*, Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, Melbourne, 2011.
93. Business Council of Australia, *Discussion Paper for the COAG Business Advisory Forum*, Melbourne, 2012.

them. In total, the company invested more than $25 million in the environmental impact assessment.

Recent reform progress

Recent amendments to the EPBC Act have created a new matter of national environmental significance (MNES) in relation to the significant impacts or likely significant impacts of coal seam gas development and large coal mining development on a water resource (the 'water trigger'). This means in effect that any coal seam gas or coal mining development, irrespective of size, will require federal government assessment and approval.

The Australian and Queensland Governments have recently signed a Memorandum of Understanding to establish a one-stop-shop for environmental approvals by way of accreditation under the EPBC Act. This is an encouraging step towards removing double handling between the Commonwealth and states. Other state governments should look to negotiate similar agreements with the Commonwealth with urgency.

Corporate governance regulation

Rationale

Having an effective corporate governance framework is an important driver of company performance through its effects on entrepreneurialism, innovation, development, accountability and risk management.

The level of corporate governance red tape has increased significantly in recent years as the regulatory approach shifts from a performance to conformance-based approach.[94] This has been evident in recent approaches to executive remuneration, regulation of fraudulent phoenix company activity and gender equity reporting.

With this approach comes an increasing likelihood that corporate governance requirements become an impediment to better company performance by diverting the attention of boards and executives from their core business.

Recent changes to regulation of executive remuneration are illustrative of this. While improving levels of shareholder engagement on remuneration issues, in some instances the laws have resulted in an over-emphasis on remuneration issues and have detracted focus from a range of other issues critical to shareholder value. The laws have also provided a vehicle for some groups to protest against a company on social and environmental issues unrelated to remuneration.

An Australian Institute of Company Directors survey found that almost 50 per cent of directors now listed the remuneration report as amongst the most time consuming disclosures for boards.[95] This is despite the fact that less than 10 per cent of those surveyed felt that it should consume the majority of the board's time and focus.[96]

Evidence

The Corporations Act currently runs to more than 2,500 pages, reflecting the expanding and ungainly nature of Australia's corporate regulations.

This is well acknowledged by both business and corporate law experts. For example, Associate Professor Cally Jordan from the University of Melbourne argues that:

> There is no dispute. The Corporations Act 2001 (Cth) ('Corporations Act') is unlovely and unloved. Complex, ungainly, badly drafted, internally inconsistent and conceptually troubled; it is a mishmash of old law, ad hoc amendments, provisions pulled willy-nilly from different legal systems, statements which are not law at all, ideological posturing, and drafting styles that swing wildly from the colloquial to the

94. F. Hilmer, 'What's Wrong with Microeconomic Reform Today?', Presentation to the Sydney Institute, 31 August 2010.
95. Australian Institute of Company Directors, Member Survey, November 2012.
96. ibid.

> technical ... Despite massive efforts at law reform in the last 15 years, and continuous tweaking, the Corporations Act remains, as Sir Anthony Mason found it, 'indigestible and incomprehensible.'[97]

There are a range of other regulations that impact the corporate governance environment in Australia – for example, even after recent COAG reforms to Directors Liabilities take full effect there will still be well over 2,500 offences that directors could face under liability provisions.[98]

The extensive regulatory regime comes in spite of Australia being a relatively high performer in corporative governance – for example, the World Economic Forum places Australia seventh out of 148 countries for the efficacy of our corporate boards.[99]

Exhibit 12: Minority shareholder rights gone too far?

Current provisions under section 249D of the Corporations Act allow just 100 shareholders to require that directors convene an extraordinary general meeting (EGM).

To illustrate the incredibly small minority of shareholders that can demand an EGM regardless of the genuine urgency of their issues, it is useful to consider how the 100 member rule would apply to a handful of major Australian companies. For example, this would represent:

- Less than 0.03 per cent of all Woolworths shareholders.
- Approximately 0.0125 per cent of all Commonwealth Bank shareholders.
- Approximately 0.007 per cent of all Telstra shareholders.

The conduct of EGMs to consider matters that can be properly addressed at AGMs consumes considerable unnecessary resources and diverts management from the day to day operations of the company. EGMs for large listed companies can cost up to $1 million.

Flaws in this current threshold have been widely recognised and amendment of this provision is well overdue. For example, in 1999 the Parliamentary Joint Statutory Committee on Corporations and Securities concluded that "the present provision for 100 members to requisition a meeting of the company is inappropriate and open to abuse".

Source: *Report on Matters Arising from the Company Law Review Act 1998*, October 1999, para 15.16.

Recent reform progress

Recent reform efforts in this area have been heavily focused on increasing regulatory requirements, and have come in waves without considering the cumulative impact on companies or other areas of corporate regulation that could be streamlined.

