Regulation for Australia's Federation in the 21st Century*

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I have been asked today to provide a regulatory perspective on the theme for this morning's plenary session, "Federalism in the Future: Will the next wave of Reform deliver?". This invitation no doubt recognises the work of the recent Taskforce which I chaired on Reducing Regulatory Burdens on Business, as well the Productivity Commission's ongoing analysis and reviews of areas of regulation of particular importance to our national economic performance, including our review of National Competition Policy reforms. Each stream of work has revealed considerable scope for regulation within our federal system to work better in the national interest, and my remarks today will draw on both.

Australia's regulatory problem

The Taskforce's report identified a number of problems with Australia's regulatory environment. Regulation is growing apace and, while regulation can be justified in many areas, the efficiency of that regulation often leaves much to be desired and its cumulative compliance burden on business and the economy has escalated beyond what is justifiable. A major part of the problem lies in the way regulation is formulated and designed. Notwithstanding improvements in some areas, common faults include:

- unclear or questionable objectives;
- a failure to properly target the regulation at the source of the 'problem';
- undue prescription and complexity;

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- overlap, duplication or inconsistency with other regulation, especially across jurisdictions;
- excessive reporting or other paperwork requirements;
- poorly expressed, and confusing use of terms; and
- unwarranted differentiation from international standards.

These problems are often exacerbated by the agencies charged with administering and enforcing regulation. There are many instances of regulators being unduly heavy-handed or legalistic; failing to use risk assessment when determining how stringently or widely to enforce a regulation; not adequately consulting or communicating with those being regulated, and leaving business uncertain about compliance requirements.

The Taskforce's findings have lent support to the conclusion emerging from successive Productivity Commission reviews in a variety of regulatory areas, that there are few regulations that could not be significantly improved. This is true within each of the jurisdictions in Australia's federation. However, the fact that we have multiple jurisdictions, while not without benefits, introduces further problems.

Nationally incoherent regulation

One oft-noted example of the resultant costs and complexities occurs in rail — an area that the Commission is currently examining as part of its inquiry into land freight infrastructure pricing. While the colonial hang-over of different track gauges has now been largely addressed, it is still the case — as Ken Henry pointed out at a Productivity Commission Roundtable last year — that Australia, with a population of 20 million, has seven rail safety regulators administering nine pieces of legislation, whereas the 300 million citizens of the United States are able to make do with one. Further, an operator of an interstate train in Australia may also have to deal with up to six access regulators, three transport accident investigators, 15 pieces of legislation covering occupational health and safety of rail operations, and 75 pieces of legislation with powers over environmental management.

This may be an extreme case, but there are plenty of other examples of regulatory layering and mismatches that are hard to justify. For example, why is it that someone licensed to serve liquor in Albury requires a different licence to do so across the river in Wodonga; a firearms instructor operating on both sides of the NSW-Victorian border needs to obtain licences in both States; or the regulatory 'trigger height' for using safety equipment on construction projects is only 2 metres in NSW, when it is 3 metres in Queensland?

Some examples defy belief. In preparing a presentation a couple of years ago, I learnt of the case of a South Australian snake handler who had been invited to give an educational talk and demonstration at a Rotary Club meeting just over the border in Victoria. He encountered no less than 18 separate regulatory hurdles between the two jurisdictions, in a process lasting three months. Unfortunately, regulatory snakes and ladders is a game being played out daily for real by many people and businesses across our nation.

Economic activity is increasingly 'national'

The Australian Constitution, in Section 51, gives Federal Parliament powers over a number of matters, including those considered in the 1890s to be important for the formation of a national market. They include quarantine, currency, bills of exchange, bankruptcy, copyright and corporations. In the early decades of Federation, the fact that other regulations differed between States was not greatly problematic for the conduct of business, given the limited geographic reach of economic activity at the time. However, technological advances in transport, communications, production processes and distribution systems over the last century have meant that the geographic scale of much economic activity has increased dramatically. Thus, whereas once many towns or regions had their own brands of soft drink or beer, today those markets are national or international. (One is as likely to be offered a Heineken at a party in Alice Springs as in Adelaide, or perhaps even Amsterdam!)

These days miners living in NSW can 'fly-in and fly-out' of mining operations in Queensland or the Northern Territory. Engineers in Brisbane can, at the click of a mouse, submit plans to clients in Tasmania (or, indeed, in Timbuktu). Moreover, it is now commonplace for many people to move interstate, if not overseas, for career and lifestyle reasons. These trends towards national and global-scale production, and an increasingly mobile population, appear unlikely to abate anytime soon; quite the contrary.

One century after Federation, there are clearly advantages in workers and businesses in Australia being able to operate as seamlessly as possible across State borders. Unnecessary variations and inconsistencies in regulatory requirements between jurisdictions add to the costs and complexities of doing business. Further, the overlay of requirements from different levels of government can add complexity and cost to doing business even for workers and businesses operating entirely within the one state. The complexities and costs for business can also translate into less choice and higher prices for consumers and business users. This is in addition to the cost to taxpayers associated with regulatory duplication and overlap.

