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# Towards Responsive Regulations and Regulatory Coherence in ASEAN and East Asia: The Case of Australia

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**Abstract:** This paper aims to review the coherence of the regulatory management system in Australia and explore how the system was applied in two contrasting case studies of regulatory change. The paper explores the broad success of the National Competition Policy legislative review and the relatively disappointing outcome of the Seamless National Economy Agenda.

***Keywords*:** Regulatory Reform Regulatory Management; the National Competition Policy; the Seamless National Economy Agenda

***JEL Classification*:** DO4; D73; D78; F15; F23; F42; F55; G18; H11; H77; Z18

* Our colleague and friend Greg Bounds passed away in the early stages of the research and writing of this paper. He had indicated that this might be the case and Rex Deighton-Smith agreed to stand by and take over Greg's role. Greg's input was, nevertheless, valuable and important, especially his contributions at the first working party meeting in Kuala Lumpur. We shall miss him.
This country study of regulatory coherence in Australia falls into three parts. Part 1 focuses on broad regulatory policy, including the Regulatory Management System (RMS), and its evolution over time. Parts 2 and 3 are case studies that contrast a successful regulatory reform programme with a less successful programme of regulatory change, and highlight the role of the RMS in each.

# 1. The Regulatory System in Context

## 1.1. Introduction

This part of the paper provides a brief overview of the major features of Australia's legal and political system in relation to regulatory capacity, an outline of Australia's current social and economic development and a brief summary of the development of its regulatory management system (RMS), and recent assessments of regulatory quality in Australia.

Australia has been ranked among the highest performing nations for both quality of government and regulatory quality in successive World Bank Governance Indicator (WBGI) series. In 2012, its percentile rank, for example, was 94.26 for Government Effectiveness (compared with 91.71 in 2002), and 97.13 for Regulatory Quality (compared with 91.67 in 2002) (World Bank 2014). However, while of interest, the WBGI do not provide an in-depth indication of country RMSs, nor is there clear evidence linking RMS performance over time to the WBGI series indicators. This is largely because of the very limited information available, particularly quantitative, regarding RMS performance in any country. As can be seen in the sections below, while the available, limited information does indicate that Australia's RMS, notably its regulatory impact assessment (RIA) systems, have improved their performance over time, that performance has been variable and shows room for improvement. Successive governments have been aware of these limitations and have undertaken a variety of changes over time to reduce them.

## 1.2. Legal and Political System and Regulatory Capacity

Australia is a constitutionally based federation with a national government (hereinafter the Commonwealth Government or Commonwealth), based in part on that of the British system of parliamentary democracy, as well as some features of the USA's system. There are six state governments, namely Queensland, New South Wales, Victoria, South Australia, Western Australian, and two territory governments, the Northern Territory and the Australian Capital Territory, similarly based on the British system.

Its legal system has its origins in the British system, although it has evolved its own distinct features since becoming an independent federated nation on 1 January 1901. The national and all state parliaments, with the exception of Queensland, are bicameral. At the national level the Parliament consists of a House of Representatives elected to represent single-member electorates and a Senate in which each state has an equal number of directly elected representatives. The government of the day is selected from the elected members of Parliament by the governing party, or coalition of parties, with a prime minister and cabinet, as is also the case at the state level. In addition, the Commonwealth Government has a Governor-General, and each state a governor, who serves as the representative of the head of state[2], although with largely titular powers.

As a federal system, the Constitution allocates certain exclusive powers to the Commonwealth Government, although most are concurrent with the six states, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, and the two territories, the Australian Capital Territory and the Northern Territory. The two territories are largely self-governing. The major powers of the Commonwealth include taxation, defence, external affairs, interstate and international trade, foreign policy, trading and financial corporations, immigration, bankruptcy and interstate arbitration. However, the state governments have substantial constitutional powers regarding their economies so that any nation-wide economic reform in Australia, especially microeconomic reform, usually requires the agreement and cooperation of the state and territory governments (Carroll and Painter 1995). Hence, any major reform, or reform that involves areas over which the states have constitutional authority, requires continuing political and, often, legal cooperation on an intergovernmental basis.

As the political agendas of each of the governments that make up the federation are rarely, if ever, identical, gaining such cooperation is always difficult and often time-consuming, with the result that major regulatory reform is similarly difficult and time-consuming. The recognition of this challenge led to the creation by the heads of Australian governments of the Council of Australian Governments (CoAG) in 1992. It is a forum for initiating, developing and implementing reforms of national

[2] The British Monarch is, formally speaking, a separately created monarch of Australia. State governors and the Governor-General of Australia are plenipotentiaries of the Crown in right of the relevant jurisdiction.

significance, although its importance has varied over time (Edwards, Henderson, 1995). The need and means for legislative cooperation between the jurisdictions is recognised in Subsection 51 (xxxvii) of the Constitution, which states that the Commonwealth Parliament may be given power to make laws with respect to matters referred by the Parliament or Parliaments of any state or states.

As a federal democracy, the various Australian governments are characterised by substantial, although varying, participation by organisations representing a variety of groups. This is particularly the case as regards business groups and trade unions, as well as a plethora of other interest groups. The major groups representing business, notably the Business Council of Australia and the Australian Industries Group (AIG), have strongly supported, for the most part, the various waves of regulatory reform noted below, often providing reports indicating their views regarding the extent and quality of government regulation, as well as proposals for its reform, and for reforms to the systems of regulatory management (see, for example, most recently, AIG, 2014, Business Council of Australia 2013).

In the aggregate, the governments of Australia have substantial and sophisticated, albeit varying, regulatory capacity. The smaller states and territories, with more limited social and economic resources, typically have a more limited regulatory capacity for the reform of the existing stock of regulation and the assessment of proposed new regulation. As indicated in recent reports by Australia's Productivity Commission, one of the Commonwealth Government's major advisory bodies regarding the economy, and by the OECD, Australia's RMSs have in place the institutions and processes necessary for an effective regulatory capacity, although they have room for improvement (Productivity Commission 2011: x; OECD 2010a). A 2010 OECD review of Australia's regulatory system noted that Australia had been one of the most successful OECD countries in weathering the global financial crisis and that what it described as 'Mature regulatory settings' had worked in Australia's favour (OECD 2010b, 13). However, it also noted that there was room for improvement.

### 1.3. Social and Economic Development

Australia exhibits relatively high levels of economic development and social stability, with nearly 22 years of uninterrupted economic growth from 1992 to 2013.

This was accompanied by falling unemployment and low levels of inflation, although the former increased slightly after 2008 (OECD 2014a). GDP per capita rose from US$34,888 (PPP) in 2005 to US$45,016 in 2012, and average household income per capita is US$31, 197. Much of the economic growth of the 2000s was associated with a mining boom and, as this recedes, GDP growth has slowed. Similarly, productivity gains have slowed in recent years to below that of the leading OECD countries. In terms of trade, the period 2008–2013 saw Australia's already relatively low barriers to trade and investment reduced by the further reduction of import tariffs and simplification of the screening and approval procedures for foreign direct investment, so that Australia now ranks 4th in the OECD for ease of trade and investment flows, behind the Netherlands, Poland and Belgium (OECD 2014b). Further details regarding Australia's socio-economic development can be found in OECD (2014b) and the Australian Bureau of Statistics (2014).

### 1.4. Regulatory Quality: Room for Improvement

Australia has nine regulatory management systems, one for each state and territory, one for the Commonwealth Government and one for CoAG. While, as noted, the capacity and quality of those systems are generally good, recent reports have indicated the need for improvement. In 2011, the Commonwealth's influential and largely independent Productivity Commission indicated the need for

- the prioritisation and sequencing of reviews and reforms—with greater attention paid to the costs of developing and undertaking reforms;
- the monitoring of reviews and the implementation of reforms;
- the provision of advance information to achieve better focused consultations;
- improvements to incentives and mechanisms for good practice by regulators; and
- better identification of the best approaches for building public sector skills in evaluation and review (Productivity Commission 2011: x).

A 2010 OECD review of Australia also noted that there was room for improvement, including the need for:

- A culture of continuous improvement supported by evidence-based decision-making needs to be embedded more strongly in government practices, with ministers and their departments more clearly accountable for the quality of regulation in their portfolios.
- While Australian competition law had been effective in establishing robust and competitive markets, there was a need to give greater prominence to long-standing commitments to further reform of particularly challenging aspects of the transport, energy, water and infrastructure sectors.
- The reduction of significant costs associated with inconsistent or duplicative regulatory regimes between the Australian jurisdictions that were a significant issue for competitiveness. Hence, the further streamlining of regulatory frameworks would enhance market openness, as well as the ability to compete globally in knowledge intensive industries (OECD 2010b, 13).

Most recently, a review of the Commonwealth's RIA system—the key instrument for assessing proposed new or modified regulation—was more critical of the performance of that system (Borthwick and Milliner 2012). It found that while the Commonwealth's RIA was 'entirely consistent with' the OECD principles for such systems, major government, business and not-for-profit stakeholders expressed substantial dissatisfaction with the system and the review recommended a range of changes.

### 1.5. The Evolution of Australia's Regulatory Management Systems: Waves of Reform

Australia's nine RMSs have evolved and changed over time, initially, for the most part, on an ad hoc basis within each of the nine jurisdictions. However, since the mid-1980s, there has been a series of more systematic waves of regulatory reform and, to a more limited extent, deregulation coordinated in part through CoAG. They have resulted in increasingly similar, but not identical, RMS for each jurisdiction, as well as strategic reviews of the existing stock of regulation and modifications to regulatory impact assessment systems. The focus here is primarily on the regulatory reforms of the Commonwealth Government, or those led by it in cooperation with CoAG.

### 1.5.1. The first wave of reform: 1983–1996

The first wave of reform commenced slowly in the mid-1980s under the Hawke Labor Government. It focused primarily on sector-based reform and selectively upon a few major areas of the existing stock of regulation that impacted most heavily upon business and the economy, such as: the floating of the Australian dollar; a substantial deregulation and reform of financial market regulation; the rapid reduction of protective tariff barriers; and limited reform to industrial relations systems (for a useful description of the reforms undertaken in this period, see Kelly, 1994). As with the somewhat earlier New Zealand reforms of the 1980s, there was also an increasing move towards performance-based regulation and related economic instruments, and away from more traditional 'command and control' regulation. The first wave also included, on a very modest basis, the introduction in 1985 of a system for RIA, first in the Victorian state government and in the Commonwealth. This was aimed at improving the quality of the 'flow' of new and modified regulation.