Reform efforts focused on streamlining corporate governance requirements have also been patchy. For example in the areas of directors' liabilities, states such as New South Wales have reduced the number of offences faced by directors from over 1,000 to 144.[100] On the other hand, states such as Western Australia, South Australia and Tasmania are not even in a position to accurately quantify the number of offences that currently apply to directors in their legislation.[101]

Next steps

While the government should seek to take a broader view of the cumulative cost impact of the corporate governance regulatory environment with a view to streamlining requirements, there is

97. C. Jordan, 'Unlovely and Unloved: Corporate Law Reform's Progeny', *Melbourne University Law Review*, Vol. 33, 2009, p. 627.
98. BCA calculation based on COAG Reform Council, *Seamless National Economy: Report on Performance 2011–12*, December 2012, p. 90.
99. World Economic Forum, *The Global Competitiveness Report 2013–14*, p.111.
100. ibid.
101. ibid.

also a case for hastening slowly so as not to increase uncertainty for firms. Making dramatic changes to corporate governance regulations in a short period of time would bring with it major transitional costs and could have unintended consequences.

On this basis, a useful first step may be for the government to commission a study to ascertain the cumulative compliance burden of corporate governance regulation in Australia. This would provide policymakers with a better understanding of the existing regulatory burden from corporate governance regulation before introducing new requirements. It would also provide a basis for understanding which areas of regulation are the most costly and identifying the greatest opportunities for streamlining.

Recommendation 10: The government should commission a study to quantify the cumulative compliance burden of corporate governance regulation in Australia.

Workplace relations regulation

Rationale

Improvements in productivity and competitiveness improvements are likely to flow from working smarter, not harder, by being innovative in product and service design, by adopting new technologies, work processes and supply chains – changing what businesses do and how they do it.

Industrial relations regulations have a rightful role to play in addressing legitimate community concerns about workers' basic rights. But equally they have to preserve the ability of businesses to engage effectively with their employees to change work arrangements in response to commercial imperatives and achieve improvements in competitiveness that are critical to the sustainability of companies and their workforces.

Evidence

The Productivity Commission has outlined how flexible workplace arrangements enable firms to adapt more readily to changing circumstances, for example to meet changes in demand by:

- Adjusting the workforce size either through engaging or dismissing employees, the short-term use of casuals or contracting out of functions traditionally performed in-house.
- Varying the scheduling and intensity of use of the existing workforce – strategies include flexible rostering for overtime and shift work and scheduling rostered-days-off and annual leave to coincide with low demand.
- Moving labour between functional areas – this strategy requires that workers have both the skills and willingness to move between tasks and requires the removal or reduction of any barriers that may exist.
- Linking remuneration and therefore unit labour costs, to product demand and output rather than hours worked – approaches include sales commissions or incentives and bonus or profit sharing schemes.

One way to enable firms to adapt in this way is to create the institutional, policy and regulatory environment in which businesses can respond effectively to competitive pressures. This should involve regulation that supports direct engagement between employers and employees at the enterprise level, reduces unnecessary uncertainty and risk, removes barriers to job creation, creates incentives for collaboration and minimises industrial conflict and delivers fair remuneration outcomes that reward effort.

Companies have identified provisions in the current legislative framework which are being used, frequently in combination, to undermine competitiveness, impede productivity and job creation, and add unnecessary delays and costs to doing business.

Recent reform progress

The previous government's amendments to the Fair Work Act 2009 fail to address the core issues that need to be resolved in order to enhance productivity and competitiveness so as to provide an environment where employers can grow their business and provide additional employment opportunities.

The amendments in no way address the core issues raised by the business in submissions to the review of the Fair Work Act in 2012. Indeed, several of the amendments fall outside the consideration and recommendations of the panel who undertook the review.

Next steps

The BCA considers that it is inevitable that the workplace regulatory framework will need to change substantially to cope with an increasingly competitive global landscape, rapid technological developments, changing consumer demand and an ageing workforce. In the longer term this requires a fundamental rethink of the regulatory framework that will be most conducive to productive workplaces, in light of these trends.

In the shorter term, the government should pursue a number of immediate changes to the Fair Work Act that aim to foster greater flexibility and innovation and constrain business costs.

Recommendation 11: The government should pursue a number of immediate changes to the Fair Work Act to foster greater flexibility and innovation and constrain business costs. These changes would include:

- reducing the range of matters that can be bargained over
- providing access to employer-only greenfield agreements
- enhancing the capacity to agree flexibility arrangements with employees including through individual flexibility arrangements
- reducing the scope of the adverse actions provisions
- limiting access to protected industrial action where there has been unreasonable or capricious use of such action
- limiting union entry rights to employer premises
- making unlawful clauses which exclude the engagement of contractors or labour hire companies
- modifying the "better off overall test" to provide for a broadening of matters that may be taken into account in the application of the test
- modifying provisions relating to majority support determinations
- amending the transfer of business arrangements to include a sunset clause after twelve months.

GLOSSARY

AAT	Administrative Appeals Tribunal
ACCC	Australian Competition and Consumer Commission
AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
ANAO	Australian National Audit Office
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange
ATO	Australian Taxation Office
CCA	Competition and Consumer Act 2010
COAG	Council of Australian Governments
EPBC Act	Environment Protection and Biodiversity Conservation Act
ICN	International Competition Network
IMF	International Monetary Fund
MNES	Matter of National Environmental Significance
OBPR	Office of Best Practice Regulation
RIA	Regulatory/Regulation Impact Analysis
RIS	Regulation Impact Statement

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