Notwithstanding Australia's impressive recent economic performance — itself partly a consequence of previous regulatory reforms — we face important challenges in the years ahead, not least the domestic pressures of an ageing population, and international competitive pressures from countries such as India and China. Australia is already at a disadvantage by dint of the tyranny of distance. As globalisation proceeds, it makes increasingly less sense to maintain many regulations and bureaucratic structures designed for eight separate markets.

The potential benefits associated with regulatory reform are large. Preliminary analysis by the Productivity Commission, as part of its assessment of the potential gains achievable through the National Reform Agenda, suggests that the cost of *unnecessary* regulatory compliance requirements alone could be as high as $7 billion per annum. Added to such compliance burdens are the potentially much larger efficiency costs associated with regulatory impacts on decision-making about production or investment, or constraints on firm innovation and responsiveness to changing market conditions.

In response to the Regulation Taskforce's report, the Australian Government announced a number of reforms to specific areas of regulation as well as strengthened processes to improve regulation-making and enforcement generally. Some similar exercises have been undertaken by individual states. COAG has made a broad commitment to review and reform ten interjurisdictional 'hot spot' areas. There has also been agreement to improve processes for regulation-making. COAG is to meet again in early 2007 when it will consider how to progress its reform agenda. With that opportunity in mind, it is timely to ask whether the initiatives to date go far enough and what more may be needed.

Who should regulate what?

A threshold question in considering what regulatory system is likely to best fit Australia's needs in this century is: *who should regulate what?*

In contrast to 100 years ago, when 'States rights' held supreme in public opinion, today there is a growing tendency to presume that all functions currently undertaken by State governments would be best centralised under the Australian Government.

It is thus worth recalling the potential advantages that federal arrangements offer their citizens, as compared with unitary states. Among other things, power in a federation is dispersed across multiple jurisdictions, encouraging more responsive and less autocratic government. The existence of multiple governments also creates

opportunities for interjurisdictional competition and learning from different policy approaches and innovations — if one State gets it 'right', others can (and may need to) copy. A State that 'over-regulates' can lose business and people to other, less dirigiste States. Further, federations allow the provision of sub-national goods and services to be attuned to the preferences of constituents in particular jurisdictions, while facilitating the provision of 'national' goods and services by a central government.

Thus, the question of which level of government should regulate which activities generally hinges on more than the transaction costs of running multiple regulatory regimes. Indeed, a number of criteria or considerations are relevant (criteria which overlap with the broader question of the assignment of powers or functions). They include:

- the scale of the activity;
- the extent to which actions in one jurisdiction impact on others;
- the degree of differentiation in circumstances or preferences across jurisdictions;
- the ease and costs of administration; and
- the state of knowledge about the best regulatory approaches.

Geographic scale or coverage

An increasingly important consideration is the one I have already mentioned — the geographic scale of the economic activity being regulated. Nationally consistent regulation proffers benefits by facilitating larger production runs and thus 'economies of scale'. It can promote competition and reduce transactions costs for workers and businesses operating in more than one State or Territory.

For services such as freight transport, energy transmission and communications, where often the provision of the service itself requires activity in two or more States, nationally uniform or at least consistent regulation is especially warranted.

Greater benefits from a national approach might also be expected in areas of regulation that affect firms in a variety of industries. For example, the variations in occupational health and safety regimes around Australia are cited by a variety of businesses as a major cause of unnecessary compliance costs that significantly affect their performance. Other areas of regulation where variations are likely to generate widespread transactions costs include the regulation of companies, and trading provisions such as the registration of business names and those covering weights and measures.

The scope for benefits from a national approach to other, 'industry-specific' regulation, will vary depending on the nature of businesses that operate there and the significance of the compliance costs associated with the regulation. A national approach might be expected to generate fewer benefits in relation to the regulation of newsagents, for instance, than in relation to food standards.

Interjurisdictional spillovers

Another relevant consideration is whether the activity being regulated generates significant spillovers across State borders.

Much environmental regulation falls into this category. For example, land-use and irrigation practices in the upper reaches of the Darling basin in Queensland affect water flows and river health in New South Wales, and practices in all three eastern sea-board states have flow on (or flow-off!) effects on the Murray in South Australia.

Jurisdictional 'externalities' of this kind were not a major concern in the early years of Federation, but the extent and intensity of human and economic activity on the eastern sea-board has increased greatly over time. As a consequence, the pressures on water resources and the environment that give rise to such spillovers, or exacerbate their effects, have also greatly increased. Thus the need for better regulation of water supply and use to create a 'national' market in water is now generally accepted, if not yet adequately acted on.

Ocean fish stocks and greenhouse gas emissions are other phenomena which do not respect State (or, for that matter, national) boundaries. The greater are such spillover effects, the greater the case for a national approach to regulation.

Variation in citizens' needs and preferences

An important issue to consider is the extent to which the needs and preferences of citizens vary among jurisdictions.