**Table 1. Waves of Regulatory Reform in Australia**

| Period | Reform Periods |
|---|---|
| 1983–1996 | • Floating of the Australian dollar<br>• Financial market deregulation and reform<br>• Rapid decline in tariff barriers<br>• Selective, sector-based reform<br>• Largely Commonwealth Government-based reforms |
| 1996–2006 | • Continuing, sector-based reform<br>• Increased involvement of state and territory governments, with incentive payments from the Commonwealth Government for reforms achieved<br>• National Competition Policy Reforms managed by National Competition Council<br>• Reforms to RIA systems |
| 2006–2013 | • A new focus on human capital regulation<br>• A continuing emphasis on reducing domestic, inter-jurisdictional, regulatory barriers to trade<br>• A new, CoAG Reform Council<br>• Increased role for the Productivity Commission |
| 2013 onwards | • Increased emphasis on deregulation and savings targets<br>• New review of regulation impacting on competition<br>• CoAG Reform Council terminated |

**Source: Authors (2015).**

Both sets of reforms were the result of a sharpened Australian appreciation that major productivity reforms were necessary if Australia was to successfully face increasingly competitive international challenges, at a time when its economic performance was relatively weak. This led to a new, strategic commitment to undertake relevant reforms, supported in general by all major parties and the major business associations. The Commonwealth Government's Industry Commission (later renamed as the Productivity Commission) was an important actor in identifying, assessing and promoting the need for such reforms (Carroll 1995, 76–98).

While the bulk of the reforms in this first period were largely successful and have been relatively little modified since, the same cannot be said for the RIA systems. In summary, much of the period from 1986 to 1997 saw a slow and somewhat painful period of birth and infancy for the RIA system at the Commonwealth level, with widespread non-compliance with the RIA process and little discernible impact on the quality and extent of new or amended regulation regarding business (Auditor General 1989; Head and McCoy 1991, 163; Industry Commission 1993; Argy and Johnson 2003, 22; Office of Regulation Review 1993, 272; Carroll 2008, 17–32). A relative lack of political commitment by ministers and senior departmental and agency executives resulted in policy development processes remaining largely unchanged, with an under-resourced, oversight unit, the Business Regulation Reform Unit (BRRU), often unable to discharge its advisory functions. At best, the BRRU had encouraged departments and agencies to view the development of new or modified regulation with regard to business somewhat more critically, in line with the Government's new principle of the minimum of effective regulation (Industry Commission 1993, 272; Carroll 2008, 19). The primary reasons for the limited performance of the RIA system were:

- The RIA system was imposed at short notice upon departments and agencies by successive governments, eagerly supported by peak business associations and, increasingly, the Government's own Productivity Commission. However, the departments were not enthusiastic about the imposition, with its implication that their existing policy development systems were inadequate (anonymous interviews conducted by Carroll at the state and Commonwealth level in the period 1993-95 and 2007-07).
- In addition, there was some feeling that the RIA system had a primarily ideological, rather than a quality improvement purpose, aimed at freeing

markets from regulatory control without convincing justification for such reform (Head and McCoy 1991).

- The RIA represented, at least in its earlier years, an increased workload for the public service and, if it was to be accommodated in the fashion desired by the Government, a degree of change to established policy processes and practices. Such organisational change, welcome or not, takes time to implement.
- Insufficient resources and staff for the oversight unit, BRRU, to achieve its objectives, leading to it being only able to comment on a small proportion of the total volume of new regulatory proposals (Auditor General 1989; Office of Regulation Review 1993, 271–272).
- BRRU was often consulted too late in the policy development process to have a significant impact on the quality and content of the regulations being proposed.
- BRRU devoted too many of its limited resources to its role of providing advice with regard to the regulatory impact statements submitted to Cabinet, compared with its other, particularly training, functions (Office of Regulation Review 1993, 271–272).
- Given that successive governments in the 1985-96 period had not provided the resources necessary for the tasks allocated to BRRU, especially as regards its monitoring of the RIAs undertaken by departments and agencies, it seems clear that the necessary ministerial and high level executive level commitment to, and support for RIA, had not been forthcoming, or had been very limited. Without such commitment no reform is likely to be fully successful.

### 1.5.2. The second wave of reform: 1996–2006

The second wave of regulatory reform, largely microeconomic in nature, again largely sector-based, commenced during the Hawke and Keating Labor Governments of the later 1980s and early 1990s, and increased its impetus continued from 1996 under the first Howard Liberal/National Government. Because a great deal of this microeconomic reform agenda required federal-state cooperative action, much of the strategic policy work for regulatory reform occurred through the then new CoAG. This second wave was notable for two broad sets of reforms. The first was the very wide-ranging National Competition Policy (NCP) reforms, which involved a detailed review of the existing stock of regulation for any anti-competitive impacts. The second was a set of reforms to RIA systems designed to improve the quality of the ‘flow’ of new and modified regulation.

The NCP reforms proved to be a lengthy (over 10 years) and largely successful process of review of 1,800 regulations at the national and state levels. It was based on three related agreements between the Commonwealth and state governments, signed in 1995: the Conduct Code Agreement (CCA), the Competition Principles Agreement (CPA), and the Agreement to Implement NCP and Related Reforms. The initiation and progress of the reviews were stimulated by incentive payments from the Commonwealth Government to the state governments for the successful completion of reviews, overseen by the National Competition Council (Kain, Kuruppu and Billing, 2003). The Productivity Commission later estimated that the NCP had boosted Australia's GDP by 2.5 percent or A$20 billion (Productivity Commission 2005a).

The success of the NCP reforms can be attributed to at least the following factors:

- It received support from all Australian governments, in turn based on substantial evidence of the likely gains to be made from reform provided by the Productivity Commission.
- As a broadly based reform programme it improved the prospect that those who might lose from any one specific reform could still gain benefits from other reforms, making it easier to undertake reforms that would have been difficult to implement on a one-by-one basis.
- The NCP included a set of reform principles that provided a degree of flexibility for the state governments in implementing the resulting reforms, enabling them to be adapted to differing socio-economic and political environments.
- The reforms were prioritised and agreed in advance, so that each government was aware of its specific commitments and schedule.
- There was an effective public interest test to be applied in all of the reviews, with a presumption in favour of competition and the onus of proof being placed on stakeholders benefitting from a restriction on competition to demonstrate it should be retained (Productivity Commission 2005a, 17). The guiding principle was that legislation (either existing or proposed) should not restrict competition unless it could be demonstrated that: (i) the benefits of the restriction to the community as a whole outweighed the costs; and (ii) the objectives of the legislation could only be achieved by restricting competition. As such, NCP reversed the usual onus of proof for regulatory restrictions to be maintained.
- The reviews and assessment were, for the most part, conducted independently and in a public and transparent fashion, thus encouraging public support.
- The distributional costs of regulatory change were identified as far as possible and transitional assistance was provided in appropriate cases.

- Most modified or new regulations resulting from the NCP reviews were systematically scrutinised.
- Perhaps most importantly, the Commonwealth Government provided incentive payments for completed reforms of an appropriate standard (Productivity Commission 2005a).

The second set of reforms in the second wave focused largely on the introduction of new RIA systems for jurisdictions where they did not exist, and the improvement of existing RIA, with the aim of ensuring that any new or modified regulations impacting on business and the economy would not exhibit the anti-competitive features and the often cumbersome red tape that had stimulated the NCP reviews. The reforms extended to CoAG when, in 1995, CoAG agreed to the introduction of an RIA system to cover regulations with a national application. The bulk of the RIA reforms were introduced by the 1996 Howard Liberal/National Government, which strengthened the Commonwealth's RIA system by:

- Expanding the resources available to the Office of Regulatory Review (ORR, the successor to BRRU) and stressing that the submission of a Regulatory Impact Statement (RIS), following an RIA, was mandatory for all departments and agencies.
- Requiring that RISs were to be tabled as one of the explanatory documents when proposals for legislative change were put before Parliament;
- Specifying that the Assistant Treasurer, although not a cabinet minister, would be responsible for regulatory best practice, as a visible sign of a greater political commitment to regulatory reform;
- Requiring the Office of Regulation Review (ORR) to report to cabinet on departmental compliance with RIS requirements for regulatory proposals;
- Requiring the Productivity Commission to report annually, in public reports, on overall departmental and agency compliance with RIS (Office of Regulation Review 1997; Productivity Commission 1998).
- Establishing a separate Office of Small Business (OSB). The OSB was to be consulted for all cabinet submissions that might have an impact on small business, and to develop and report annually on a system of nine regulation performance indicators (RPIs). The departments and agencies would monitor and provide the OSB with the data related to their own performance, with the OSB reporting annually on its performance against the RPIs, with the first report to be made in 1999 (Productivity Commission 1999, 12).
- In 1998, Prime Minister Howard committed his second government to the introduction of annual regulatory plans for all departments and agencies, to be

> reported on by the OSB. The aim of this was to provide business and the community with timely access to information about past and planned changes to Commonwealth regulation, with the goal of making it easier for businesses to take part in the development of regulation.

In the first two years of the reformed RIA system (1996–1997) at the Commonwealth level, compliance with the RIA process was lower than the average for the 1999–2006 period, as measured by the new RPIs (which proved to be of only limited value, see Carroll 2008c). As the Productivity Commission put it, these two years were a learning period for all concerned and it was expected that the level of compliance would improve (Productivity Commission 1999, xviii). It was also apparent that several ministers' offices were not aware that the modified RIA requirements applied to them and there were also examples of differences of opinion between the ORR staff and departmental staff over how to interpret the RIA Guide (Productivity Commission 1998, xix).

On a more positive note, for the relatively few RISs that were submitted in the 1996–1997 period, the ORR felt that the level of analysis was adequate in 92 percent of cases (Office of Regulation Review 1997, 44). The major reasons identified for the poor performance in these two years were, in summary: (i) a lack of awareness of the requirements of the new system; (ii) varying degrees of understanding of and priority accorded to the new system; (iii) a lack of resources for the ORR; and (iv) a slow process of cultural and organisational change resulting in a lack of integration of RIA into departmental policy processes (Productivity Commission 1998, 1999).

After this initial 'learning period', the performance of the reformed RIA improved as regards process, although with significant variations between departments and between the Commonwealth RIA and CoAG's, as highlighted by the ORR's annual reporting of performance statistics. In terms of volume, for example, from 1999 to 2005, a total of 11,545 bills and disallowable instruments were introduced in the Commonwealth, with the ORR receiving 4,832 new RIS queries from agencies with regard to this total, of which it advised that 1,085 (9.4 percent) required an RIS. The relatively small proportion of bills and instruments subject to RISs was because most of the latter involved minor amendments to existing regulation that did not require the preparation of an RIS (Productivity Commission 2005b, 79).