Some federations contain sub-national jurisdictions differentiated by populations with quite different ethnic identities, living standards, languages, cultures and customs — think of Chechnya in the Russian Federation, French-speaking Quebec in Canada and, in the USA, Alaska versus Hawaii. There are likely to be significant differences in the needs and preferences of the inhabitants of these states, and thus more potential benefits from differentiated approaches to certain areas of regulation.

By contrast, although Australia's population today is arguably more heterogeneous than at federation, it seems unlikely that the citizens of different States, taken as a

whole, would have markedly divergent needs or preferences in relation to many areas of regulation. It is not clear, for instance, that the average Queenslander would have significantly different preferences for risky over safe products than the average South Australian; or that the average Western Australian would be more susceptible to being duped — and thus be in greater need of consumer protection laws — than the average denizen of Victoria. In such cases, the scope for variations in regulations between States would not of itself allow for the better meeting of citizens' needs and preferences.

Also it could be argued that while the cultural and ethnic mix in Australia is greater today, this is generally the case across all jurisdictions. At the same time, improvements in communications technology and much lower transport costs have been forces for greater convergence in tastes and preferences across the country.

Nevertheless, we do observe some significant population differences, such as the large indigenous population in the Northern Territory, and pronounced differences in environment and climatic conditions, which can warrant the tailoring of regulatory as well as service delivery approaches. (Australia's system of horizontal fiscal equalisation goes further than most federations in redistributing tax revenue based on the uneven distribution of such influences on service delivery costs.)

Administrative costs

In general, regulation making at the national level has the potential for cost savings and for concentrating regulatory expertise, thereby potentially improving the quality of regulation. This may be significant where the regulation-making process entails particularly high costs — for example, in relation to areas such as financial regulation, food standards, vehicle safety and therapeutic goods, where complex technical assessments are required.

A centralised or national approach may also generate cost savings in relation to some elements of the administration of regulatory regimes. For example, if a regulatory regime requires that products undergo a pre-market assessment and certification process against national standards before being made available for sale, as is the case, for example, with therapeutic goods and automobiles, it makes obvious sense from a cost-viewpoint to require only one such assessment and certification for each product, rather than replicating this activity in each jurisdiction.

On the other hand, the costs of many aspects of *enforcing* regulations — including the costs of resourcing inspectorates and of prosecuting breaches — tend to increase as more enforcement is undertaken. Indeed, in many areas, there will be efficiencies

to be gained from devolution of enforcement responsibilities, which can tap local knowledge and yield 'economies of scope' in enforcement across a range of related regulatory areas. For example, in some local government areas individual inspectors may enforce a range of food, liquor, waste and other environmental health regulations.

Knowledge about 'what works best'

Not least important in assessing the case for national regulatory approaches is the extent to which the best regulatory solution is *known*. As noted, one of the benefits of federal systems is that they provide scope for regulatory experiments that initially have localised effects. While these can give rise to transaction costs for firms and citizens who operate across jurisdictions, a bad regulation in one State will generally still be less costly than uniformly bad regulation everywhere. (These issues are germane to current debates about policy approaches to the greenhouse issue and school curricula.)

A national approach is thus more likely to be warranted where the 'right' approach to an area of regulation is relatively clear-cut. It could be said that with advances in technology and a long history of federal regulatory experiments, there would be greater certainty today about what constitutes the 'right' approach in many areas.

However, unlike physical experiments, policy experiments can be hard to evaluate and sometimes take a long while to play out. And while Australia has greatly benefited from regulatory reforms based on the demonstration effects of past failures, we continue to observe costly features of modern regulatory solutions. Indeed, it has been the downsides of more recent regulatory activity, particularly for business, that prompted the Taskforce's work and the regulation stream of the new National Reform Agenda. Further, even where the best regulatory solution is known today, it may not be appropriate in the future. That is not a reason for foregoing the benefits of a national approach, especially where these are strong, but it puts a premium on ensuring that there are also strong processes for making regulation and reviewing it over time.

The implications

These various considerations suggest that the question of which level of government is best-placed to regulate in different areas is not always straightforward. A balancing of considerations will normally be required, and no one regulatory size will fit all.

Nevertheless, it seems clear that the case for national approaches is strengthening over time. The imperatives of forging an efficient national economy through national regulation are greater, as is the need to address spillovers across jurisdictions. Regional variations remain, but in some respects may be less pronounced than they were. And, in some cases, they can be accommodated by 'mixed' regimes which set high level principles in national regulation, while allowing significant devolution in regulatory interventions. For example, in its report on native vegetation regulation, the Commission found that local-level variables and input from local stakeholders, were pivotal in determining appropriate regulatory interventions. It recommended an institutional framework in which public-good principles and oversight were developed at a national level, with decision-making authority (and resources) for many matters delegated to regional bodies.

That said, the fact remains that the best regulatory solutions are not always evident, and while national or centralised approaches can involve lower costs for business, they allow no escape from uniformly bad regulatory outcomes. This means that regulatory variations will remain desirable in some areas, even where other criteria may favour national consistency. It also makes it particularly important that the consequences of regulatory proposals with national coverage are carefully assessed at the outset, and that outcomes are periodically reviewed to identify any necessary adjustments.

Mechanisms for achieving national consistency in regulation

There is an array of mechanisms through which governments can achieve more nationally consistent regulation, or at least reduce the effects of inconsistencies between jurisdictions. The mechanisms include centralised, decentralised and mixed approaches. Each has pros and cons, and their success in generating appropriate and nationally coherent regulation depends critically on how they are implemented and utilised in practice.

Referral of powers

At one end of the spectrum, a national approach can be achieved by the States simply 'referring' their powers to regulate in a particular area to the Australian Government. This approach, which guarantees uniformity, has been successfully followed in relation to corporations law.

Cooperative national standards

Another model involves the creation of national regulation through joint Commonwealth-State Ministerial Councils. These bring together the relevant ministers from the Australian Government and the States and Territories (and, in many cases, from New Zealand) to agree on particular standards, with the intention that these should then be embodied or referred to in each jurisdiction's legislation. Examples of such bodies include the National Resource Management Ministerial Council, the Australian Transport Council, the Ministerial Council on Consumer Affairs, and the Australian New Zealand Food Regulation Ministerial Council.

A significant body of 'national' regulation has been developed through such Ministerial Councils, as well as by national standard-setting bodies (such as the Australian Building Codes Board and the National Health and Safety Commission). A concern with this model, however, at least as it has been implemented to date, is that the regulation generated has not always been justified or well designed.

The approach to regulating access to nationally-significant infrastructure, adopted as part of the Hilmer reforms, represents another model for achieving nationally-consistent regulation. In that case, governments agreed to the development of a generic National Access Regime, which allowed individual states to develop their own regimes provided they were certified by the NCC, as complying with nationally-agreed principles. In practice, in a number of areas of infrastructure, such as electricity and gas, industry-specific regimes were established. An important exception is rail, where State variations from the national model have not been certified and have proven problematic for the industry.

Mutual recognition

At the other end of the spectrum is mutual recognition. Subject to certain exceptions, the Australian Mutual Recognition Agreement allows goods sold lawfully in one jurisdiction to be sold in any other, even though the goods may not comply with the regulatory standards in the other jurisdiction. Similar provisions apply to the registration of occupations. The marvel of mutual recognition, at least in theory, is that it does not require the adoption of uniform or even consistent regulations in each jurisdiction; only that jurisdictions agree to live with whatever differences exist. It can also be a force for jurisdictions with demonstrably uncompetitive regulatory features to bring them into line with other jurisdictions. There is some evidence of these benefits occurring in Australia, but also evidence to the contrary (as discussed later).

Problem areas remain

Notwithstanding these various mechanisms for achieving more nationally coherent regulatory outcomes, many problem areas remain. The different state-based occupational health and safety regimes are a particular sore point for business, and I have already mentioned the mess that is rail safety regulation. The Regulation Taskforce also identified major problems of regulatory overlap or inconsistency between jurisdictions in relation to workers' compensation, childcare, consumer protection, chemicals and plastics, vocational education and training, privacy legislation, trade measurement, building, food, and environmental regulation.

In many such areas, the problems are well known and a blueprint for reform has been drawn up, but gaining agreement has proved difficult. For example, a 2004 Productivity Commission review into national frameworks for workers' compensation and occupational health and safety, identified clear net benefits in creating a national framework, but this was not fully supported by the Government at the time. While there has been disagreement about the merits of a single regime, the Australian Government has set about creating an opt-in nation-wide alternative to State regimes. Such 'vertical competition' will see the national approach become dominant only if it proves superior over time. The Commission saw this as a viable way forward for workers' compensation, and has also raised it in the past as a possible approach to advancing reform in the industrial relations domain.

Even where a national approach has been agreed to, adherence to national standards has been tenuous. Take the case of building standards. While the Inter-Governmental Agreement sensibly allows for 'local' variations, a Productivity Commission inquiry found that due to poor regulatory assessment, such variations were undermining a sound national building regulation system.

Why do problems arise – and persist?

There are several reasons as to why regulatory overlaps and inconsistencies continue to arise and persist, both within and between jurisdictions.

The sheer growth in regulation in Australia over recent decades inevitably increases the risks of duplication, overlap and inconsistency. As the Taskforce noted, since 1990 the Australian Government alone has passed more pages of legislation than in the preceding nine decades since Federation. These trends are not confined to Australia: the regulatory regimes of many other advanced countries have experienced similar growth. There are, of course, many legitimate reasons for some of this growth. They include developments such as greater knowledge of the causes (and costs) of various product-related health, safety and environmental problems —

think of cigarettes, chemicals and cars. But perverse factors, including media scares, pressure group politics and excessive risk aversion within our more affluent society, are also to blame.