In summary, the performance of the RIA system at the core of Commonwealth's RMS slowly improved through to the middle 2000s, but it was often variable as regards both regulatory processes and regulatory content, leading to growing stakeholder dissatisfaction. In particular, there was growing pressure from business associations, such as the Australian Chamber of Commerce and Industry (ACCI) and the Business Council of Australia (BCA), and from the Productivity Commission (see, for example, ACCI 2005a; 2005b; BCA 2005a; 2005b; Productivity Commission 2005b). This resulted in the establishment of the Taskforce on Reducing the Regulatory Burden on Business, to examine the impact of regulation on business and the RMS, which reported in 2006 (Regulation Taskforce 2006). The taskforce was designed primarily to identify the views of business, for the benefit of business, with its members being drawn from business, plus, as chair, the Chair of the Productivity Commission, and the Howard Government accepted most of its recommendations (Australian Government 2006).

As well as many detailed recommendations for the reform of specific regulations, the RMS and the RIA, a significant proportion of the recommendations represented a plea for more effective support and resourcing for the RMS and RIA systems. The report felt these resources were already largely in place but lacked the strong political and senior administrative commitment and support needed to make the systems more effective (Carroll 2008b). The last of the Howard Governments lost office in the 2007 Commonwealth election, before it could implement the taskforce recommendations with which it agreed.

### 1.5.3. The third wave of reform: from a National Reform Agenda to a Seamless National Economy

The third wave of regulatory reform, initially described as the National Reform Agenda (NRA), and then the Seamless National Economy, commenced in 2006 under the last Howard Government and received additional impetus following the election of the Rudd Labor Government in late 2007 (Carroll and Head 2009). This wave of reform encompassed:

- a substantial agenda of agreed initiatives aimed at increased productivity, including actual or proposed reviews of legislative and policy content, with a

greater focus on human capital regulation, and a strong emphasis on reducing inter-jurisdictional, regulatory barriers to trade; and

- a series of reforms to national and intergovernmental policymaking structures and processes, including processes for performance oversight and for funding accountabilities. The reforms represented a major increase in the scale of CoAG's operations and that of the state governments, which were to have responsibility for the bulk of the implementation of the reforms.

The content, priorities and plans for this wave of reform drew heavily on advice from a new advisory body, established in 2007, the Business Regulation and Competition Working Group (BRCWG), as well as Productivity Commission reports. The BRCWG drew up an implementation plan for 27 deregulation priorities identified by CoAG as priorities for reform, which was agreed to by CoAG in 2008. A further eight competition policy reforms were added in 2009, as indicated in the National Partnership Agreement to 'Deliver a Seamless National Economy', an agreement with its basis in the Intergovernmental Agreement on Federal Financial Relations (OECD 2010b, 135–36). The Productivity Commission played a major part in helping achieve this new CoAG agenda, advising on the economic impacts of the reforms and collecting performance data to measure progress for the CoAG Reform Council (CRC). It also prepared a series of studies of 'Performance Benchmarking of Australian Business Regulation' in the Commonwealth and the states (Productivity Commission 2014a). As with the NCP competition reforms a decade earlier under the National Partnership Agreement, the Commonwealth Government agreed to provide the states with A$550 million, provided it felt that appropriate progress had been made, based on the advice of the CoAG Reform Council.

While it is still too early to offer final conclusions as to the performance of this third wave of regulatory reform which, as noted below, overlapped into what might become a fourth wave of reform, the CRC, in reviewing progress from 2008 to 2013 for the new Abbott Government, found that the stakeholders consulted agreed that CoAG had made significant progress in establishing an agreed course of action in the policy areas under the reform agenda and then delivering on these initiatives. In part, the CRC review was based on a consultant's report from Deloitte Access Economics, which found that substantial progress had been made, but that 'evidence of substantive change to outcomes is yet to emerge', pointing out that a number of the original

agreements had been abandoned, suggesting a decline in what it described as the 'collaborative federalism' necessary for appropriate policy design (CRC 2013; Deloitte Access Economics 2013). However, the latter review also concluded that the regulatory reforms related to the 'Seamless National Economy' had mostly been met, although some were at risk in terms of time and target. In contrast, more than half of the competition reforms were at risk for both time and target reasons, adding impetus to the Abbott Government's new review of competition policy (Deloitte Access Economics 2013, 25–26).

Provisional conclusions regarding the progress and performance of the third wave of reform include:

- The reform agenda was very ambitious, both as to extent and timeframe, at least compared with previous periods of reform in Australia. It included complex areas of service delivery, with a greater emphasis on social policy reform than the macro and microeconomic reforms of the previous reform periods.
- Not all elements of the planned reforms contained in the National Partnership agreements and the Intergovernmental Agreement on Federal Financial Relations were well designed, given differences in the level of pre-existing agreement about appropriate ways of measuring both progress and outcome (Deloitte Access Economics 2013, 34).
- A reduction in priority and time given to the reforms, particularly at the Commonwealth level with the onset of the global financial crisis.
- The slowing of momentum caused by continuing internal, ministerial and Australian Labor Party differences that led to a change in prime minister, from Kevin Rudd to Julia Gillard, then to the election of the first Abbott Liberal/National Government in 2013.
- The election of an increasing number of Liberal/National Party Governments at the state level after 2007, with a greater range of differences from those of the ALP Governments of Rudd and Gillard, and a resulting decrease in the cooperation needed to achieve the intergovernmental, CoAG reform agenda.

### 1.5.4. A fourth wave of reform? 2013 onwards

The Abbott Government adopted a threefold strategy of reform when it came into office in September 2013. The first part focused on the need for extensive deregulation so as to reduce the adverse impact of regulation on business (Australian Government 2013a; Douglas 2014). This was a revived emphasis on deregulation, symbolised in

the setting aside of two parliamentary days each year to repeal unnecessary and costly regulation, with a target of A$1 billion per year. The first repeal day was in the House of Representatives on Wednesday 26 March 2014. It received a slightly mixed reception in the media, with its claim of having achieved savings of over A$700 million and cutting 10,000 pieces of legislation.

The second part consisted of a regulatory reform process regarding competition, commenced in June 2014, the first since the Hilmer review of competition policy in 1993 (Australian Government 2014a). The third part consisted of a series of changes to the existing system for regulatory management at the national level, including: moving the OBPR from the Department of Finance and Deregulation to the Department of Prime Minister and Cabinet; creating a new Office of Deregulation in that Department; appointing a Parliamentary Secretary responsible for its deregulatory activities (essentially downgrading the ministerial 'weight' given to deregulation, as it had been the responsibility of a cabinet minister in the Rudd and Gillard Governments); revising the existing principles and guidelines for RIA (Australian Government 2013b); and establishing a new Deregulation Division in Treasury's Markets Group. The Abbott Government continued to support several of the reform initiatives commenced under the Rudd Government, where progress had been variable, although it reduced the number of CoAG Councils and modified its priorities (CoAG 2013a). As the Abbott strategy of reform was only put in place in 2014 and his Government overturned in September 2015, it is too early to comment in any detail as regards its performance and impact on regulatory policy and the RMS or, indeed, whether it constitutes a major 'wave' of reform to the extent experienced in the first three waves. At present his successor, Prime Minister Malcolm Turnbull, seems content to continue with the planned reforms.

### 1.6. Developing an Increasingly Sophisticated RMS: 1983–2013

The development of Australia's RMS into an increasingly sophisticated system has taken 30 years, expanding to cover national, state and territory governments and most forms of regulation. An RIA system, gradually improved over time, has been put in place for all jurisdictions to cover proposals for new and modified regulation, with the cost of new regulation increasingly often being required to be fully offset by

reductions in the existing stock of regulation. Similarly, to a varying extent, the existing stock of regulation has received a number of detailed reviews, with a focus on that with an adverse impact on competition and productivity. At the Commonwealth level all regulation must be periodically reviewed to test its continuing relevance. These developments have been accompanied by supporting, institutional changes, most notably:

- The creation of an oversight, regulatory review unit close to the centre of government, largely responsible for the development and distribution of detailed regulatory reform guidelines for departments and agencies.
- Increasingly for the Commonwealth the creation of small Deregulatory Review Units within major departments and agencies.
- The development of the independent, Productivity Commission as the Commonwealth Government's major advisory body on all aspects of microeconomic reform. It provides regular reports and advice to the Commonwealth Government and CoAG regarding regulatory performance.
- The development of CoAG as the major body for agreeing and overseeing regulatory reforms that cross jurisdictional boundaries.

### 1.7. The Current Regulatory Management System

The Commonwealth Government's RMS consists of three central agency oversight bodies and all government departments and agencies, directed and coordinated by the prime minister and the cabinet, based on 'The Australian Government Guide to Regulation', which contains 10 basic principles regarding regulation and a guide to the preparation of a RIS. In addition, CoAG has a closely linked RMS outlined in the 'Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies'. This provides guidance for over 40 Commonwealth-State Ministerial Councils and related inter-governmental bodies that facilitate consultation and cooperation between the Commonwealth, state, territory and local governments in Australia. The councils initiate, develop and monitor policy reforms in the areas for which they are responsible, including the development of policy reforms for consideration by CoAG and the implementation of agreed reforms. The central agencies are:

- The Department of Prime Minister and Cabinet, particularly its OBPR and Office of Deregulation. The Office of Deregulation is responsible for

providing deregulation policy advice to the prime minister and the parliamentary secretary assisting the prime minister on deregulation; overseeing and coordinating the Government's audit of regulation and its A$1 billion annual regulation cost reduction target; facilitating the exchange of information on deregulation across the Government, in particular between deregulation units established in each department in 2013–2014; assisting the prime minister to establish a deregulation agenda with states and territories through CoAG; and monitoring and providing reports to the Government on the progress of its deregulation agenda. The OBPR manages the Government's regulatory impact analysis requirements. In addition, it: assists agencies in preparing RIS through training and guidance; monitors and reports on the Government's RIA requirements; and administers CoAG guidelines for regulation-making by national bodies. The new Deregulation Division of Treasury also provides advice on deregulation.