A 'regulate first' culture

In these circumstances, there seems to be a tendency for policy-makers and regulators to focus on new regulation, and less on whether existing regulation is sufficient (or is at least not inconsistent with the new regulation). Indeed, when faced with the crisis of the moment, 'doing something *new*' has obvious political attractions, even if it overlays existing measures partly directed at the same thing. Possible recent examples may be found in regulatory changes to tighten controls in corporations and financial services legislation in the wake of the HIH collapse.

There is also more scope to 'get away with' regulatory overlaps and inconsistencies because many of the costs of regulation are diffuse and 'off-budget' — they are incurred by a multitude of businesses and individuals across the economy. Accordingly, the compliance costs are effectively 'hidden' to those promulgating regulations, and are thus less likely to be taken into account, or given due weight, in government decisions about whether a regulation should be introduced. This contrasts with the much sharper disciplines that budgetary measures face through the Expenditure Review Committee and related processes.

The risks of overlap and inconsistency are exacerbated where regulation is developed within individual portfolios or jurisdictions. In these cases, those inside a particular 'silo' are likely to be less aware of, or concerned about, outside regulation, or whether the regulations are consistent or whether information/reporting requirements overlap with those of another portfolio or jurisdiction. The natural inclination of officials in environmental or consumer agencies is to protect the environment or consumers, not minimise compliance costs to businesses, nor even maintain consistency with other jurisdictions.

Another growing source of overlap and duplication in certain areas of regulation is associated with the fiscal mismatch between the Australian Government and the States. Specifically, while the States and Territories have had formal responsibility for areas like aged care, childcare and education, the Australian Government provides funding for these services. To ensure 'value for money', it has increasingly been overlaying existing State and Territory regulation with its own quality accreditation mechanisms and reporting requirements.

Bad regulation 'sticks'

While factors such as these may explain why deficiencies in regulation, including overlaps and inconsistencies, arise, they do not explain why they persist, even after their costs have been exposed and reforms recommended. For this we need to look for other explanations.

Part of the story no doubt is that sometimes there are substantive disagreements about the virtues of the regulatory approaches adopted in different jurisdictions or of the merits of reform proposals. For example, in relation to occupational health and safety and workers' compensation arrangements, divergent views are held by different groups on how an employers' 'duty of care' should be applied and on the extent to which employers should be held liable for the costs of workplace injuries.

Part of the story might also be bureaucratic inertia. Even so, it was clear to the Regulation Taskforce that with three levels of government and as many as 1300 regulatory bodies Australia-wide (including more than 700 local councils), inter-jurisdictional rivalries, parochialism, turf protection and bureaucratic self-interest are often a bigger problem. For instance, the Taskforce learned of cases where regulators appear to have simply ignored COAG directives to harmonise regulations or comply with mutual recognition provisions.

It is also perhaps inevitable that government ministers themselves will sometimes find it politically advantageous to act in ways that undermine cooperation and imperil inter-governmental reforms.

Four areas to focus reform efforts

The problems posed by costly and incoherent regulatory systems within and across jurisdictions have caused a backlash from business, to which there has been a positive response from governments. Indeed, we have recently seen an unprecedented coalescence of actions by governments seeking to reform Australia's regulatory regimes. Examples include the Australian Government's response to the recommendations of the Regulation Taskforce, and the regulatory reform stream recently endorsed by COAG as part of the NRA. However, history suggests that, after an initial flurry of activity, enthusiasm for regulatory reform can soon wane. Australia needs additional reforms to secure sustainable solutions to the problems that bedevil the regulatory landscape. These will need to bring about lasting systemic or institutional improvements in the following areas:

- regulation-making processes within jurisdictions;
- regulation-making processes across jurisdictions;

- reviews of regulatory problem areas, including interjurisdictional overlaps and inconsistencies; and
- ensuring that regulations remain relevant and effective over time.

Better regulation-making processes within jurisdictions

Poor regulatory outcomes are generally attributable to poor regulation-making processes. In seeking more coherent national regulation, a good place to start, therefore, is through reforms to the processes and institutions responsible for regulation *within* each jurisdiction.

The Regulation Taskforce found that a 'regulate first, ask questions later' culture was a root cause of many of the problems it identified. That culture is pervasive and deeply rooted, and has proven resistant to previous attempts to inculcate good regulatory practice through the requirements for regulatory impact analysis that apply in most jurisdictions.

At its February 2006 meeting, COAG agreed to a number of significant undertakings within the new National Reform Agenda to achieve better regulation. On the basic need for better processes for *making* regulation, First Ministers agreed that their governments will:

> ... establish and maintain effective arrangements to maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition.

There was further agreement that, to achieve this, governments would improve the quality of regulation impact analysis "through the use, where appropriate, of cost-benefit analysis", undertaking better measurements of compliance costs and recognising cumulative burdens of regulation. Importantly, they also agreed that such analysis should consider whether existing regulatory regimes in other jurisdictions might "offer a viable alternative."