- The Attorney-General's Department has broad and specific responsibilities regarding all government regulation, including: the Legislative Instruments Act; reviews embedded in statutes; and sun-setting requirements.
- The Australian National Audit Office (ANAO) undertakes targeted in-depth process and performance audits of all government agencies. It also provides 'best practice' performance guides such as that relating to the administration of regulation (ANAO 2014).

The day-to-day work associated with the RMS is carried out within line agencies and departments, including the: development of RIS following the application of RIA, including those needed for embedded statutory reviews and sun-setting; the development of annual regulatory plans; and reporting on their regulatory performance to relevant central agencies. In addition, the Productivity Commission, as noted above, provides regular reports and advice to the Commonwealth Government and CoAG regarding regulatory performance.

### 1.8. The Coverage of the RMS in Australia

In general, there has been a trend to expand the type and scope of regulation subject to RIA and requiring a RIS in all Australian jurisdictions, although at different rates, so that actual coverage varies between jurisdictions, with a wide range of exemptions and exceptions for minor regulations and an initial focus that was only on regulation impacting on business, the economy and not-for-profits. This expanded so

that by 2012 the only type of regulation not subject to an RIA requirement was quasi legislation, where only the Commonwealth, Queensland and South Australia governments had such a requirement (Productivity Commission 2012, 107–108). Furthermore, in 2014 the Abbott Liberal/National Government specified that all regulatory proposals to be submitted to the cabinet be subject to RIA, not only those impacting on business, the economy and not-for-profits.

However, in practice, the volume of primary and subordinate legislation actually subject to RIA, for example, in 2010 and 2011, varies from 0.5 percent (Western Australia) to 6.5 percent (Northern Territory) of the total annual, new or amended regulation being considered in each jurisdiction (Productivity Commission 2012, 110). This is because the requirement for RIA applies only to regulatory proposals that will have a significant impact, with variations between governments. Moreover, the proportion of RIA undertaken varies greatly by jurisdiction, with the Commonwealth accounting for over 30 percent of the total and CoAG, and Victoria and NSW for another 50 percent. The explanation for this small volume and varying distribution lies primarily in the considerable exemptions and exceptions from RIA that are permitted in all jurisdictions, their varying volumes of legislation and varying commitment to RIA systems.

### 1.9. RMS Actors and Issues

As with all RMS and similar policy development processes, the type and role of actors involved, and the extent of their involvement varies according to the policy being subject to the RIA process and the stage of the process involved. Similarly, the issues that emerge and their impact upon RIA performance tend to vary somewhat. In general terms, five types of actor are involved: (i) the relevant ministers; (ii) the public servants or/and consultants undertaking the assessment; (iii) the RIA oversight body; (iv) parliaments, especially parliamentary committees; and (v) non-governmental actors, notably relevant business associations and to a lesser extent trade unions.

### 1.9.1 Parliament

Where a regulation is tabled in Parliament, a RIS (or its equivalent) must be included, including treaties that have significant regulatory implications, but excluding Post Implementation Reviews (PIRs). It is not required that Parliament actually examine the RIS, nor is it undertaken formally as a matter of routine, other than in NSW, Victoria, Tasmania and the Australian Capital Territory. However, given the typical dominance of the parliamentary process by the government in power, at least in lower houses, the extent to which such committees undertake rigorous scrutiny of RIS is variable, with varying evidence as to their performance (Deighton-Smith 2013). To date, other than in the form of an occasional, minor reference to regulatory impact statements in case law, the courts have been silent in relation to RIS, as is the case in most European countries.

Until recent years, there has been a very low rate of reference by parliamentarians to RIS or the RIA in debates and committee sessions, although it has now sharply increased. RIS can be used both in the attempt to improve the quality of proposed legislation, which is their basic aim, and for party political and electoral purposes, by casting doubt on the validity of the regulatory objectives and policy making capacity of the government of the day, as revealed or allegedly revealed by the RIS tabled in Parliament. Hence, it is not surprising that, increasingly, it is opposition parliamentarians that have tended to make most use of the material provided by RIS, or to indicate the inadequacy of a tabled RIS.

### 1.9.2 Ministers

When RIA systems were introduced, especially with their initial narrower focus on regulation impacting on business, they tended to be regarded as an ‘add on’, something to be undertaken after the traditional policy process had been completed, a view that has persisted, albeit to varying extents (Borthwick and Milliner 2012, 47). Hence, is not altogether surprising that, as reported in 2012, ministers, their offices and departments and agencies still exhibit a widespread lack of full acceptance of RIA and RIS, and no minister consulted in the preparation of a major Australian report felt that RIS had any relevance to their, or cabinet’s decision making, demonstrating either

a distinct lack of commitment to the RIA philosophy, or the weaknesses of the RIS they have perused, or both (Borthwick and Milliner 2012, 9, 37, 38). This is likely to be because RIA processes constrain ministerial authority and influence in decision-making, unless an exemption from the process can be gained. Given that ministers display a lack of acceptance of the value of the RIA and RIS, it is highly likely that their views percolate down into the departments for which they are responsible, acting as a disincentive for systematic and rigorous application of the process by public servants.

### 1.9.3 Public servants and regulators

In Australia, for the most part regulators are public servants and play a key and challenging role in the RMS, especially as regards RIA and RIS. In the early years of regulatory reform there was an unsurprising lack of familiarity with the processes of reform and individual members of the public service still often have only a limited experience with the RIA, as they are undertaken infrequently by departments and agencies. While advice and training from the oversight body have reduced these problems, it has not entirely overcome them. This is especially so regarding the measurement of the costs and benefits of proposed regulation, where the relevant expertise was in short supply. This led to the provision of relevant training by the OBPR and the development and required use of a computer-based standard cost model (the 'Business Cost Calculator') to simplify the process.

Despite this, as the OBPR's annual reports usually indicate, departmental estimates of regulatory costs and benefits are often unsatisfactory and the then chairman of the Productivity Commission, Gary Banks, indicated that in 2004 only 20 percent of tabled RIS contained even an attempt at quantifying the costs related to proposed regulations (Banks, 2005: 10). The adequacy of assessment of the net impact of proposed regulation remains a challenging issue with varying views as to how to proceed. The Borthwick and Milliner review, for example, while noting the value of quantitative assessment, recommended that the OBPR be less rigid in assessing the quantitative CBA and impacts data in RIS and PIR, and should give greater consideration to qualitative assessment where there was insufficient quantitative material available (Borthwick and Milliner 2012, 73). There is little sign that this view

has been accepted and the OBPR recently released even more detailed guidance and requirements for quantifying costs and benefits, described as the 'Regulatory Burden Measurement Framework', and renamed the 'Business Cost Calculator', as the 'Regulatory Burden Measure' (OBPR 2014d).

Outside of the departmental officials and regulators undertaking reviews, those in the Productivity Commission and the Australian Competition and Consumer Commission (ACCC), provide influential advice on economic matters. In particular, the Productivity Commission has:

- acted as a major advocate for regulatory reform, based on the research it undertakes, including frequent regulatory reviews and the performance of RIA systems;
- provided CoAG with regular assessments of the economic impacts, costs and benefits of the various reform programmes developed over recent decades;
- provided reports on performance in implementing agreed reforms; and
- provided annual reports to the Commonwealth on the performance of government services.

While, as noted above, the OBPR and similar bodies have long provided relevant training and information for public servants and regulators in an ongoing effort to improve their capacity, coherence and performance, continuing dissatisfaction with regulator performance, particularly from the business community, stimulated the development of a proposed Regulator Audit Framework (Productivity Commission 2014b). In large part, this was adopted by the Abbott Government in 2014 and, following public consultation, was put into practice in July 2015 (Media Release 2014b). It establishes a common set of six performance measures enabling an assessment of regulator performance and their engagement with stakeholders, which will be published annually based on externally validated data.

### 1.9.4 RIA oversight bodies

The OBPR (the successor to ORR), administers the Commonwealth RIA system, its key activities being:

- assisting agencies in preparing RIS through training and guidance;
- monitoring, reporting and advising in relation to the RIA requirements; and

- most importantly, advising departments and cabinet as to the adequacy of the RIS.

History suggests that the effectiveness of such oversight bodies on the performance of RIA systems, especially compliance, is limited. A major review of the Commonwealth's RIA system found that, while there had been a distinct increase in compliance with the RIA process from the mid-1990s, it was by no means perfect (Regulation Taskforce 2006; Carroll 2008). The criticisms and recommendations of review were largely accepted by the Howard Government in 2006 and the changes were detailed in a revised Best Practice Regulation Handbook.

Despite these and later changes, in 2012 two major reports concluded that there was a major gap between RIA principles and what actually happened in practice in the policy development process, despite a 27-year period of operation (Borthwick and Milliner 2012, 72; Productivity Commission 2012, 2). As a result, the new, 2013 Coalition Government of Tony Abbott moved the OBPR to the Department of Prime Minister and Cabinet and, in addition, also established a new Office of Deregulation within the department, responsible to a parliamentary secretary for deregulation, both in order to signal greater political commitment and support for the RMS and the reform agenda.

Despite their successive organisational relocation and the slowly increased resources available to them, there is little direct evidence as to the actual impact on regulatory performance of the oversight body responsible for the Commonwealth RIA, nor is there for any similar oversight body in Australia or elsewhere.

### 1.9.5 Non-government actors

The Commonwealth RMS system focused initially upon regulation impacting on business and the economy, then broadened to include not-for-profits, and only since 2013 was it expanded to include all community groups and individuals. The bulk of non-government actors have been overwhelmingly from business and, to a lesser extent, from trade unions and the larger not-for-profits. Business associations such as the ACCI, AIG and the BCA have been regularly consulted in regard to regulatory proposals, although the extent and quality of consultation has varied, and has often

been surprisingly low, leading to the development of a specific government policy on consultation and a requirement for each RIA to include an approved consultation plan (AIG 2014; Business Council of Australia 2005, 2013; Australian Public Service Commission 2005, 56).

### 1.10. RMS Procedures

The RMS procedures centre on the RIA system, administered by the OBPR and similar procedures exist in the states and territories. The details of the procedures and guidance advice are provided in:

- The Best Practice Regulation Handbook (OBPR 2014a).
- Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies (OBPR 2014a).

In addition, the OBPR provides detailed guidance regarding each stage, the use of the Regulatory Measurement Framework, cost-benefit analysis, the assessment of competition implications, risk analysis, environmental valuation and the Trade Impact Assessment (OBPR 2014c).