This agreement, if properly implemented, would represent a considerable advance. A major omission though is any reference to public consultation, which is fundamental to good regulatory process but often lacking. Governments need to reach agreement on key principles relating to the nature and timing of consultation. This should include a requirement to consult early, when different approaches to intervention (including self-regulatory or non-regulatory options) are still open for consideration.

The greatest deficiency, however, is the in-principle nature of the COAG agreement at this stage and lack of specifics as to how its aspirations can be translated into

actual practice. Indeed, most of the areas identified by COAG are already codified within the best practice manuals of most governments. The real challenge is to implement and enforce them.

Drawing on the work of the Taskforce, the key to this is for COAG to agree to two further principles:

- that no regulatory proposal which has not met the best practice requirements can proceed to Cabinet or other decision-makers, and
- that assessments of the adequacy of compliance will be undertaken by a body with statutory independence from the executive.

Since the last COAG meeting, the Australian Government has implemented both of these requirements in its own processes, following recommendations of the Taskforce. While there is an escape clause for 'exceptional circumstances', its use is constrained by the need for the Prime Minister's approval. In addition, a post-implementation review must be held within 1-2 years of the regulation being introduced.

Extending these requirements to all governments could do much to align regulatory practice with good regulatory principles. For example, common deficiencies in regulation-making are a failure to diagnose the problem adequately and weak rationales for government intervention. Much unnecessary or inappropriate regulation could be avoided if these were remedied. If it became clear that a regulatory proposal that failed would ultimately come unstuck, the incentive to address these matters at the beginning of the process (rather than merely 'asking questions later') should be greatly increased.

Constructing regulation with a clear sense of its purpose and objectives, also gives better guidance to those who have to administer it — and thus ultimately to those who must comply. Beyond this, there is a need for the consistent application of best practice governance frameworks for regulators across all jurisdictions, to reduce the scope for approaches that are at variance with policy intent or generate unintended adverse impacts. The Taskforce's recommendations for enhanced performance reporting against transparent criteria established by governments, consultation protocols, stakeholder forums, codes of conduct and timely review processes, were endorsed by the Australian Government and could form the basis for nationally agreed principles for all regulatory bodies.

Better regulation-making across jurisdictions

Inculcating more rigorous processes for making regulations within jurisdictions would help ensure that any variations were justified by circumstances specific to

different jurisdictions. It would also provide greater assurance that nation-wide application of the regulatory regime of any individual jurisdiction in specific areas would yield net benefits. Regulatory benchmarking across jurisdictions could also assist and the Productivity Commission has been asked by COAG to develop a framework of indicators for this purpose.

As noted, the main forums for developing national regulation, outside COAG, are the 40 or so Ministerial Councils and several national standard-setting agencies. These bodies are required by COAG to follow the steps for a regulation impact statement, with the Commonwealth's Office of Regulation Review (ORR) providing independent monitoring and reporting of compliance. The provisions include a requirement that draft RISs be released for the purposes of public consultation – a stricter provision than applies within individual jurisdictions.

The proportion of the regulatory proposals from those national bodies that have adequately complied with the RIS requirements has averaged around 75-80 per cent in recent years. As for the Australian Government, however, compliance has in some years been lowest for the more significant regulatory intervention. Moreover, again consistent with the experience at the Commonwealth level (and no doubt within the States) even where RISs have been assessed as adequate by the ORR, the quality of analysis has generally not been high and too often decisions to regulate have preceded analysis of the issue or problem, or any real consideration of different options.

Thus, the fact that COAG extended the arrangements it agreed to in February 2006 to Ministerial Councils is welcome. However, the same caveats apply concerning the need to introduce sanctions on non-compliance, so that in the absence of some minimum level of adequacy, the proposed national regulation could not proceed.

Some proposals from Ministerial Councils for national regulatory approaches can place business groups in the invidious position of choosing between the transaction costs of regulatory fragmentation and the adoption of a single regulatory model which may give rise to other costs or adverse impacts. Much depends on which model is favoured. Given a desire for national consistency, political forces within Ministerial Councils do not always favour adoption of the most cost-effective or efficient approach.

For example, as noted by the Commission in a recent report on energy efficiency, it appears that the stringency of the building code's energy efficiency standards for housing have been driven largely by a desire to catch up to the most stringent State's standard. Significantly, energy performance requirements have been raised despite considerable uncertainty about the costs and effectiveness of building standards in reducing energy consumption. Similar situations appear to have arisen

in relation to regulation to ban plastic shopping bags and apparent moves to adopt container deposit legislation. These examples confirm the importance of mandating the need for rigorous cost-benefit analysis (including risk assessment) as part of the regulation-making process.

There is also scope to improve the capacity of Australia's current regulatory arrangements to secure consistent regulation across jurisdictions, by implementing failsafe mechanisms to ensure that jurisdictional variations from national regulations are either legitimated by all parties or terminated. A model canvassed in a recent Commission report on consumer product safety involved a process whereby product bans unilaterally imposed by a given jurisdiction would automatically lapse after 120 days, unless the Ministerial Council agreed that the ban should apply across the nation, or that a mandatory standard relating to the product should be developed. For areas of regulation where national consistency has not been agreed, this model could be modified to allow jurisdictions to maintain different regulations, subject to an independent cost-benefit analysis of the variation being undertaken and endorsed by the relevant Ministerial Council or COAG.

As a means of not only reducing the costs of regulatory differences, but creating pressures on jurisdictions with less 'attractive' regulation to bring them into line, mutual recognition agreements have great appeal. As noted, however, in practice a number of difficulties with these arrangements have emerged which impair their ability to facilitate nationally consistent regulatory outcomes. Current arrangements contain a number of exemptions and, paradoxically, are narrower in scope than those applying in the European Union. Beyond this, their intent is being circumvented in some areas.

In a recent evaluation of mutual recognition arrangements, the Commission identified scope for some 50 improvements. They include reforms aimed at clarifying or correcting some exemptions to increase policy consistency and effectiveness, removing occupational qualification requirements from business licences that are inconsistent with mutual recognition objectives, and increasing the attention given to mutual recognition obligations by policy makers effecting new or revised regulation. Several of the proposals were not endorsed by officials, who took the position that they would be administratively difficult to apply or that there was insufficient evidence to warrant making changes. The arrangements are scheduled for review by 2008, which will afford an opportunity to revisit some of the earlier reform proposals.

Reviews of regulatory 'hot spots'

Introducing better processes Australia-wide for assessing the need for regulation and testing the cost-effectiveness of different approaches could make a difference to the flow of regulation in the future, but in itself cannot do much about the existing *stock*, which is where today's problems mainly reside.

This will require reviews and reform of regulation already in place. Previous reviews, focussing on anti-competitive regulation, were conducted across all jurisdictions as part of the NCP. In its new National Reform Agenda, COAG has agreed that there will be further rounds of reviews within and across jurisdictions directed at reducing business compliance burdens. A number of jurisdictions have commenced such reviews, and some have set targets for the reduction of compliance costs (though as yet without a clear basis for measurement).

The Australian Government got off to an early start through the review by the Regulation Taskforce, which spanned all areas of Commonwealth regulation. Many of the Taskforce's recommendations for changes to specific regulations were accepted and are being implemented. In addition, the Government will soon be initiating a further, more targeted annual regulatory stocktake by the Productivity Commission, to take place over the next five years.

The Taskforce also identified some 50 regulatory areas requiring more detailed examination, many because of their inter-jurisdictional character. A number of these have been encompassed within COAG's list of 'hot spots', which initially covered six areas: rail safety regulation, occupational health and safety, national trade measurement, chemicals and plastics, development assessment arrangements and building regulations. Subsequently, in July 2006, the list was extended by four, to cover business registration arrangements, bilateral agreements under the *Environmental Protection and Biodiversity Conservation Act*, personal property securities, and product safety regulation.

This is clearly a good start. However, given the intention to set up a program of reviews and reforms over a number of years, there were some significant omissions. For example, additional priority areas identified by the Regulation Taskforce include workers compensation, childcare, consumer protection (now to be reviewed by the Productivity Commission), privacy, energy efficiency standards for premises, and harmonising the administration of stamp duty and taxes in general.

That said, as demonstrated by the experience with multi-jurisdictional or national reviews under the legislation review program of the National Competition Policy, reforming regulations with sizeable cross-jurisdictional overlaps and inconsistencies is challenging. As noted by the National Competition Council:

> Although a national process can improve regulatory consistency across jurisdictions, progress has been unacceptable in many cases. ... In many cases, governments have not yet implemented the recommended reforms because delays have arisen from protracted intergovernmental consultation: some national reviews have taken several years to be completed. (NCC 2004, p. 9.21)

An important threshold issue in establishing reviews is to ensure that terms of references allow rationales to be re-examined and various options canvassed. In some areas it could be that no existing regime provides the best way forward. It is also important that such reviews are able to consider the scope to rationalise the number of regulators involved. It follows that in many areas such reviews will necessitate independence of the reviewer from the policy arms of governments (rather than, for example, being undertaken by officials within the relevant portfolio or Ministerial Council).

It is important that governments provide leadership in initiating and undertaking effective reviews, but it is just as important that they respond to them. Reviews have already been undertaken in a number of the hot spot areas in recent years without much resulting action. It would seem appropriate for COAG to revisit the merits of the recommendations from such reviews, given the greater weight now being given by governments to the need to reduce regulatory inconsistencies and overlaps and the costs they impose.

Specific proposals covering the ten nominated hot spots are to be considered at COAG's next meeting early in 2007. Some basic pre-requisites for effectively progressing reform include:

- developing a schedule of action plans;
- ensuring that any reviews are independent and public; and
- establishing processes for monitoring and assessing the performance of governments in addressing their reform commitments over time.

The list of regulations on COAG's work program is large and, as noted, will need to be supplemented over time. Effectively progressing reform will require sustained and substantial effort. This suggests that careful consideration will also need to be given to resourcing issues, and processes for responding effectively to proposals.