In summary, the sequence of procedures is as follows:

#### 1.10.1 Annual Regulatory Plans

All departments or agencies are required to develop an Annual Regulatory Plan in consultation with their Deregulation Unit and the OBPR that indicates likely new or modified regulation to be developed. It is published on websites in July each year and provides stakeholders with an early indication of potential regulatory change that enables them to offer their views and submissions in a reasonable time frame.

#### 1.10.2 Initiating the development of a regulation: the preliminary or early assessment

Departments and agencies are required to commence regulatory development, including the proposed removal of regulations, by first considering and developing preliminary answers to the seven questions specified in ‘The Best Practice Regulation Handbook’ (p. 5). A written summary of the answers is then provided to OBPR, which advises whether or not a RIS is required and, if so, of what type. It must be signed off

by a deputy secretary, secretary or chief executive and the decision-maker must not have finalised any decisions about the preferred option at this point. Three types of RIS are specified: short, standard or long form, depending upon the extent and type of impact of the proposed regulation. Each form specifies the tasks to be undertaken in developing the RIS. The only exemptions from the requirement for a RIS are: (i) for minor matters not being considered by cabinet where the proposed change is likely to have an insignificant impact; and (ii) in exceptional circumstances, an exemption can be granted by the prime minister at the formal request of the departmental minister.

### 1.10.3 Preparation of a RIS in discussion with the Deregulation Unit and the OBPR

If a RIS is required, one is prepared by the department or agency (an external consultant can be used) drawing on the advice of the departmental Deregulation Unit and the OBPR, and detailed consultation with those likely to be affected, based on a required consultation plan. It must include: (i) the consideration of a range of options including, where applicable, a justification for establishing or amending standards in areas where international standards already apply (in particular, agencies are asked to consider opportunities for aligning regulations with those of New Zealand); (ii) detailed costing and an assessment of the net benefits, using one or more of cost-benefit analysis, risk analysis and a new Regulatory Burden Measurement Framework; (iii) an implementation plan; and (iv) an evaluation plan that describes how the recommended option will be evaluated in the future, if accepted and implemented. More detailed formal advice regarding each of these items is provided by the OBPR (OBPR, 2014b).

### 1.10.4 The OBPR Final Assessment

The Final Assessment is a two part process. In part one the OBPR comments on whether the RIS is consistent with the Government's requirements and adequately addresses all required elements, including the quantification of regulatory costs and associated red tape reduction offsets. It may comment on whether the RIS accurately

reflects stakeholder feedback on the analysis and whether the options considered reflect the full range of policy options available, including those suggested by stakeholders. The OBPR provides formal written comments, which are not published, within five working days if improvements are required to the RIS.

In part two, OBPR assesses the RIS for consistency and adequacy, within five working days. A RIS is assessed as consistent if it conforms to all applicable processes and has all necessary inclusions, such as an appropriate consultation approach and a minimum of three policy options, one of which must be a non-regulatory option. OBPR can find a RIS as non-compliant with RIS requirements if any of the analysis is unsatisfactory, the costing inaccurate, or the consultation process inadequate. When OBPR assesses a RIS as compliant, it can proceed to the relevant decision-maker, usually cabinet, for a final decision.

One of the initial aims of the RIA in Australia was to strengthen cabinet's collective ability to scrutinise regulatory proposals that came from its individual ministers. This was to take the shape of the RIS document, which provided ministers with relevant information and, most importantly, the OBPR and its predecessors were charged with providing, for cabinet, an assessment of the extent to which each RIS that reached cabinet level actually complied with the requirements for a RIS. In the earlier years, ORR only had limited success in providing such assessment, with a 1989 review by the Commonwealth Auditor-General noting that the ORR was not achieving this objective because of insufficient resources (Auditor General 1989; Industry Commission 1993). However, it should be noted that ORR and its successors were not responsible for providing a detailed critique of the adequacy of each RIS, only an assessment of whether or not it complied with the RIS requirements. In practice, of course, its comments on compliance provided useful material regarding the adequacy of the proposed regulation as a whole.

A department or agency can proceed to the decision-maker even if the RIS is found to be non-compliant, but the OBPR publishes all RIS and its assessment of them on the OBPR website and the relevant department is required to publish it on its own website. Hence, interested stakeholders, including parliamentarians, other agencies and, of course, the media can view the assessment and, especially if it has been found

to be non-compliant, is likely to attract adverse comment. If the proposed regulation is tabled in Parliament, the RIS is included with the explanatory material.

### 1.10.5 Post Implementation Review (PIR)

Where a regulation is exempt from the RIA process and the need to submit a RIS, it is required that it be subject to a PIR that is similar to the process and content of a RIS.

### 1.10.6 Sun-setting of regulations

Australian jurisdictions have made considerable and growing use of 'sun-setting' provisions, which require regulation to be reviewed after a specified period of time (typically 10 years), especially for subordinate legislation. The Commonwealth lagged behind the states in the inclusion of such provisions, with it commencing on a systematic basis following a 2006 review, reinforced by the Abbott Government in 2014. In addition, there have existed a large number of regulations exempted from such review (normally via the RIA process), weakening its impact. Similarly, the review requirement in RIS has not usually been accompanied by subsequent monitoring to ensure that such reviews are undertaken, even by oversight bodies. In addition, with the realisation that many thousands of such reviews would need to be undertaken from 2014, it was decided by the Commonwealth Government that, where the sun-setting review does not involve significant change, a department will be allowed to self-assess the performance of the instrument and its assessment will be published in lieu of an RIS. While these limitations were clearly identified by the Productivity Commission, as yet there exists no substantial evidence as to the extent and effectiveness of most sun-setting systems (Productivity Commission 2011).

### 1.10.7 Managing the existing stock of regulations

In addition to the RIA system, Australian jurisdictions have developed a range of means for managing the existing stock of regulation, although these have lagged somewhat behind the development of the RIA system perhaps because of the extent of

the additional workload involved in periodic systematic reviews of existing regulation. Hence, in 2007, as part of the Government's response to the 2006 Report of the Taskforce on Reducing Regulatory Burdens on Business:

- The Productivity Commission was asked to conduct ongoing annual reviews of the burdens on business arising from the stock of government regulation.
- The Commonwealth Government introduced a 'catch-all' requirement that any regulation not subject to sun-setting or other evaluation be reviewed every five years. However, there is little information available as to when such reviews are scheduled, the findings of past reviews, or on whether changes to regulation have occurred as a result.
- The Commonwealth Government initiated a series of partnerships between the Minister for Finance and Deregulation and ministerial colleagues with responsibility for particular regulatory arrangements. These partnerships were to enable a review of the extent to which the regulatory frameworks are unnecessary or poorly targeted.

Based on its experience in conducting annual reviews of the stock of regulation, in 2011 the Productivity Commission was asked to examine, in part, the existing system for managing and reviewing the stock of regulation. It found that:

- A range of approaches is required to ensure that the stock of regulation is fit for purpose, ranging from 'good housekeeping' measures to in-depth reviews.
- There should include better prioritising and sequencing of reviews and reforms.
- More information on progress in implementing review recommendations should be provided.
- The provision of advance information to stakeholders was needed to achieve better focused consultations.
- There was a need for appropriate incentives and mechanisms for good practice by regulators.
- There was a need for the further building up of skills in evaluation and review (Productivity Commission 2011).

### 1.11. Assessing Australia's Regulatory Management Systems

Australia was one of the earliest OECD members to develop a coherent system of RMS, borrowing from the earliest developers (e.g. the USA) and from the OECD. It has been further developed and refined over the past three decades and is generally regarded as of high quality although, as noted by the OECD and a number of other

external reviews, there is still room for improvement. This applies to both the RIA process and proposed new regulation, and to the management of the stock of regulation. While the earlier waves of reform undertook reviews of the stock of regulation, for example the National Competition Policy reforms, it was not until the latter half of the 2000s that there was markedly greater pressure for departments to periodically and more systematically review the entire stock of regulation for which they were responsible.

The new regulatory reform processes were gradually embedded in a reformed, institutional structure that provided the centre of government with a gradually increased capacity to manage the RMS, including the OBPR, the Office of Deregulation, departmental Deregulation Units and the Productivity Commission. As any RMS exists in a dynamic and essentially political environment, it is likely that change will be an ever-present fact of life for those involved in RMS (OECD 2010b; Productivity Commission 2011; Borthwick and Milliner 2012).

As noted in detail above, especially in Sections 1.3, 2 and 3, the RMS system has had a number of weaknesses, several of which have been remedied, or partially remedied, over time. Nevertheless, the system displays a relatively high level of policy coherence horizontally, at the national, Commonwealth level, managed by key institutional structures (OBPR, the Office of Deregulation, the Productivity Commission and agency Deregulation Units). This is less so vertically between the Commonwealth and state governments, as the latter have substantial, constitutionally based, regulatory authority. However, the development of CoAG and its regulatory agreements, the development of CoAG's own RIA process, and the use of bodies such as the National Competition Council, have substantially improved vertical coherence. There is also a growing degree of international coherence, focused on a Commonwealth requirement that agencies align regulations with those existing internationally or, if not, demonstrate why this should not be the case as part of the RIA process (Australian Government 2014b).

Departments and agencies have improved, if to varying extents, their performance with regards to meeting RIA *process* requirements, but they have been rather less successful with regards to improving the *content* of new and amended regulation, or of the existing stock of regulation. In 2012–2013, for example, of the 66

RIS required, 64 were assessed as adequate, a compliance rate of 97 percent, up from 88 percent in 2011–2012. A total of 95 PIR were required, of which three were non-compliant, 18 had not been implemented, 43 had not been commenced, 11 had commenced, 6 were completed but not published, and 14 were completed and published. Only one agency had not prepared the required annual regulatory plan. The CoAG RIS were slightly less adequate and compliant (OBPR 2013).

As indicated, the bulk of new or modified regulations are not subject to detailed scrutiny in the RIA system, and the production of an RIS, unless they will proceed to cabinet. While this reduces the administrative cost of RIA and RMS as a whole, it means that a large volume of new or modified regulation, albeit of a relatively minor nature, is not prepared to the same detailed standards, although all are now required to be costed using a new 'Regulatory Burden Measure', an IT-based tool. It provides an automated and standard process for quantifying regulatory costs on business, community organisations and individuals using an activity-based costing methodology. While such minor regulations, individually, may be of limited impact, in aggregate and over time as their number tends to increase, they can have a significant and possibly negative impact on the economy and business. The Turnbull Government, following on from the Abbott Government, is addressing this issue in the context of the existing stock of regulation and its new deregulation strategy.

Management of the existing stock of regulation has received greater attention in recent years, especially following the Productivity Commission's 2011 report on 'Identifying and Evaluating Regulation Reforms'. The bulk of the report's recommendations have been, or are currently being, put into practice, but it will be some time before a judgement can be made as to their impact on performance.

There are a variety of reasons for the variations in performance, several of which have persisted over time, notably:

- A relative lack of influence and authority for the RIA oversight bodies (BRRU, ORR, OBPR), although these have been increased over time, most recently with the move of the OBPR to the Department of Prime Minister and Cabinet and the creation there also of an Office of Deregulation.
- A relative lack of resources for oversight agencies, although this has been slowly increasing over time, with increased budget allocations.
- A varying lack of regulatory expertise in analysis in departments, although expertise has grown slowly over time and it is still limited as regards the

application of cost-benefit analysis and risk analysis. The proposed introduction of a new, Regulator Audit Framework, aimed at annual comparative assessments of the performance of regulators, might provide the information necessary to further improve that performance.

- A varying, but often very limited commitment to, and respect for, the RIA process and the resulting RIS by ministers, leading to adverse impacts on regulatory culture within departments (see Box 1).
- A lack of systematic attention to the need for regular, systematic reviews of the stock of regulation.
- And, of course, by the often inherently difficult process of finding solutions to complex problems.

**Box 1: Status of the RIA Process**

It was clear that notwithstanding statements supporting the RIA Framework and RIA Process by the Minister for Finance and Deregulation, other ministers and their offices did not approach the RIA process with the degree of commitment that a 'mandatory' process of government required. Indeed, there seemed a clear lack of appreciation of what the RIA process actually involved and a view that this was really something for agencies to handle rather than for ministers to be concerned about. Significantly, none of the ministers consulted saw that RIS had any relevance to their, or cabinet's, decision-making (notwithstanding RIS being attached to the relevant cabinet submission or decision document) (Borthwick and Milliner 2012, 38).

The varying performance of RMS, especially RIA and RIS, may be also because any system for policymaking in a democracy, inevitably and continuously will be subject to competing political pressures, from those desiring change for the benefits they hope it will bring, to those who resist change, for fear the benefits that they currently receive will diminish or be eliminated. The making of regulation is an intensely political process and occurs in multiple arenas in which the regulation selected is determined as much by the relative power of the participants as by the process and the quality of regulatory content, especially where, as is usually the case, the selected regulation only partly resolves the problem it addresses. Efforts to promote a greater degree of rationality, such as RIA, are to be welcomed for any improvements in content and process performance they might bring but they are not immune from

the exercise of power in the policy process. This is the central problem faced by RIA and its adherents. It is the reason that popularly elected ministers will always vary in their degree of support for such a system, for they are players in that process, acutely sensitive to its demands and constraints. If they are not, they do not remain as ministers for any length of time.

## 2. The National Competition Policy Legislative Review

Parts Two and Three of this paper explore two regulatory reform programmes undertaken in Australia in recent decades, both of which sought to increase competition across the national economy: the National Competition Policy (NCP) and the Seamless National Economy Agenda (SNEA). The contrasting experience of these reform programmes helps elucidate the role of the RMS in driving successful reform programmes. A particular focus is on the role of the Productivity Commission (PC) in the respective reform programmes.

### 2.1. Introduction – the Productivity Commission

The Productivity Commission (PC) is the pre-eminent source of independent expert advice on microeconomic reform issues for the Australian Government. Its core function is 'to conduct public inquiries at the request of the Australian Government on key policy or regulatory issues bearing on Australia's economic performance and community wellbeing.' It also undertakes research on a range of issues at the request of government.

The PC reports to the Treasurer (the Minister of Finance), but is an independent body established via its own Act of Parliament, with commissioners and a chairman who can only be removed by Parliament. The PC is the latest evolution in a series of bodies providing advice on industry policy issues to government. The focus of these bodies has transformed over time, reflecting changes in the dominant views within the Australian political sphere on industry policy issues. Thus, the major steps in this revolution have been:

- The Tariff Board was established in 1921, with the largely protectionist role of providing advice to government on the provision of assistance to import competing industries;
- It was re-established as the Industries Assistance Commission in 1973, with powers to hold inquiries and to submit reports to the Minister, as well as providing an annual report on assistance to industry and its impact on the economy and on industry performance;
- The IAC was re-established as the Industry Commission in 1989–1990, with a focus on assisting industry to become more internationally competitive and explicit recognition in its legislation, for the first time, of the desire of the government to reduce industry regulation. It was also required to report on the social and environmental consequences of its recommendations;
- The IC was merged with two other bodies to become the PC in 1998. Its role was broadened to cover areas of both State and Federal Government responsibility and to encompass all sectors of the economy.

Given the central importance of the PC to the Australian regulatory management system, the following case studies will review two major reform programmes undertaken in Australia since its establishment through the prism of an assessment of its involvement in, and importance to, the outcomes achieved. They will therefore highlight both the potential benefits to regulatory policy of governments establishing a professional, independent source of advice similar to the PC (as, for example, is provided by the USA's Office of Information and Regulatory Affairs and, more recently, by the New Zealand Government's new Productivity Commission), and consider its importance in relation to other identified critical success factors.

### 2.2. The Trigger for the Changes

Australia embarked on a large-scale process of microeconomic reform following the election of a new Federal government in 1983. This was a response to a long period of relative economic decline. As the reform programme gathered pace, it became increasingly apparent that the limited scope of the existing competition policy arrangements would limit future reform opportunities and inhibit the development of a competitive economy in Australia. The Federal government was at the time implementing a 'new federalism' policy and sought, as part of this, to adopt a national approach to competition policy reform, based on agreements between itself and

State/Territory governments. State and Federal heads of government agreed to pursue such an approach in 1992.

### 2.3. The Sequence of Events and Key Steps

The 'Hilmer Review' of competition policy was commissioned in 1992 and reported in 1993. Its recommendations led to all State and Territory heads of government adopting, in 1995, a compendium of National Competition Policy (NCP) Agreements and to the passage of the Competition Policy Reform Act 1995 by the Federal government (Kain et al. 2003).

At the centre of the NCP agreements was a systematic and comprehensive programme of legislative reform, the 'NCP Legislative Review Program', which was accompanied by new scrutiny requirements in relation to the adoption of restrictions on competition in any new legislation. The review program required each participating government to compile a list of all legislation for which it was responsible, which contained substantive restrictions on competition, and to develop a review timetable that would see all such legislation reviewed and reformed between 1996 and 2000. The initial stocktake of legislation containing restrictions on competition identified 1700 Acts for review—a larger than anticipated stock.

Reviews were required to be conducted in accordance with the NCP Guiding Legislative Principle. This stated that existing legislative restrictions on competition should only be maintained, and new restrictions only imposed, where a two-part test is met:

- the benefits to society as a whole of the restrictions clearly outweigh the costs; and
- there is no alternative means of achieving these benefits that is less restrictive of competition.

A National Competition Council (NCC) was established (as an intergovernmental body) with the role of assessing whether review and reform obligations were being met by participating governments and reporting annually to the Federal government on this issue.

A system of 'competition payments' was established as part of the agreement establishing the Legislative Review. This required the Federal government to make

cash transfers to State governments, subject to their meeting their reform obligations, as advised by the NCC. The payments were justified on the basis that much of the 'reform dividend' would flow to the Federal government through higher tax receipts resulting from higher levels of economic activity and that a partial redistribution of these benefits to the states, in recognition of their contribution to achieving the reform was appropriate.

### 2.4. The Key Players

The Independent Hilmer review, chaired by a business academic, was fundamental to determining the broad design of the NCP program, with its recommendations largely being accepted by heads of government. The central agencies at each level of government drove the detailed design of the NCP agreements and their obligations, with the Federal Treasury (i.e. the Ministry of Finance) being particularly influential, notably in developing the Guiding Legislative Principle.

During the implementation phase, the NCC was the key player at the national level, particularly as a result of its responsibility for monitoring and reporting on compliance annually and making recommendations regarding the distribution of the competition policy payments.

Individual ministries within each government were also major players, taking primary responsibility for the completion of the legislative reviews, albeit that their conduct was often outsourced to expert consultants. Ministries were also responsible for developing reform recommendations, while these had to be approved by cabinet in each state, given the need for legislative amendment or even repeal in order to implement them.

Central agencies coordinated the program within the administration and were responsible for compiling the annual reports of each government to the NCC.

The PC was also a key player at several stages of the process, as outlined in the following discussion of key success factors. In general terms, its role was to contribute to the development of a better understanding of the benefits and dynamics of reform among a wide range of stakeholders, using both ex ante and ex post analysis. This was largely achieved through the publication of three major reports at different stages of

the reform process, although the PC also participated extensively in the public debate over the reforms.

Business groups and other stakeholders were also engaged in a wide range of review activity, given that process guidelines emphasised the need to undertake significant consultation with affected parties during the review process. Some business representative bodies were strong proponents of reform in a wide range of areas.

### 2.5. Key Success Factors

Most of the identified legislation was subjected to review during the life of the program, however, rather than being completed in 2000, the program continued for nine years, until 2005. While significant restrictions on competition remain in some areas, very substantial pro-competitive changes resulted and the legislative review program was widely seen as a significant success.

A number of factors were important contributors to the success of the program. First, the breadth of the reform program helped to generate widespread support by creating an expectation that all would capture some benefits and incur some costs, for example, with job losses in some sectors being offset by expansions elsewhere as the economy became more flexible. Also, dynamic gains were thought to be available from enhancing competition, which might be lost if reform were too narrow.

Second, significant transparency provisions in key areas of the program helped to maintain momentum. Annual progress reporting by the NCC, which focused particularly on reform outcomes, helped to create pressure on participating governments to maintain reform momentum by highlighting any areas in which reform obligations were not being met. Industry associations representing the major corporate sector in particular were strong proponents of reform and governments sought to avoid the stigma of being identified as non-compliant with their obligations.

A further transparency element was the requirement that reviews incorporate significant stakeholder consultation (e.g. public hearings, written submissions, publication of draft reports, etc.). This helped to ensure that the rationale for restrictions and the implications of removing them were well understood, and improved the quality of the resulting reform recommendations. That said, it arguably also provided a platform for strong lobbying against reform.

Third, the system of 'competition payments', constituted a tangible incentive for State governments to pursue reform. While the absolute amounts involved were modest, these payments represented discretionary funding for State governments. In addition, the withholding of part of these payments had symbolic importance as a tangible indicator of significant non-compliance on the part of a government.