If such cooperative endeavours ultimately do not deliver, the Commonwealth retains the option (noted previously for workers' compensation) of developing parallel regimes for national business to opt into from existing state-based regimes. (This was flagged in the BCA's just-released report 'Reshaping Australia's Federation'.)

Ensuring regulation remains appropriate over time

Looking forward, even with best practice processes for making regulation, ensuring that existing regulations remain relevant and effective over time is fundamentally important.

As observed in the Regulation Taskforce report, regulation in many areas raises complex conceptual and practical issues. As a result, there is often some uncertainty about the likely effectiveness of many regulations and considerable scope for unintended consequences. Areas like telecommunications, broadcasting and regulation of the financial market, labour market, and environment provide plenty of examples.

Sunset provisions can be useful because, in the absence of appropriate actions (such as a built-in review) a regulation would automatically lapse. This provides a useful housekeeping mechanism for dispensing with redundant or increasingly inappropriate regulation. However, these provisions are unlikely to be appropriate for major primary legislation, such as that applying to the financial market or regulations supporting the tax and superannuation systems. For such regulation, alternative review mechanisms are needed.

The Regulation Taskforce saw a role for two types of reviews — early post-implementation reviews and periodic reviews at, say, five yearly intervals. The former could be undertaken within 1 to 2 years of a regulation being introduced where the regulation had been fast-tracked (that is, avoided the full application of RIS requirements) or the extent of the compliance burden or the accuracy of the initial cost-benefit analysis was uncertain. The latter could be applied to all remaining regulations not already subject to a sunset clause. The costs to government agencies of such reviews can be reduced by designing appropriate filters to promote cost-effective outcomes.

These in-built review mechanisms have been accepted by the Australian Government and should apply in all jurisdictions. If implemented they would provide a measure of confidence that the regulatory stock will remain 'fit for purpose' over time, regardless of whether there is sustained political interest in cutting red tape.

Summing up: regulatory governance for the 21st century

The regulatory stream of COAG's National Reform Agenda has made a promising start in addressing key problems in Australia's multiple regulatory regimes. However to be confident of achieving the goal of a regulatory system that can meet

the contemporary needs of Australia's national economy and society at least national cost, much more needs to be done to entrench good practice and ongoing reform. In particular, there is a need to establish nationally a new governance and reform framework for regulation. This would be advanced through the following actions:

First, the regulation-making framework at the jurisdictional level agreed to by COAG needs to be extended and strengthened to entrench best practice, including by requiring more effective consultation and by tightening sanctions on non-compliance in the ways just described, and establishing best practice governance principles for all regulatory bodies.

Second, there is a need to apply the (augmented) best-practice regulation-making principles to Ministerial Councils and national standard-setting bodies, to enhance regulatory practice at the national level as well. Beyond this, there is scope to draw on other institutional arrangements to promote national consistency. In particular, governments need to adopt failsafe mechanisms to avoid unwarranted jurisdictional variations from agreed national standards. And mutual recognition arrangements need to be strengthened to enable that regime to realise more of its potential.

Third, reviews of the existing stock of regulation need to be progressed in a systematic and coordinated way. If not handled well, there is a danger that although reviews may proliferate, their average quality may not be high and little real reform may result. Of particular importance are the COAG-nominated 'hot spots'. These will need to be supplemented over time and progressed according to an agreed agenda based on priorities and adequate resourcing. The national significance of such areas of regulation calls for independent reviewers, with scope for public consultation and scrutiny.

Fourth, in-built mechanisms are needed to ensure that regulations remain relevant and effective over time. COAG should endorse stricter provisions for sunset clauses and post-implementation reviews. The latter should be essential where the introduction of regulations has been fast-tracked or where there were significant uncertainties about some potential impacts.

Fifth, the funding arrangements under the national reform agenda recognise a case for providing financial incentives to the states and territories to enable an appropriate sharing of the costs and benefits of reform. While many regulatory reforms will be clearly beneficial to the jurisdictions implementing them, reforms directed primarily at achieving national consistency may not yield benefits to individual jurisdictions commensurate with the national gains. In such circumstances, there may be a case for the Australian Government to provide financial incentives for jurisdictions to take a broader view.

Lastly, as with the national competition policy reform framework, the effectiveness of the National Reform Agenda, including its regulatory reform stream, will be enhanced if its governance arrangements include provision for the independent monitoring and assessment of progress in implementing agreed reforms. At this stage, COAG has agreed to establish an independent Reform Council to report to it on progress in implementing the NRA. As experience with NCP and the NCC demonstrated, for this new Council to play an effective role, there will need to be robust accountability arrangements comprising concrete reform commitments and progress measures. This would also facilitate and complement any reform-related financial transfers.

This may all seem like a big ask, when considered in the context of our federal history. But promising foundations have been laid as part of the embryonic National Reform Agenda. The secular challenges confronting Australia, as we move beyond the current 'boom' into this new century, provide a compelling case for completing the job.

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