Fourth, the PC contributed substantially to the success of the legislative review at three stages of the process, as follows:

- *In advance of the commencement of the review programme* (in 1995), it published a report that estimated the future benefits expected to be obtained by implementing the NCP agreements, notably including the legislative review program (Industry Commission 1995). This report provided credible estimates of the scale of the benefits that would be achieved and, in so doing, helped to strengthen the political consensus in support for the program at a time when significant concerns were being raised about the potential social impacts. More generally, it contributed to a fuller understanding of the gains from competition policy reform;
- *During the review process*, concerns were expressed increasingly strongly about the distribution of the benefits and costs of reform and risked undermining support for the continued implementation of the NCP agreements. The existence of the PC as a credible and respected analytical and advisory body enabled the Federal government to respond to these concerns by commissioning a detailed review of the impacts of the policy in the various regions of Australia. The resulting report (Productivity Commission 1999b) concluded that implementing the NCP would increase income in all regions of Australia but for one, thus demonstrating that the benefits of reform were widely spread. Moreover, it showed that the size of the impact of NCP on the one region that would not obtain a net income benefit (and would bear losses in employment numbers) was small relative to the changes caused by a range of other economic impacts and changes.
- *In the final stages of the legislative review*, a third PC study was published (Productivity Commission 2005a), which summarised the overall impact of the NCP, including the legislative review and reform program and other key elements. This partly 'ex post' analysis concluded that the benefits the policy had delivered had far outweighed costs, had contributed to a long period of uninterrupted economic growth and had supported innovation. Moreover, the benefits were widely spread, with both high- and low-income earners and both country and city areas having received net benefits. This further review arguably cemented societal views of the merits of the NCP program and paved the way for the subsequent adoption of a 'second wave' of competition policy reform.

## 2.6. Role of Different Elements of the Regulatory Management System

The adoption of the Guiding Legislative Principle was central to the achievement of the outcomes obtained by the legislative review program. The principle is clearly derived directly from the Regulatory Impact Assessment (RIA) requirements that are one of the core elements of the regulatory management system. The first part of the principle is based on the benefit/cost principle, while the second reflects the widely adopted RIA requirement that all options capable of achieving the identified policy objective should be identified and assessed, and that with the greatest net benefit chosen. The existence of this principle as a core requirement meant that, in practice, RIA-like disciplines and approaches, based on benefit/cost analysis, were widely adopted in the review process. Moreover, the existing RIA processes operating at National and State government levels were adopted as the core means of ensuring that the principle was applied to new regulatory proposals.

Second, as noted above, transparency and formal public consultation processes are key elements of the regulatory management system that were embedded into the NCP legislative review process, albeit that an explicit requirement that all review reports should be made public would have improved performance in this area.

Institutional considerations constitute a further key element of regulatory policy. As noted in OECD recommendations and reports on this issue, appropriate institutions must be in place to undertake key roles, they must be adequately resourced, and responsibility must be carefully allocated to appropriate institutions. As discussed above, the NCP legislative review involved the creation of a substantial new institution (i.e. the NCC) and an allocation of review and reform responsibilities that gave primary responsibility to regulating ministries, but subjected them to substantial oversight backed by significant incentives for strong performance.

## 2.7. Other Contributions of the Productivity Commission

In addition to the roles of the PC noted above, it also undertook a number of other, related roles in regard to the NCP. The first, leading up to the appointment of the Hilmer Committee, was that of advocacy and provision of factual information on the potential benefits of, regulatory reform and a more competitive economy. This occurred especially in its annual reports and its first annual review of progress in

microeconomic reform. Such advocacy, coming from an expert largely independent body, provided important support for those promoting the need for a review of regulation that impacted on competitiveness.

Following the move of the PC to the Treasury portfolio in 1989, competition received added emphasis, including, for example, four inquiries addressing impediments to competitiveness, which dealt with government (non-tax) charges on industry, impediments to international trade in services, food processing, and travel and tourism.

The impact of those promoting reform is enhanced if their arguments are supported by strong factual evidence as to the likely benefits. The research and reports of the PC and its predecessors were especially important in this regard. In particular, this included its development of the sophisticated ORANI, multi-sectoral model of the economy, enabling the systematic asking of 'what if' questions regarding the impact of regulation and possible reforms (IAC 1987b).

As well as the stress on the need for reform contained in its reports, senior staff of the IAC (often very senior public servants) and, in particular, its chair, were increasingly active in promoting the need for reform, drawing on the factual material contained in its research reports, as well as their own expertise.

The second role performed by the PC was as a staffing resource for other key actors in the development and implementation of the NCP, notably the NCC. Several of the NCC's senior staff were drawn from the PC (as well as Treasury) and a number of secretariat services were also provided to the NCC.

The third role was that of a contributor to a number of the reviews of regulations targeted in the NCP, including a detailed submission to the National Competition Council Review of the *Australian Postal Corporation Act 1989.* Similarly, at the request of the panels established for the reviews of the New South Wales Dairy Industry and the Queensland Dairy Industry, the PC made detailed submissions to both reviews. The requests were an acknowledgement of the value and experience gained from earlier PC reviews of the dairy industry.

In the following section, we will explore the 'second wave' of competition policy reform and the establishment of the Seamless National Economy Agenda (SNEA). This is a case example of a less successful programme of regulatory reform.

Significantly, this case is characterised by the relative under-use of the PC as a reform advocate, information provider and advisor. It also demonstrates the existence of diminishing returns from further reforms in circumstances in which a successful and wide-ranging reform programme has already been undertaken and the consequent need to pay careful attention to both programme design and implementation if significant benefits are to be achieved. A key lesson in this regard relates to the negative effects of an undue rush to adopt and implement reform.

## 3. The Seamless National Economy Agenda (SNEA)

### 3.1. The Trigger for the Changes

Following the completion of the NCP legislative review program in 2005, attention turned to the potential for adopting a 'second wave' of competition policy reform. This was based on awareness of the fact that the legislative review had had limited success in removing costly restrictions on competition in several areas,[3] and that there were opportunities to address additional areas of restriction on competition that arose, in many cases, from the federal nature of the Australian Constitution. That is, much of the focus was on reducing or eliminating barriers to competition across state borders. It was therefore based on identifying areas of regulation that were not necessarily anti-competitive per se but where *differences* in regulatory requirements between States restricted competition in practical terms.

In addition, the OECD had recommended, in its 2009 review of regulatory reform in Australia that the government should 'Develop a more systematic and transparent approach to reducing the burden of regulation'. The then government's response highlighted the SNEA as a key initiative in this regard.

The SNEA has three parts, being:

- 27 'deregulation priorities' agreed by the CoAG;
- 8 priority areas for competition reform, also agreed by CoAG; and

[3] In particular, the PC advocated completing what it regarded as the unfinished NCP reforms and these items became the first two thirds of the 2006 National Reform Agenda. Subsequently, these items became the 49 items of the SNE agenda (Deloitte Access Economics 2013: 74).

- Continued development and improvement of the existing arrangements for scrutiny of new regulatory proposals (i.e. RIA and related processes) to increase the efficiency of new regulation.

The 27 deregulation priorities entailed the adoption of significant programmes of reform in specific areas of regulation. These typically involved achieving regulatory uniformity in the field in question, or else closer regulatory harmonisation between jurisdictions. This necessarily also implied a process of modernisation, ensuring that the uniform regulatory standards and approaches adopted were consistent with best practice. Examples of deregulation priorities include the establishment of a single national regulator for a range of health professions, the adoption of uniform workplace health and safety legislation and regulation, and the adoption of a National Occupational Licensing Scheme covering a range of trades such as plumbing and building.

The outcomes sought through the SNEA were:

- creation of a seamless national economy, thus reducing costs incurred by business in complying with unnecessary and inconsistent regulation across jurisdictions;
- enhancing Australia's longer-term growth, improving workforce participation and overall labour mobility; and
- expanding Australia's productive capacity over the medium term through competition reform, thus enabling stronger economic growth (CoAG 2008).

### 3.2. Sequence of Events and Key Steps

The SNEA was agreed by CoAG in 2008. Its objective was to reduce the costs of regulation and enhance productivity and workforce mobility in areas of shared Commonwealth, State and Territory responsibility.

The Inter-Governmental Agreement that adopted the SNEA broadly noted the division of responsibilities between Federal and State/Territory governments along constitutional lines, but did not identify in detail the roles of specific institutions. However, in general terms, regulatory reforms were to be developed under the auspices of the CoAG Ministerial Councils, supervised by the CoAG Business Regulation and Competition Working Group and ultimately endorsed by CoAG itself (i.e. heads of government).

The successful NCP model of providing incentive payments for the states was also adopted for SNEA, with A$550 million to be paid over a five-year period. Ten of the 27 'deregulation priorities' contained in the SNEA were identified as being of particular importance, with State governments remaining eligible to receive the full amount of reform payments only if all reform milestones were met in these areas.[4] In the event, however, these became some of the most problematic of the reforms.

Despite the experience of the NCP Legislative Review, which saw the time taken to complete the agreed reform program more than double from initial estimates, an ambitious timetable for delivering the reforms was initially agreed by CoAG through its Business Regulation and Competition Working Group—a body established to facilitate the achievement of the SNEA. The adopted timetable covered a five-year period in total (the last year being 2012–2013), although much shorter timespans were proposed for completion of many of the 27 deregulation priorities. As an example, the process of developing, agreeing and implementing a complete suite of uniform workplace health and safety legislation was scheduled to be completed in 3.5 years. In practice, many of the early milestones were not met and timetable revisions occurred frequently.

The CoAG Reform Council was required to report annually on progress in achieving the milestones set out in the implementation plan, while this reporting was to be supplemented by more detailed and technical analysis to be supplied by the PC. The PC was asked by CoAG to report on the implementation and impacts of the SNEA every two to three years, with these reports addressing both achieved and prospective benefits. However, while the agreement was reached in March 2008, the first PC report (Productivity Commission 2012b) was not published until early 2012. No subsequent PC report has been released. In addition, the SNEA was to be reviewed by the Federal government, in consultation with the States, in 2011.

[4] That is, unmet milestones in relation to the remaining 17 deregulation priorities would not automatically lead to withholding of reform payments.

### 3.3. Key Players

The SNEA, as a wide-ranging reform agenda, necessarily included numerous key players. Given the 'top down' nature of the reform, CoAG mechanisms were central to the process. This included CoAG itself (i.e. heads of government meetings), the Business Regulation and Competition Working Group and the Ministerial Councils.

#### 3.3.1. Ministerial Councils

Of note is that the Ministerial Council structure, which had evolved organically over a number of years as specific areas of regulatory cooperation developed, was substantially overhauled on two occasions during the life of the SNEA. These changes had substantial implications for their roles in the reform process.

CoAG announced in February 2011 that the previous structure of over 40 councils would be replaced with a new structure of only 12 standing (i.e. permanent) and 11 'select' councils. However, less than three years later, in December 2013, the structure was again changed to one of eight 'CoAG councils', by the incoming Abbott Government, each covering broad areas of policy, with the former distinction between standing and select councils abolished and all councils now being 'time limited'.

The consolidation of councils responded to several factors, notably:

- Concerns regarding the proliferation in council numbers had developed over many years, particularly in relation to the risk of fragmentation and loss of policy coherence;
- At a more micro-level, specific administrative problems arising where council memberships did not include all ministers responsible for a particular area of reform in some cases, thus frustrating reform efforts; and
- General concerns that the council structure did not reflect a strategic reform focus and thus enable the benefits of reform to be maximised.

#### 3.3.2. Central agencies

The increasing concern to ensure a strategic reform focus and to speed the pace of reform also saw central agencies become more closely involved in the design of the reform agenda. The fact that this reform initiative was developed as a single inter-governmental agreement with the specific areas of regulatory reform to be addressed

being identified in some detail, *ex ante* inevitably meant that the central agencies were important players in the process. This enhanced role for central agencies necessarily tended to reduce the importance of line agencies in determining the strategic direction of the reforms and the broad content of the changes adopted.

As noted above, the PC was given a specific role of reporting in detail on the impact of reforms, with these reports initially being intended to be presented regularly (on a biennial basis), although this has not occurred in practice. This role was similar to that played by the PC in respect of the NCP, as set out above. In practice, however, a further role played by the PC was that of identifying many of the priority areas for regulatory reform, as noted above. This reflected the fact that the development of the reform agenda drew on the outcomes of various PC reviews undertaken in recent years, as well as its assessment of the performance of the NCP.

### 3.3.3. Critical success factors

A February 2014 Final Report released by the CoAG Reform Council, reviewed reform performance across 45 areas, including all those identified in the SNEA. It found that significant reforms had been achieved in 31 of the 45 areas, but that 'substantial further attention' from CoAG was required in respect of the remainder.

As the above suggests, while some significant reforms were adopted, implementation performance generally disappointed expectations. In at least one case (the National Occupational Licensing Scheme) the proposal for a national regulatory scheme was officially abandoned (CoAG 2013b). In several other cases, implementation was partial in nature and not in accordance with expectations. For example, while six of eight jurisdictions have adopted national occupational health and safety laws, the other two (Victoria and Western Australia) are not currently intending to do so. Moreover, of the six that have legislated, most adopted Acts which differed in at least some respects from the agreed national model.

States that have decided not to adopt the national approach developed under the reform projects have generally made this choice as a result of emerging evidence suggesting that there would not necessarily be net benefits in doing so. For example, Victoria commissioned its own RIS on the occupational health and safety laws (being unconvinced by the quality of the national RIS), which found that the net benefits of

change were minimal, while the distribution of the benefits and costs favoured larger business at the expense of smaller ones (PwC 2012)). Subsequent academic research has also supported this conclusion (Windholz 2010).

Concerns in this area were, paradoxically, driven in part by the post-implementation performance of reforms adopted in some areas. For example, national health practitioner registration came into effect as scheduled in mid-2010, but has been criticised for poor legislative design, concerns over inadequate accountability, regulatory duplication and inefficiencies, consequent substantial increases in registration costs and concerns as to the effectiveness of new nationally based practitioner complaints and discipline procedures (Legislative Council of Victoria 2014).

A number of factors have been identified as significant in limiting the success of the SNEA. One area of concern is that the changes adopted in the respective roles of CoAG, its Ministerial Councils and other entities in tandem with the reforms are believed by many to have been less successful than expected. The moves to consolidate the council structure and adopt a more centralised approach to determining and implementing the reform agenda meant that CoAG and central agencies also took on a larger role in developing and agreeing the reform programmes, at the expense of line agencies (Harwood and Phillimore 2012).

These changes were the outcome of prior concerns that the existing reform arrangements, which saw Ministerial Councils as largely driving the process, had had limited success in practice. There was a consequent desire to more effectively drive the new reform agenda. However, there is significant doubt as to whether the changes made improved actual reform performance, although it is too early to make a final judgement for several of the reforms implemented. As noted above, the SNEA has taken significantly longer than originally envisaged, while significant parts have been either delivered only in part or abandoned altogether.

Some research suggests that there is a strong link between the increased degree of centralisation adopted and these resulting problems. Because reform priorities have in many cases been set centrally, with limited reference to the line agencies and/or the Ministerial Councils responsible for those areas of policy, the choice of regulatory reform priorities was often poorly informed, while the objectives sought were similarly

poorly specified in many cases. Evidence exists of areas of regulation that had previously been considered for harmonisation/reform but rejected by subject matter experts on benefit/cost grounds were subsequently included in the SNEA programme. For example, a report commissioned by CoAG found that:

> The substantial departures from the IGA framework mean that it has played a very limited role in driving reform. Neither has the commitment to minimising input controls and freedom in the deployment of funding been maintained. A number of the original Agreements have been abandoned, associated with a decline in collaborative federalism in policy design.
>
> COAG played a vital role in gaining agreement on action at a head of government level. In part this was at the expense of active involvement by line ministers and their departments. That suited high-level objective setting and agreement making. However, more focus is now required on process and execution. This means that line ministers and their departments at both levels of government need to be effectively engaged at all stages of the design and delivery of policy. COAG oversight of progress against the agreed reform agenda needs to be an item of consideration at a COAG meeting each year, supported by an independent assessment of progress provided by the CRC through its chair (Deloitte Access Economics 2013, i).

A key point of context in this regard is that regulatory harmonisation and uniformity initiatives have been pursued in Australia for several decades and have been the subject of a strong reform focus at least since the adoption of Mutual Recognition Acts at national and state government levels in the early 1990s. This meant that many of the largest available gains from reform had already been achieved: for example, regulatory harmonisation had been pursued in the workplace health and safety area since the late 1980s. This meant that the imperative to carefully weigh the potential benefits and costs of further moves toward uniformity was necessarily particularly strong. In the event, this did not always occur: Deloitte Access Economics argued in its review that the rapidity with which the reform agenda was adopted and the demanding timelines imposed meant that many reforms were not well designed, while their implementation was also unduly rushed. It found that a more 'considered' approach would likely have been more effective (2013, 35).

The 2012 report of the PC on the actual and prospective impacts of the adoption of the SNEA found that the potential benefits of implementing the SNEA and related

reforms was around A$4 billion per year in reduced business costs and A$6 billion per year (or 0.5 percent) in increased GDP. While these represented worthwhile potential gains, it is notable that they are equivalent to less than one tenth of the benefits estimated by the PC to have accrued from implementing the NCP legislative review. In addition, the PC reported in 2012 that 'most reforms are either still in train or have only just been implemented'. Hence, this was essentially an *ex ante* analysis. A 'period of adjustment' was said to be required before these benefits would be attained, but it was estimated that they should be mostly felt by 2020.

More positively, the adoption of financial incentives to facilitate reform, as used in the NCP legislative review, was supported in published reviews of the SNEA. A November 2014 'Lessons for Federal Reform' final report found that progress on reform was significantly enhanced through reward payments. The council noted that 'governments have made better progress implementing the reforms that attract reward payments than they have made on the reforms that do not attract reward payments'. It found that governments have completed 21 of 26 reforms in which rewards were offered and only 10 of 19 reforms where no reward was offered.

### 3.4. Role of Key Elements of the Regulatory Management System

The OECD's work on regulatory policy emphasises the importance of having an appropriate range of well-designed institutions to support the implementation of the policy and of carefully allocating reform responsibilities among them. The problems highlighted above suggest that weaknesses in this area were significant in explaining the shortcomings of the SNEA.

The centralisation of responsibility undertaken in the interests of achieving greater reform momentum and a more strategically coherent reform programme was only partially successful. While many reforms were achieved in accordance with the very demanding schedules set out at the commencement of the programme, the reforms adopted failed to meet expectations in many ways, while others were not completed. The relative lack of input from line agencies and the amalgamation of formerly specialised Ministerial Councils is likely to have been a significant factor in this outcome. While there may be some degree of necessary trade-off between centralised and decentralised models of reform in terms of benefits and costs, there is a need to

focus on how best to balance these considerations. In the current case, this implies ensuring effective input from subject-matter specialists is retained while simultaneously providing strong and strategic direction from the policy centre.

The largely 'top-down' approach to the SNEA reform may also be reflected in the approaches adopted to consultation. Peak business groups, particularly those representing the corporate sector, were strongly in favour of most of the SNEA agenda and appear to have been influential in its design and development. Conversely, the concerns of smaller businesses, occupational groups and other interested parties appear not to have been widely understood early in the policy process. More timely consultation with these groups would likely have led to earlier recognition of their concerns and consequently to problems with the proposed reforms being identified and addressed.

Successful reform relies on being able to convince stakeholders that significant benefits will result, while the above problems meant that this was not possible in many areas and reform was sometimes not implemented, or only partly implemented, when it became apparent that this was the case, as documented in the comments on the 'programme logic' of the SNEA made in the Deloitte report highlighted above.

Finally, greater use of the PC as a resource capable of contributing to the development of the specific reform programme, as well as aspects of its implementation, might have improved the performance of the SNEA process. The PC played a similar role, or set of roles, that it had played in regard to the NCP process, including that of reform advocate, information provider and advisor, but its advice seems not to have been drawn upon as fully as might have been expected. Thus, a significant element of the RMS was relatively underused.

## 4. Conclusion

This paper has summarised the development and current status of the Australian RMS and provided two contrasting case studies of major recent reform programmes, focusing on the role of key RMS elements in their completion. The contrasting experience of these case studies suggests that, even in a context in which a highly developed RMS exists and there is substantial prior regulatory reform experience, reform processes and outcomes can vary widely. A key consideration is that policymaking, and therefore regulatory reform, is a highly political process, one that is necessarily subject to the particular political demands and constraints that dominate from time to time. This fact underlines the importance of a well-functioning RMS in contributing to more objective policy processes and, consequently to successful reform outcomes. At the same time, it implies that the influence of the RMS remains limited and subject to political and other constraints.

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